1981 January 10

[A. Loizou, J.]

DOMESTICA LTD.,

Plaintiffs,

v.

1. ADRIATICA SOCIETA PER AZIONI DI NAVIGAZIONE,
2. A.L. MANTOVANI & SONS LTD.,

Defendants.

(*Admiralty Action No.* 20/78).

Contract—Carriage of goods by sea—Damage to goods whilst on board ship—Carriers liable for breach of their common law duty as carriers—Bill of lading—Exemption clause—Exempting carrier from liability for damages caused by impact and in the course of discharge—Effect—Limitation of actions—Suit must be brought, "on penalty of prescription within six months"—Meaning—Section 28 *of the Contract Law, Cap.* 149.

Limitation of actions—Carriage of goods by sea—Bill of lading—Suit must be brought "on penalty of prescription within six months"—Meaning and effect—Suspension of the Limitation of Actions Law, Cap. 15 *by virtue of Law* 57 *of* 1964 (*as amended by Law* 25 *of* 1971) *and the orders made thereunder by the Council of Ministers—Effect.*

Agent—Principal and agent—Carriage of goods by sea—Goods damaged on the voyage—Claim for damages against shipowners and their agents—Liability of agents—Agents acting for a disclosed principal—And so treated by the owners of the goods—Not liable for the damages.

By a bill of lading dated February 15, 1977 defendants 1 contracted to carry on board the s.s. "Corriere Dell Ovest", in a 20 ft. container owned by them, 64 pieces of Candy washing machines from Venice to Limassol. The plaintiffs were the holders and endorsees of the said bill of lading and the owners and receivers of the washing machines. When the said ship arrived at Limassol it was noticed that the container had sustained damage on the side; and when the container was opened

it was ascertained by the Lloyd's agent that the washing machines had suffered a damage amounting to C£768.

When the plaintiffs sued defendants 1 and defendants 2, who have acted as agents of defendants 1, for damages defendants 1 relied on the provisions of Articles 8*, 17* and 26* of the bill of lading which so far as relevant read as follows:

> "Article 8. The Company accept no responsibility for damages to goods loaded deriving from sea risks..... .....; nor do the company assume responsibility for damage caused to goods by fire, ... impact.....
>
> Article 17. The goods loaded shall be discharged under the care of the company, but for account, at expense and risk of the Receiver without being obliged to give notice to the consignees ....
>
> Article 26. Any claim for damage, shortage, deterioration or loss of the loaded goods must be filed in writing to the agents of the Company at the port of destination within 8 days after the discharge date, failing which the Consignee loses any right to take his action or file his claim.
>
> In lack of a friendly agreement, the suit must be brought before the competent Court at Venice, on penalty of prescription, within 6 months after the delivery date of the loaded goods, or, in case of total loss, within 6 months after the date when said goods were supposed to be at destination.
>
> Both the Shipper and the Consignee, as well as any other person interested in the goods, expressly waive the competence of any other jurisdiction.. .....".

Article 8 above was invoked because the Managing Director of the plaintiff company, when asked in cross-examination, as to what in his opinion caused the severe damage complained of, said that the container must have been roughly handled and that on being further asked, if something in his opinion had hit the container and the container had been dropped and the damage had been sustained on impact, he said, "I believe so".

Regarding Article 26 defendants 1 contended that in the

* Articles 8, 17 and 26 are quoted in full at pp. 91, 92 93 post, respectively.

absence of a friendly agreement this action should have been brought before the competent Court on penalty of prescription within six months after the delivery date of the landed goods. The container was landed on the 6th March, 1977 and consequently this claim, which was brought on the 13th January, 1978, is prescribed by agreement as unenforceable.

Held, (1) *on the question whether Article* 8 *can be invoked*:

That this random opinion by the Managing Director, a merchant, does not amount to a discharge on the part of the carriers of the burden of proof that the loss complained of had been due to an excepted cause, namely that of impact; that in the circumstances definite and unambiguous evidence to bring the case within such excepted perils' clause is expected; accordingly Article 8 cannot be invoked.

(2) *On the question whether Article* 17 *can be invoked:*

That in order that a ship-owner may successfully invoke article 17 there must exist the necessary evidence from which it could be deduced that the damage on the container was caused in the course of discharge, which is according to it done at the expense and risk of the receivers, which does not exist in the present case; that, on the contrary, the container was obviously damaged before it was discharged from the ship and that delivery of same was duly taken in a manner to which defendants 1 duly consented through their authorised agent, defendants 2; accordingly Article 17 cannot be invoked.

