1979 June 21

[TRIANTAFYLLIDES, P., STAVRINIDES, A. LOIZOU, JJ.]

D. OUZOUNIAN, M. SOULTANIAN & CO. LTD.,
Appellants-Defendants,

v.

CHR. HJIPRODROMOU ESTATES LTD.,
Respondents-Plaintiffs.

(Civil Appeal No. 5624).

Sale of goods—Passing of property—Transfer of risk—"Unconditionally appropriated" to the contract—Sections 23(1) and 26 of the Sale of Goods Law, Cap. 267—Unascertained goods by description—Ordered in advance of anticipated time of delivery—Paid for by buyers—Kept by the sellers in their store pending the date, in the future, when buyers would take delivery of them—Store coming under Turkish military occupation and delivery of goods to buyers impossible—Property in the goods, or risk in relation to, never passed from sellers to buyers—Nor were the goods kept by sellers as bailees for the buyers—Amount paid by buyers ordered to be refunded to them as paid for a consideration which has failed.

On October 4, 1973, the respondents-plaintiffs placed with the appellants-defendants an order for twenty electric cookers and twenty refrigerators (both hereinafter referred to as "the goods"), at a total agreed price of C£1560, which were to be installed at their block of flats in Famagusta, which was being built at the time and was expected to be finished at the end of 1974, or early in 1975. The purpose of the order was to take advantage of the prevailing prices at the time and to avoid having to pay more for the same goods later. It was stated in the relevant order form that the goods were bought on a cash on delivery basis and that the delivery would take place within four to five months. On January 25, 1974 the appellants sent an invoice for the goods to the respondents who on February 23, 1974, paid by a cheque, and against a relevant receipt, the amount of C£1560.—to the appellants as the agreed price for the goods.

It was common ground that the invoice was issued and the price was paid because the manager in Famagusta of the appellants had informed the chairman of the respondents that the goods had arrived in Cyprus and had been cleared through the Customs; but it has been the version of the chairman of the respondents that he was told that, at the time, the goods were in Nicosia, whereas the said manager of the appellants has testified that he had said to the chairman of the respondents that the goods were already in Famagusta. The aforesaid manager testified that the goods, after they had been paid for by the respondents, were kept in the store of the appellants in Famagusta at the request of the chairman of the respondents, pending actual delivery of them to the respondents. It was, also, common ground that the goods were never actually delivered by the appellants to the respondents, as before the completion of the construction of the block of flats in question there intervened the Turkish invasion of Cyprus, which resulted in the still continuing Turkish military occupation of Famagusta, including the store of the appellants in which the goods were kept.

By letter dated November 4, 1975 the respondents asked for the delivery of the goods or for the refund of the said amount of C£1560.—but their request was turned down by the appellants.

In an action by the respondents for the refund of the said amount of C£1560.— the trial Judge found that the risk concerning the goods had not passed from the appellants, as sellers, to the respondents, as the buyers, because the property in such goods has not passed from the appellants to the respondents; and, therefore, as the goods were never actually delivered by the appellants to the respondents, he ordered the refund of the said purchase price on the ground that the consideration for the payment of such price had failed. In reaching this conclusion the trial Judge took the view that this was a case of sale of unascertained goods and he relied on the provisions of sections 23(1)* and 26* of the Sale of Goods Law, Cap. 267.

Held, that in the particular circumstances of this case, the goods were never "unconditionally appropriated" to the relevant

* Quoted at pp. 731–2 *post*.

contract between the parties, in the sense of section 23(1) of the Sale of Goods Law, Cap. 267; that neither the property in, nor the risk as regards, the goods concerned, passed from the appellants to the respondents, in the sense of section 26 of the same Law, or was ever intended to have passed, until the time when the store in which they were being kept in Famagusta came under Turkish military occupation; that since thereafter it has not been possible for the appellants to deliver to the respondents the goods, and they have refused to satisfy the claim made by the said letter of November 4, 1975, the said amount of C£1560 must be treated as being an amount which has been paid for a consideration which has failed; and that, consequently, it has to be refunded to the respondents as ordered by the trial Court.

