1981 June 13

[DEMETRIADES, J.]

MOSSES TANAGBA AND OTHERS,

Plaintiffs,

v.

PIPINOS SHIPPING CO. LTD.,

Defendants.

(*Application in Admiralty Action No.* 2/79).

Stay of proceedings—"Exclusive foreign jurisdiction clause"—Contract of employment—Foreign seamen employed by Cyprus Company—Contract of employment providing that all disputes arising out of the seamen's employment to be determined by Greek Courts under Greek Law to the exclusion of foreign Law and Courts—Action for balance of wages commenced in Cyprus—Principles to be applied by Cyprus Court in deciding whether to stay action—Court's discretion exercised against stay in the light of the particular circumstances of this case.

The plaintiffs in this action, who were seamen employed by the defendants on their ship "CHRISTOS" brought an action in Cyprus against the defendants, a limited company registered in Cyprus, for balance of wages they have earned.

Following the filing of the petition by the plaintiff and the filing of an application for judgment on the ground that the defendants had failed to file their answer the latter filed an application for an order staying the proceedings on the ground that the Admiralty Court of Cyprus had no jurisdiction to try the case because the contract of employment contained an "exclusive jurisdiction clause" which provided that such contract will be governed "exclusively as to any claim or right arising out of the seamen's employment, including claims on account of illness or accident, by the provisions of the present collective agreement and Greek Law, being judged exclusively by the competent Greek Authorities and Greek Law Courts, resort

to any foreign Courts and to any foreign law being prohibited and expressly ruled out".

The application was based on rules 84, 88, 203, 212 and 237 of the Cyprus Admiralty Jurisdiction Order, 1893 and on the practice and the inherent powers of the Admiralty Court.

Held, (*after stating the principles to be applied by the Court in deciding whether to stay the action—vide* pp. 258–61 *post*) that the defendants will have no language problem if they appear before a Cyprus Court; that there is no evidence as to what the Greek Law on employment of seamen is and in the absence of such evidence this Court takes it that the Greek Law is similar to Cyprus Law; that the plaintiffs are all foreigners living abroad and the defendants is a limited company registered in Cyprus; that defendants' allegation that they carry their business and manage all their affairs from Piraeus Greece does not impress this Court; that there is not the slightest shred of evidence that the defendants genuinely desire to have the claim tried in Greece; that the defendants cannot be prejudiced by having to defend the action in Cyprus, as they ought to have known that in case they face a claim for wages by their seamen, they are not entitled to an order for security of their costs (see rule 185 of the Cyprus Admiralty Jurisdiction Order, 1893); that, therefore, this is not a proper case in which this Court can exercise its discretion and order a stay of proceedings; accordingly the application must fail.

Application dismissed.

Cases referred to:

Jadranska Slobodna Providba v. *Photos Photiades & Co.* (1965) 1 C.L.R. 58;

Cubazucar and Another v. *Camelia Shipping Co. Ltd.* (1972) 1 C.L.R. 61;

Sonco Canning Limited v. "*Adriatica*" (1972) 1 C.L.R. 210;

The Fehmarn [1958] 1 All E.R. 333;

The Eleftheria [1969] 2 All E.R. 641;

Trendtex Trading Corporation and Another v. *Credit Suisse* [1980] 3 All E.R. 721.

Application.

Application by defendants for an order that further proceedings in the present action be stayed on the ground that the

contract of employment entered between the parties contains an "exclusive jurisdiction clause".

J. Erotocritou, for the applicants.

L. Papaphilippou, for the respondents.

Cur. adv. vult.

DEMETRIADES J. read the following ruling. The applicants-defendants apply by summons for an order that the further proceedings in the present action be stayed, on the ground that as the contract of employment entered into between them and the respondents-plaintiffs contains an "exclusive jurisdiction clause", which provides that such contract will be governed "exclusively as to any claim or right arising out of the seamen's employment, including claims on account of illness or accident, by the provisions of the present collective agreement and Greek law, being judged exclusively by the competent Greek authorites and Greek Law Courts, resort to any foreign Courts and to any foreign law being prohibited and expressly ruled out", the Admiralty Court of Cyprus has no jurisdiction to try the case.

All plaintiffs are seamen who, at the material time, were employed by the defendants, a limited company registered in Cyprus, on their ship "CHRISTOS" and their claims against the defendants are for balance of wages which, as they allege, they have earned.