(3) *On the question whether Article* 26 *can be invoked*:

That regarding the limitation of time within which an action or claim can be raised, this only takes away the remedies by action but it leaves the right otherwise untouched; that in this sense it cannot be said that this term provides from the discharge from all liability in respect of loss or damage unless a suit is brought within six months after the delivery date of the landed goods; that the words "on penalty of prescription" cannot be taken as providing for a release or forfeiture of rights, if no suit is brought within the period stipulated in the agreement, in which case this provision would have been outside the scope of section 28* of the Contract Law, Cap. 149 and binding between

* Section 28(1) of Cap. 149 reads as follows:

"28(1) Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceeding in the Courts, or which limits the time within which he may thus enforce his rights,is void to that extent".

the parties; that the suspension of the operation of the Limitation of Actions Law, Cap. 15 by virtue of the Limitations of Actions (Suspension) Law, 1964 (Law No. 57 of 1964) as amended by Law 25 of 1971 and the orders made thereunder by the Council of Ministers, does not affect the legal position as explained above, as it applies a fortiori to the cases where under the Law there is no limitation of time within which an action or claim can be raised, because the restriction imposed by the said article naturally limits the unlimited, from the point of view of time, right to file an action; and that in view of this conclusion it need not be examined whether the words "on penalty of prescription within six months" should have been read solely in conjunction with the preceding phrase "that the suit must be brought before the competent Court at Venice", a situation which has not arisen in the present case.

(4) *On the merits of the claim*:

That the amount claimed by the plaintiffs as damages is duly warranted by the evidence adduced and that they are entitled to it as the defendants 1 are liable in Law for that amount; that the damage complained of was clearly caused whilst the goods were on board the ship and in the possession and control of defendants 1 who are liable for breach of their Common Law duty as carriers (see Carver's Carriage by Sea 12th ed. vol. 1 p. 19); accordingly judgment will be given for plaintiffs against defendants 1 for £947.250 mils with legal interest and costs.

(5) *On the question whether defendansts 2 were liable*:

That as defendants 2 were acting solely as agents of a disclosed principal and they were so treated by the plaintiffs themselves, the action against them cannot stand (see *Djemal* v. *Zim Israel Navigation and Another* (1967) 1 C.L.R. 227; (1968) 1 C.L.R. 309).

Judgment for plaintiffs against defendants 1 for £947.250 mils with costs. Action against defendants 2 dismissed with costs.

Cases referred to:

Baroda Spg. & Wvg. Co. Ltd. Satyanarayen Marine & Fire Insurance Co. (1914) 38 Bom. 344;

Girdharilal v. *Eagle, Star and British Dominions Insurance Co.* (1923) 27 C.W.N. 955;

Rainey v. *Burma Fire & Marine Insurance Co.* (1925) 3 Ran. 383; 91 I.C. 622; 1926 A.R. 3;

Yiannakouri and Another (No. 3) v. *Cyprus Sea-Cruises (Limassol) Ltd.*, (1965) 1 C.L.R. 397 at p. 413;

Baxter's Leather Company v. *Royal Mail Steam Packet Company* [1908] 2 K.B. 626 at p. 630;

Beaumont-Thomas v. *Blue Star Line* [1939] 3 All E.R. 127 at p. 130;

Djemal v. *Zim Israel Navigation Co. Ltd. and Another* (1967) 1 C.L.R. 227; (1968) 1 C.L.R. 309;

Skapoullaros v. *Nippon Yusen Kaisha and Another* (1979) 1 C.L.R. 448.

Admiralty action.

Admiralty action for £947.250 mils for damages caused to plaintiffs' goods, whilst they were under the absolute and exclusive control, possession and responsibility and/or were carried on board SS "CORRIERE DELL OVEST" from Venice to Limassol, due to the negligence of the defendants.

Gl. Raphael, for the plaintiffs.

St. Mc Bride, for defendants 1.

M. Houry, for defendants 2.

Cur. adv. vult.

A. Loizou J. read the following judgment. The plaintiffs' claim against the defendants jointly and severally is as follows:-

"A. £947.250 mils, special damages, for damage caused to plaintiffs' goods and for other consequential damages, suffered by plaintiffs between 15.2.77 till 6.3.77, and whilst the said goods were under the absolute and exclusive control, possession and responsibility and/or were carried on board SS "CORRIERE DELL OVEST", from Venice to Limassol, due to negligence and/or otherwise by defendants and/or their servants and/or their agents, and/or alternatively,

B. £947.250 mils, special damages for damage caused to plaintiff's goods and for other consequential damages, suffered by plaintiffs between 15.2.77 till 6.3.77 owing to failure by defendants and/or their servants and/or their agents, to deliver to plaintiffs in safe and intact con-

dition their goods as they undertook and/or had written agreement and/or undertaking to do so, and/or otherwise.

C. Any other relief that the Court would consider just.

D. Legal Interest and Costs".

The plaintiffs are a limited Company established and duly registered in Cyprus and are engaged, *inter alia*, in the importation and sale of home appliances and other associate products.