Held, further, that the contention of counsel for the appellants that the goods concerned were kept by them for the respondents as bailees, cannot be accepted because this is not a case in which the goods sold, having been appropriated unconditionally, were kept in storage by the sellers on behalf, and for the benefit of, the buyers, pending their instructions for actual delivery to them, at any time, but it is a case in which the buyers placed an order for certain goods in advance of the anticipated time of delivery, in order to take advantage of the prevailing prices at the time, and to avoid having to pay more for the same goods later; and because, when the goods which had been ordered arrived in Cyprus, they were paid for by the buyers, but they were kept by the sellers pending the date, in the future, towards the end of 1974 at the earliest, when the buyers would take possession of them and in the meantime, as it has been correctly found by the trial Judge, the goods were only provisionally appropriated to the contract between the parties and there was nothing to prevent the sellers from selling to other customers of theirs such goods, or any number out of them, and replacing them by others of the same kind, provided that this would not, in any way, result in any increased financial burden for the buyers.

Appeal dismissed.

Cases referred to:

Demetriades v. *Caxton Publishing Co. Ltd.* (1973) 1 C.L.R. 35 at p. 43;

Ross T. Smyth & Co., Ltd., v. *T.D. Bailey Son & Co.* [1940] 3 All E.R. 60 at pp. 65, 66;

Carlos Federspiel & Co., S.A. v. *Charles Twigg & Co., Ltd., and Another* [1957] 1 Lloyd's Rep. 240 at pp. 255, 256;

Sterns, Limited v. *Vickers, Limited* [1923] 1 K.B. 78 at pp. 82, 83;

Comptoir D' Achat et de Vente Du Boerenbond Belge S/A v. *Luis De Ridder Limitada (The Julia)* [1949] A.C. 293;

Demby Hamilton & Co., Ltd. v. *Barden (Endeavour Wines, Ltd. (Third Party))* [1949] 1 All E.R. 435 at pp. 437, 438.

Appeal.

Appeal by defendants against the judgment of the District Court of Nicosia (Papadopoulos, S.D.J.) dated the 30th September, 1976 (Action No. 833/76) whereby they were ordered to repay to plaintiffs the amount of C£1,560 with interest at 9% as money which had been paid for a consideration that had completely failed.

K. Chrysostomides, for the appellants.

A. Dikigoropoullos, for the respondents.

Cur. adv. vult

TRIANTAFYLLIDES P. read the following judgment of the Court. The appellants, who were the defendants before the trial Court, have appealed against a judgment by means of which they were ordered to repay to the respondents, who were the plaintiffs at the trial, the amount of C£1,560, with interest at the rate of nine per centum as from February 26, 1974, as money which had been paid for a consideration that had completely failed.

The salient facts of this case appear, on the material before us, to be, briefly, as follows:

The respondents were building a block of flats in Famagusta, which was expected to be finished at the end of 1974, or early in 1975.

As prices were about to rise, the chairman of the plaintiffs, Christakis HjiProdromou, who had, also, been urged to do so by the manager of the Famagusta branch of the appellants, Angelos Varnava, placed with the appellants, through their said manager, and on behalf of the respondents, an order for twenty electric cookers at C£31 each and twenty refrigerators at £47 each, that is for an agreed total price of C£1,560, for the purpose of avoiding to have to purchase them later at higher prices; they were to be installed, eventually, at the aforemen-

tioned block of flats, when its construction would have been completed.

It is common ground that the said cookers and refrigerators were never actually delivered by the appellants to the respondents, as before the completion of the construction of the block of flats in question there intervened the Turkish invasion of Cyprus, which resulted in the still continuing Turkish military occupation of Famagusta.

The order for the cookers and the refrigerators was placed, as aforesaid, on October 4, 1973, and it was stated in the relevant order form that the cookers and refrigerators were bought on a cash on delivery basis and that the delivery would take place within four to five months.

On January 25, 1974, the manager of the Famagusta branch of the appellants sent an invoice for the goods concerned to the chairman of the respondents, who on February 23, 1974, paid by a cheque, and against a relevant receipt, the amount of C£1,560 to the appellants, as the agreed price for such goods. The cheque was cashed by the appellants on February 26, 1974.

It is common ground that the invoice was issued and the price was paid because the manager in Famagusta of the appellants had informed the chairman of the respondents that the goods in question had arrived in Cyprus and had been cleared through the Customs; but it has been the version of the chairman of the respondents that he was told that, at the time, the goods were in Nicosia, whereas the manager in Famagusta of the appellants has testified that he had said to the chairman of the respondents that the goods were already in Famagusta.

On November 4, 1975, counsel acting for the respondents wrote to the appellants requesting that the goods concerned be either delivered to the respondents without any further delay or that the sum of £1,560, with interest at nine per centum per annum, be refunded to the respondents by the appellants. It was stated in the letter of November 4, 1975, that it had been agreed between the appellants and the respondents that the property in the goods in question would not pass to the respondents until after the goods had been ascertained and delivered to their premises late in 1974, and that such goods had neither been ascertained nor been delivered.