The action was filed on the 4th January, 1979, and was, as it appears from the file, duly served on the defendants at their registered office in Nicosia. On the 22nd February, 1979, when the action was fixed for the appearance of the defendants before the Court, counsel appearing for them applied for leave to enter a conditional appearance. Such leave was granted by the Court on condition that the defendants would make an application for the setting aside of the writ of summons within two months, otherwise their appearance would be considered as an unconditional one. As no application was made by the defendants for the setting aside of the writ of summons within the time fixed, the Registry of the Court gave, on the 25th April, 1979, notice to counsel appearing for the parties that the action had been fixed for directions on the 4th May, 1979. On that day and in the presence of counsel for both sides, the Court

made an order as to the time within which the pleadings had to be filed and delivered.

The plaintiffs filed their Petition on the 7th May, 1979, but as the defendants failed to file their Answer within the time fixed for this purpose, the plaintiffs, on the 21st September, 1979, filed an application by summons by which they prayed for judgment on the ground that the defendants had failed to file their Answer. This application of the plaintiffs was fixed for hearing on the 3rd October, 1979. On the 1st October, 1979, counsel for the defendants requested plaintiffs' counsel to give him further and better particulars on a number of allegations made in the Petition. On the 3rd October, when the application for judgment in default of filing the Answer came up for hearing, counsel appearing for the defendants opposed it orally—as the practice is—and was given time within which to file a written opposition, but, instead, he, on the 16th October, 1979, filed the present application.

The present application is based on rules 84, 88, 203, 212 and 237 of the Cyprus Admiralty Jurisdiction Order 1893, on the practice and the inherent powers of the Admiralty Court.

Having summarised the background of the application of the defendants, I propose to see what is the legal position governing the issues raised by this application.

Useful reference may be made, in this respect, to the cases of *Jadranska Slobodna Plovidba* v. *Photos Photiades & Co.*, (1965) 1 C.L.R. 58, *Cubazucar and another* v. *Camelia Shipping Company Ltd.*, (1972) 1 C.L.R. 61, and *Sonco Canning Limited* v. "*Adriatica*" (*Societe Per Azioni Di Navigazione*), (1972) 1 C.L.R. 210, in which judgments of the English Courts, such as *The Fehmarn*, [1958] 1 All E.R. 333 and *The Eleftheria* [1969] 2 All E.R. 641, were considered and the principles enunciated therein were followed and applied.

In the very recent case of *Trendtex Trading Corporation and another* v. *Credit Suisse*, [1980] 3 All E.R. 721, Robert Goff J. summarises the law applicable to issues called to be decided on the "inherent jurisdiction of the Court" and the "exclusive jurisdiction clause" and states the following (at pp. 734–735), which I fully adopt:–

"As I understand it those principles are as follows:

(1) '..... the real test of stay depends on what the Court in its discretion considers that justice demands' (see [1978] 1 All ER 625 at 636, [1978] AC 795 at 819 per Lord Salmon).

(2) The Court must first consider whether there is another jurisdiction which is clearly more appropriate than England for the trial of the action. (a) Such a jurisdiction has been called the 'natural or appropriate forum' (see [1978] 1 All ER 625 at 631, [1978] AC 795 at 812 per Lord Diplock) or the 'natural forum' (see [1978] 1 All ER 625 at 636, [1978] AC 795 at 818 per Lord Salmon). The Court looks for another forum which is clearly more appropriate, because the Court will not lightly stay an action properly commenced in this country (see [1978] 1 All ER 625 at 629, 636, [1978] AC 795 at 810, 818 per Lord Diplock and Lord Salmon), the reason being that, since the jurisdiction of the English Court has been completely invoked, a stay should not be granted without good reason (see [1978] 1 All ER 625 at 642, [1978] AC 795 at 826 per Lord Keith). (b) The burden rests on the defendant to prove the existence of such other jurisdiction. (c) In considering whether there is another jurisdiction which is clearly more appropriate the Court will consider all the circumstances of the particular case, including, for example, where the cause of action arose, the connection of the parties with any particular jurisdiction, the applicable law, the availability of witnesses and the saving of costs.