By a Bill of Lading dated the 15th February 1977, (*exhibit* 1(1)), which was signed by them defendants 1, contracted to carry on board the s.s. "CORRIERE DEL OVEST" in a 20 ft. container owned by them, 64 pieces of Candy washing machines delivered in good order and the aforesaid Bill of Lading was issued as clean for carriage from Venice to Limassol. Such a document is indeed a prima facie evidence of the truth of the statement which it contains and a carrier, who delivers the cargo received in a condition different, and damaged, than that in which it is described in a Bill of Lading—though he issued a clean Bill of Lading—has to prove affirmatively that the Bill of Lading was wrong and that he delivered all the cargo and in the condition in which he received it, unless he relies on damage by excepted perils.

The plaintiffs are the holders and endorsees of the said Bill of Lading and the owners and receivers of the aforesaid washing machines. When the aforesaid ship arrived at Limassol, it was noticed that the said container had sustained damage on the side. This was noticed by Onisiforos Alexandrou, a driver employed by Lefkaritis transport firm, who had been instructed to carry this container to the plaintiffs to their stores at Nicosia, and Charidemos Theocharides, a clearing agent, who was acting as such for the plaintiffs at the time.

The delivery of the goods to the plaintiffs was made on the 10th March, but they had to await the Customs for the opening of the container and its examination in their presence for the purpose of ascertaining the condition of its contents. When this was done the Lloyd's agents were called and a survey report was eventually prepared, copy of which has been produced by consent of the parties as *exhibit* 1 (doc. No. 12). In the meantime, by letter dated the 12th March 1977, *exhibit* 1, (doc. No. 2), the carriers were notified through their agents

at Limassol, of the damage and that the goods would have been surveyed by the Lloyd's agent on the 14th March 1977, and invited them to attend the survey. The damage as ascertained by the Lloyd's agent was to the amount of C£768, to which the plaintiffs add an amount of C£148, being the cost of the replacement of several parts which were found to be damaged when the washing machines were dismantled for repairs at their workshops. By adding to it the amount of C£31.250 mils the cost of the surveyor, the total of C£947.250 mils claimed by this action, is reached.

As it has been rightly stated by counsel for defendants 1, the Carriage of Goods by Sea Law, Cap. 263 is not applicable as this was a case of an inward carriage. Consequently the question of liability for the alleged damage has to be resolved under the principles of the Contract Law and of course subject to the terms of the contract entered into between the parties governing the carriage of goods in question. In fact defendants 1 relied on the provisions of Articles 8, 17 and 26, of the Bill of Lading, *exhibit* 1, (doc. No. 1). Article 8 reads as follows:

> "ARTICLE 8—The Company accept no responsibility for damages to goods loaded deriving from fortuitous causes or force majeure nor those caused by or deriving from sea risks, enemies and pirates, war risks, mines and torpedoes, be they stationary or mobile, barratry, orders of Prince, or of government whether recognised or not; nor do the Company assume responsibility for damage caused to goods by fire, collision with another ship, impact, or for any other risk, peril and accident of navigation; neither for the bursting, breakage, or any latent or hidden defect in boilers, engines, refrigerators, hull or accessory plants.
>
> Moreover, the Company do not accept any responsibility for loss and damage caused by rats and insects, for breakage or fragile objects or leakage of liquids, irrespective of the container in which these have been placed. The Company are not liable for damage and loss caused by piercing of drums, dispersal of goods, death or escape of animals, rust dampness caused by rain or evaporation, neither for damage and loss caused by sea water or exhalation, insufficient packing, natural deterioration, nor for theft."

This is a clause providing for excepted perils and has been invoked by defendants 1 bacause the Managing Director of the plaintiff company, when asked in cross-examination, as to what in his opinion caused the severe damage complained of, said that the container must have been roughly handled and that on being further asked, if something in his opinion had hit the container and the container had been dropped and the damage had been sustained on impact, he said, "I believe so". This random opinion by a merchant does not amount to a discharge on the part of the carriers of the burden of proof that the loss complained of had been due to an excepted cause, namely that of impact. I would expect in the circumstances definite and unambiguous evidence to bring the case within such excepted perils' clause.

Article 17 of the bill of lading also relied upon by defendants 1, reads as follows:

> "Article 17—The goods loaded shall be discharged under the care of the Company, but for account, at expense and risk of the Receiver without being obliged to give notice to the Consignees. The discharge may take place even during the night and on holidays. Collection of the goods must be taken on arrival of the vessel even though it be a holiday, otherwise they shall be placed on lighters, on any quay, or deposited in Customs or other warehouses. In such cases all carriage, storage and delivery charges shall be borne by the goods as well as all risks, loss or damage, without any obligation on the part of the Company to advise the Shippers of the non-collection".