On November 13, 1975, counsel acting for the appellants replied, in writing, that the goods were ascertained and unconditionally appropriated to the relevant contract of sale between the parties to the present proceedings, with the full consent and knowledge of the respondents, on January 25, 1974, when the relevant invoice was issued, as stated earlier in this judgment, and that as from that date the property in the goods had passed to the respondents, as well as the risk in relation to such goods; and, therefore, the refund of the amount of C£1,560 was refused. It was, also, denied that there had been made between the parties any agreement concerning the time of the passing of the property in such goods.

According to the testimony at the trial of the manager in Famagusta of the appellants, the goods, after they had been paid for by the respondents, were kept in the store of the appellants in Famagusta at the request of the chairman of the respondents, pending actual delivery of them to the respondents.

The trial Judge has found that the risk concerning the goods had not passed from the appellants, as sellers, to the respondents, as the buyers, because the property in such goods has not passed from the appellants to the respondents; and, therefore, as the goods were never actually delivered by the appellants to the respondents, he ordered the refund of the purchase price, namely the amount of C£1,560, on the ground that the consideration for the payment of such price had failed.

In reaching his above conclusion the trial Judge took the view that this was a case of sale of unascertained goods and he relied on the provisions of sections 23(1) and 26 of the Sale of Goods Law, Cap. 267, which read as follows:-

> "23.(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.
>
> (2) .....
>
> 26. Unless otherwise agreed, the goods remain at the

seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not:

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault:

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party."

It is, also, relevant to refer to sections 18 and 19 of Cap. 267, which read as follows:-

"18. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

19.(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property is the goods is to pass to the buyer."

As it has been correctly pointed out in *Demetriades* v. *Caxton Publishing Co. Ltd.*, (1973) 1 C.L.R. 35, 43 our Cap. 267 reenacts, with small variations in order to adapt it to local circumstances in Cyprus, the Sale of Goods Act, 1893, in England (see Halsbury's Statutes of England, 3rd ed., vol. 30, p. 6). Section 18 of Cap. 267 corresponds to section 16 of the said English Act, subsections (1) and (2) of section 19 of Cap. 267 correspond to section 17 of such Act, subsection (3) of section 19 corresponds to the opening sentence of section 18, subsection (1) of section 23 to rule 5 of section 18 and section

26 to section 20. It is, therefore, quite useful, and proper, to rely on relevant case-law in England for the purpose of the proper construction and application of the provisions concerned of Cap. 267.

In Ross T. Smyth & Co., Ltd. v. *T.D. Bailey Son & Co.*, [1940] 3 All E.R. 60, Lord Wright said (at pp. 65, 66) in relation to the relevant provisions of the Sale of Goods Act, 1893, and, in particular, to rule 5 of section 18 of such Act:-

> " Where, as here, the sale is of unascertained goods by description, there are, at that stage, no goods to which the contract can attach. The seller is free to appropriate to the contract any goods which answer the contract description. This he does by the notice of appropriation which specifies and defines the goods to which the contract attaches. These thereupon he is bound to deliver and the buyer is bound to accept, subject to the terms of the contract. That, however, does not involve the passing of the property. The property cannot pass under a contract of sale until the goods are ascertained (the Sale of Goods Act, 1893, s. 16), but, once they are ascertained, the property passes at the time when the parties intend it shall (sect. 17(1)). As the parties seldom express any such intention, or perhaps even think of it, the intention will generally be a matter of inference from the terms of the contract, the conduct of the parties, and the circumstances of the case (sect. 17(2)). Then sect. 18 gives some general rules which are to apply 'unless a different intention appears'. Of these rules, the Court of Appeal rely on r. 5(1), which provides as follows:
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> Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer...
>
> The assent is generally inferred from the terms of the contract or the practices of the trade. Subrule (2) deals with the delivery of the goods to the carrier for transmission to the buyer without reserving the right of disposal, and provides that in such a case there is deemed to be an

unconditional appropriation. This latter subrule, which only deals with delivery to the carrier and not with actual notice of appropriation, is disregarded by the Court of Appeal. In such event, the carrier receives and holds the goods for the buyer, so that in law they are delivered to the buyer. Compare also section 32(1). However, the Court, I venture to think, should not have disregarded the word 'unconditionally' in subrule (1). I do not construe subrule (1) as limited to a case where there is an express term that the notice of appropriation is unconditional, or, on the other hand, to a case where the notice of appropriation is in terms conditional,....."