(3) If the Court concludes that there is another clearly more appropriate jurisdiction, then two slightly different tests have been adumbrated. (a) A stay will be granted unless the plaintiff shows that a stay would deprive him of a legitimate personal or juridical advantage availabe to him in England (see [1978] 1 All ER 625 at 630, 639, [1978] AC 795 at 812, 822, per Lord Diplock, approved generally by Lord Fraser). (b) The burden of proof remains on the defendant. If he can show that trial in England would afford the plaintiff no real advantage, it would be unjust to refuse a stay. But, if trial in England would offer the plaintiff a real advantage, then a balance must be struck and the Court must decide in its discretion whether

justice demands a stay (see [1978] 1 All ER 625 at 636, 645, [1978] AC 795 at 819, 829 per Lord Salmon and Lord Keith).

On either test the Court will only consider advantages to the plaintiff which are real, ie objectively demonstrated. (It is not clear which of these two approaches enjoyed the support of Lord Russell; but from the general tenor of his speech I infer that he preferred the latter).

(4) If the Court concludes that there is no other clearly more appropriate jurisdiction, then only Lord Keith appears to have considered that a stay might be granted. Such a case must surely be very rare.....

It will at once be apparent that the principles now applicable are not far different from those applicable in the case of an exclusive jurisdiction clause. But there are important differences. First, in the case of an exclusive jurisdiction clause, the burden of proving that there is strong cause for not granting a stay rests on the plaintiff, because the parties have chosen the foreign jurisdiction. But in other cases, where no such choice has been made, the burden of proof (including the burden of proving that there is another clearly more appropriate forum) rests on the defendant. There is another important point of difference. If the parties have chosen to submit their disputes to the exclusive jurisdiction of a foreign court it is difficult to see how either can in ordinary circumstances complain of the procedure of that Court; whereas the mere fact that there exists another more appropriate forum should not of itself preclude the plaintiff from seeking to obtain the benefit of a procedural advantage in the English jurisdiction".

As it appears from the address of counsel for the applicants, what has to be decided is whether I should exercise my discretion to stay the proceedings in view of the provision in the contract allegedly signed by the parties, which includes the exclusive jurisdiction clause.

In considering the various matters raised by the exclusive jurisdiction clause, Robert Goff J. followed the same order

as Brandon J. and in *The Eleftheria* case (*supra*) and I shall do the same to the extent that the present case requires.

(A) Evidence. There is nothing in the affidavit accompanying the application, which is the only evidence before me, as to where the applicants-defendants' witnesses are. If language is of any importance, it suffices to say that one of the official languages of the Courts of the Republic of Cyprus is Greek. So, the defendants will have no language problem if they appear before a Cyprus Court.

(B) Which law is applicable. The ship is registered in Cyprus and belongs to a limited company registered in Cyprus. Under the Merchant Shipping (Masters and Seamen) Law, 1963 (Law 46/63) Part IV (sections 10–17), provisions are made with regard to the employment of seamen which, if not complied with, render the master and the owners of the vessel guilty of an offence. I shall not elaborate on the philosophy of these provisions in Law 46/63, but I shall limit myself by saying that these were introduced apparently for the safeguard of seamen serving on ships flying the Cyprus flag. There is no evidence before me as to what the Greek Law on employment of seamen is or what that Law provides for the payment of a seaman's wages, his rights in respect of wages and the mode of recovering them, as our aforesaid Law provides by its sections 21–45. In the absence of such evidence, I take it that the Greek Law on the above matters is similar to our Law.

(C) The parties. Though the plaintiffs are all foreigners living abroad, the defendants is a limited company, as I have already mentioned, registered in Cyprus and the allegation made in the affidavit sworn on their behalf that they carry their business and manage all their affairs from Piraeus Greece does not impress me.

(D) There is not the slightest shred of evidence that the defendants-applicants genuinely desire to have the claim tried in Greece.

(E) The defendants cannot be prejudiced by having to defend the action here, as they ought to have known that in case they face a claim for wages by their seamen, they are not entitled to an order for security of their costs (see rule 185 of the Cyprus Admiralty Jurisdiction Order, 1893).

In the light of the particular circumstances of the case as I found them to be and the legal principles on which I based myself, I find that this is not a proper case in which I can exercise my discretion and order a stay of proceedings.

The application is, therefore, dismissed with costs in favour of the plaintiffs-respondents.

Costs to be assessed by the Registrar.

Application dismissed with costs.