In *Carlos Federspiel & Co., S.A.* v. *Charles Twigg & Co., Ltd., and* another, [1957] 1 Lloyd's Rep. 240, Mr. Justice Pearson said in relation to the question of what constitutes appropriation in the sense of the above rule 5 of section 18 (at pp. 255, 256):-

" On those authorities, what are the principles emerging? I think one can distinguish these principles. First, Rule 5 of Sect. 18 of the Act is one of the Rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer unless a different intention appears. Therefore the element of common intention has always to be born in mind. A mere setting apart or selection of the seller of the goods which he expects to use in performance of the contract is not enough. If that is all, he can change his mind and use those goods in performance of some other contract and use some other goods in performance of this contract. To constitute an appropriation of the goods to the contract, the parties must have had, or be reasonably supposed to have had, an intention to attach the contract irrevocably to those goods, so that those goods and no others are the subject of the sale and become the property of the buyer.

Secondly, it is by agreement of the parties that the appropriation, involving a change of ownership, is made, although in some cases the buyer's assent to an appropriation by the seller is conferred in advance by the contract itself or otherwise.

Thirdly, an appropriation by the seller, with the assent of the buyer, may be said always to involve an actual or

constructive delivery. If the seller retains possession, he does so as bailee for the buyer. There is a passage in Chalmers' Sale of Goods Act, 12th ed., at p. 75, where it is said:

> In the second place, if the decisions be carefully examined, it will be found that in every case where the property has been held to pass, there has been an actual or constructive delivery of the goods to the buyer.

I think that is right, subject only to this possible qualification, that there may be after such constructive delivery an actual delivery still to be made by the seller under the contract. Of course, that is quite possible, because delivery is the transfer of possession, whereas appropriation transfers ownership. So there may be first an appropriation, constructive delivery, whereby the seller becomes bailee for the buyer, and then a subsequent actual delivery involving actual possession, and when I say that I have in mind in particular the two cases cited, namely, *Aldridge* v. *Johnson*, sup.,* and *Langton* v. *Higgins*, sup.**

Fourthly, one has to remember Sect. 20 of the Sale of Goods Act, whereby the ownership and the risk are normally associated. Therefore as it appears that there is reason for thinking, on the construction of the relevant documents, that the goods were, at all material times, still at the seller's risk, that is prima facie an indication that the property had not passed to the buyer.

Fifthly, usually but not necessarily, the appropriating act is the last act to be performed by the seller. For instance, if delivery is to be taken by the buyer at the seller's premises and the seller has completed his part of the contract and has appropriated the goods when he has made the goods ready and has identified them and placed them in position to be taken by the buyer and has so informed the buyer, and if the buyer agrees to come and take them, that is the assent to the appropriation. But if there is a further act, an important and decisive act to be done by the seller, then

* [1857] 7 E. & B. 885.
** [1859] 4 H. & N. 402.

there is prima facie evidence that probably the property does not pass until the final act is done."

A case which has been relied on by counsel for the appellants in relation to the issue of whether the property in the goods in question, and the risk in respect of them, have passed—as he contended—from the appellants to the respondents, is *Sterns, Limited* v. *Vickers, Limited*, [1923] 1 K.B. 78, in which Bankes L.J. said the following (at pp. 82, 83):-

"The Admiralty were possessed of a large quantity of white oil or spirit in bulk lying at Thames Haven. The defendants on January 3, 1920, purchased a portion of it, and on January 17 sold to the plaintiffs a portion of what they had bought. The spirit was at the time contained in a tank, No. 78, belonging to the London and Thames Haven Oil Wharves Company. The contract between the defendants and the plaintiffs provided that the spirit should be similar to the bulk samples drawn, which samples on analysis showed a specific gravity of 786. The defendants by the terms of their contract with the Admiralty were allowed free storage in the Thames Haven Company's tank until January 31, and it was agreed between the defendants and the plaintiffs that the plaintiffs should make their own arrangement with the Thames Haven Company for the further storage of the spirit after that date. On January 23 the plaintiffs sold the spirit to a Mr. Lazarus upon a bulk sample with the analyst's certificate attached. That contract provided that all charges including storage should be for buyers' account. It is not disputed that at the time of that contract the spirit was still in tank No. 78, and that the bulk was similar to the sample submitted, that is to say that it was of the requisite specific gravity. On January 28 the defendants obtained from the Thames Haven Company a delivery warrant for the spirit, whereby it was made deliverable to the plaintiffs' order, and handed it to the plaintiffs, who indorsed it to their purchaser. Lazarus, who did not desire to take delivery immediately, entered into an arrangement with the company by which he undertook to pay rent for the storage. The spirit was allowed to remain in storage for a considerable time and it was then found to have deteriorated in quality owing to an alteration in the specific

gravity due partly to evaporation but mainly to the storage company having mixed with it spirit of a different specific gravity. The question is Who are to bear the loss of that, the buyers or the sellers? It seems to me plain that, upon the facts quite apart from the question whether the property in the spirit had passed, the risk of deterioration rested upon the buyers, and they must bear the loss."

As is, however, correctly pointed out by Atiyah on The Sale of Goods, 5th ed., p. 165, the *Sterns* case, *supra*, is to be accepted only as a correct decision on its own particular facts, because it is a case of an exceptional nature.

In this respect, it is useful to refer to the case of *Comptoir D' Achat et de Vente Du Boerenbond Belge S/A* v. *Luis De Ridder Limitada* (*The Julia*), [1949] A.C. 293; the headnote of the report of this case reads as follows:-

"By a contract made in April, 1940, the sellers, an Argentine company, sold to the buyers, a Belgian company, 500 tons of rye for shipment 'c.i.f. Antwerp,' on the terms contained in Form 41 of the London Corn Association. The contract provided for payment 'on first presentation of and in exchange for first arriving copy/ies of bill/s of lading .... and/or delivery order/s and policy/ies and/or certificate/s .... of insurance.' The sellers were to pay for any deficiency in weight; they guaranteed condition on arrival and made themselves responsible for all averages. The rye sold was part of a larger parcel covered by a bill of lading signed before the contract was made and the policies of insurance effected by the sellers covered a quantity different from that sold and that covered by the bill of lading amount. Both the bill of lading and the policies remained throughout in the possession of the sellers or their agents. The sellers exercised their option to demand payment in exchange for a delivery order. The sum to be paid, by cable transfer to New York, against the delivery order, was stated in a provisional invoice handed to the buyers to be $4,999.33, i.e., cost less freight plus a proportion of insurance. A delivery order directed to the sellers' agents at Antwerp was handed to the buyers against payment of this sum. It was indorsed by the agents with an undertaking to honour it. The sellers delivered to their agents two certificates of insurance and the delivery order in terms

recognized the buyers' interest in these to the extent of their purchase. The charterparty under which the ship sailed recognized no port of discharge but Antwerp. While she was still at sea the Germans invaded Belgium and occupied that town. By arrangement between the owners and the sellers as charterers, but without the buyers' consent the ship discharged her cargo at Lisbon, where it was sold by the sellers. It was admitted that the property in the rye had never passed to the buyers, who claimed total reimbursement of the sum paid by them:-

Held, that despite the designation of the contract as 'c.i.f.' the true effect of all its terms must be taken into account and, in the light of these, the contract was not 'c.i.f.' but a contract to deliver at Antwerp. The payment made was not for the documents as representing the goods but for delivery of the goods themselves. There was a frustration of the adventure and no part performance and the consideration had wholly failed so that the buyers were entitled to recover the amount paid."

Lord Porter observed (at p. 312):-

" Indeed, it is difficult to see how a parcel is at the buyers' risk when he has neither property nor possession except in such cases as *Inglis* v. *Stock* [1] and *Sterns Ld.* v. *Vickers Ld.*[2], where the purchaser had an interest in an undivided part of a bulk parcel on board a ship, or elsewhere, obtained by attornment of the bailee to him."

Also, Lord Normand stated (at pp. 319, 320) the following:-

"It may be conceded that the parties can agree to some purely artificial allocation of the risk and if they express that agreement in suitable language in the contract it must somehow be given effect. But the parties to commercial contracts are practical people and in those cases in which it has been held that the risk without the property has passed to the buyer it has been because the buyer rather than the seller was seen to have an immediate and practical interest in the goods, as for instance when he has an immediate right under the storekeeper's delivery warrant to the delivery

1. 10 App. Cas. 263.
2. [1923] 1 K. B. 78.

of a portion of an undivided bulk in store or an immediate right under several contracts with different persons to the whole of a bulk not yet appropriated to the several contracts. But in the present case the buyers had no more than a promise to deliver a part of the bulk cargo and the case is typically one for the general rule res perit domino."

Lastly, in relation to the issue of the passing of the risk in goods sold, but not actually delivered, it appears useful to refer to the case *Demby Hamilton & Co., Ltd.* v. *Barden* (*Endeavour Wines, Ltd.* (*Third Party*)), [1949] 1 All E.R. 435, in which Sellers J. said (at pp. 437, 438), in relation to the first proviso to section 20 of the Sale of Goods Act, 1893, which corresponds to the first proviso to section 26 of our Cap. 267, the following:-

"The first requirement of the proviso in question is that delivery has been delayed through the fault of the buyer. I am satisfied on the facts in the present case that a good delivery, which would have avoided all loss, was delayed through the fault of the buyer, and that of the third parties. The next requirement of the proviso is that, where delivery has been delayed through the fault of the buyer, the goods are at the risk of the party in fault 'as regards any loss which might not have occurred but for such fault.' The goods referred to there must be the contractual goods which have been assembled by the seller for the purpose of fulfilling his contract and making delivery. The goods may have been defined goods, goods manufactured for the purposes of delivery, or goods which had been acquired by the seller from somebody else for the purpose of fulfilling his contract. It does not seem to me that the Act requires to be construed in any narrow sense. The real question is whether the loss which has accrued was brought about by the delay in delivery, and that must have regard to the goods which were there to be delivered. Different circumstances may arise in different cases. It may be that the seller was in a position to sell the goods elsewhere and acquire other goods for the postponed time of delivery, and if he does not do that and there is some loss in the meantime the responsibility for the loss would be held to fall upon him. Again, there may be cases (and I think this is one of them) where the seller has his goods ready for delivery and has to keep

them ready for delivery as and when the buyer proposes to take them."

In the present case, in the light of the foregoing exposition of the relevant provisions and principles of law, and relying on the totality of the composite picture presented by the versions of the two main witnesses, HjiProdromou, who is the chairman of the respondents, and Varnava, who was the manager in Famagusta, at the material time, of the appellants—and neither of which seems to have been rejected as untrue by the trial Court—we have reached the conclusion, in agreement with the trial Court, that the goods in question, namely the twenty electric cookers and the twenty refrigerators, were never "unconditionally appropriated" to the relevant contract between the parties, in the sense of section 23(1) of Cap. 267, nor did the risk in relation to such goods pass from the appellants to the respondents, in the sense of section 26 of the same Law, at any time until the store of the appellants, in which the goods were being kept, was occupied, together with the rest of Famagusta town, by Turkish military forces in the summer of 1974.

We cannot accept the contention of counsel for the appellants that the goods concerned were kept by them for the respondents as bailees. This is not a case in which the goods sold, having been appropriated unconditionally, were kept in storage by the sellers on behalf, and for the benefit of, the buyers, pending their instructions for actual delivery to them, at any time, but it is a case in which the buyers placed an order for certain goods in advance of the anticipated time of delivery, in order to take advantage of the prevailing prices at the time, and to avoid having to pay more for the same goods later; and, when the goods which had been ordered arrived in Cyprus, they were paid for by the buyers, but they were kept by the sellers pending the date, in the future, towards the end of 1974 at the earliest, when the buyers would take possession of them; in the meantime, as it has been correctly found by the trial Judge, the goods were only provisionally appropriated to the contract between the parties and there was nothing to prevent the sellers from selling to other customers of theirs such goods, or any number out of them, and replacing them by others of the same kind, provided that this would not, in any way, result in any increased financial burden for the buyers.

As it has been stated by Varnava, the manager of the

Famagusta branch of the appellants, they had, at the same time, other orders for similar electric cookers and refrigerators from other hotels or apartments in Famagusta, and he remembers delivering similar goods to other customers.

In the result, we have reached the conclusion, bearing in mind the particular circumstances of this case, that neither the property in, nor the risk as regards, the goods concerned, passed from the appellants to the respondents, or was ever intended to have passed, until the time when the store in which there were being kept in Famagusta came under Turkish military occupation; and since thereafter it has not been possible for the appellants to deliver to the respondents the said goods, and they have refused to satisfy the claim made by the aforementioned letter of counsel for respondents of November 4, 1975, the amount of C£1,560, which has been paid as the agreed price for these goods to the appellants by the respondents, must be treated as being an amount which has been paid for a consideration which has failed, and, consequently, it has to be refunded to the respondents as ordered by the trial Court.

In the result, this appeal is dismissed accordingly, without, however, in view of the rather extraordinary nature of this case, any order as regards its costs.

Appeal dismissed. No order as to costs.