In order that a ship-owner may successfully invoke this article there must exist the necessary evidence from which it could be deduced that the damage on the container was caused in the course of discharge, which is according to it done at the expense and risk of the receivers, which does not exist in the present case. On the contrary the container was obviously damaged before it was discharged from the ship and that delivery of same was duly taken in a manner to which defendants 1 duly consented through their authorised agent, defendants 2.

The last article invoked by defendants 1 is article 26 which reads as follows:

> "Article 26—Any claim for damage, shortage, deterioration

or loss of the loaded goods must be filed in writing to the agents of the Company at the port of destination within 8 days after the discharge date, failing which the Consignee loses any right to take his action or file his claim.

In lack of a friendly agreement, the suit must be brought before the competent Court at Venice, on penalty of prescription, within 6 months after the delivery date of the loaded goods, or, in case of total loss, within 6 months after the date when said goods were supposed to be at destination.

Both the Shipper and the Consignee, as well as any other person interested in the goods, expressly waive the competence of any other jurisdiction.

All what is not provided for in the present carriage conditions shall be ruled by the Code of maritime law in force in the Italian Republic".

It is the contention of defendants 1 that in the absence of a friendly agreement this action should have been brought before the competent Court on penalty of prescription within six months after the delivery date of the landed goods. The container was landed on the 6th March 1978 and consequently this claim by agreement is prescribed as unenforceable.

Section 28 of our Contract Law, Cap. 149 reads as follows:

"28.(1) Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceeding in the Courts, or which limits the time within which he may thus enforce his rights, is void to that extent.

(2) This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

When such a contract has been made, legal proceedings may be brought for its specific performance, and if legal proceedings, other than for such specific performance,

or for recovery of the amount so awarded, are brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the legal proceedings.

(3) This section shall not render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time as to references to arbitration".

This section corresponds in all material respects to section 28 of the Indian Contract Act which has been the subject of extensive judicial interpretation. With regard to the limitation of time the position is summed up in Pollock and Mulla Indian Contract and Specific Relief Acts 9th edition, by reference to Indian decisions at p. 295, as follows:

"Under the provisions of this section, an agreement which provides that a suit should be brought for the breach of any terms of the agreements within a time shorter than the period of limitation prescribed by law is void to that extent. The effect of such an agreement is absolutely to restrict the parties from enforcing their rights after the expiration of the stipulated period, though it may be within the period of limitation. Agreements of this kind must be distinguished from those which do not limit the time within which a party may enforce his rights, but which provide for a release or forfeiture of rights if no suit is brought within the period stipulated in the agreement. The latter class of agreements are outside the scope of the present section, and they are binding between the parties. Thus a clause in a policy of fire insurance which provides that 'if the claim is made and rejected, and an action or suit be not commenced within three months after such rejection all benefits under this policy shall be forfeited', is valid, as such a clause operates as a release or forfeiture of the rights of the assured if the condition be not complied with, and a suit cannot be maintained on such a policy after the expiration of three months from the date of rejection of the plaintiff's claim. It was so held by the High Court of Bombay in the Baroda Spg.

& Wvg. Co.'s case; and similarly where a bill of lading provided that 'in any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless a suit is brought within one year after the delivery of the goods', it was held that the clause was valid. But this cannot be said of a clause in a policy in the following form: 'No suit shall be brought against the company in connection with the said policy later than one year after the time when the cause of action accrues'. Such a clause does not operate as a release or forfeiture of the rights of the assured on non-fulfilment of the condition, but it is to limit the time within which the assured may enforce his rights under the policy, and it is therefore void under the present section".

The case of *Baroda Spg. & Wvg. Co. Ltd.* v. *Satyanarayen Marine & Fire Insurance Co.* (1914) 38 Bom. 344 followed in *Girdharilal* v. *Eagle Star and British Dominions Insurance Co.* (1923) 27 C.W.N. 955; 80 I.C. 637; G. *Rainey* v. *Burma Fire & Marine Insurance Co.* (1925) 3 Ran. 383; 91 I.C.622; 1926 A.R. 3.

The question therefore for determination is whether the words "on penalty of prescription within six months" amount to an agreement restricting the parties from enforcing their rights after the expiration of a stipulated period, though it may be within the period of limitation, which under the aforesaid section are void to that extent, or an agreement which does not limit the time within which a party may enforce his rights but it provides for a release or forfeiture of rights, if no suit is brought within the period stipulated in the agreement in which case it would be outside the scope of this section and binding between the parties.

The answer to this question calls for an examination of the meaning of the word "prescription" chosen by the parties as defining the rights and duties created by this article.

The meaning of the word "prescription" as given in the Shorter Oxford English Dictionary 3rd edition, is the following:

"II. Law I. Limitation of the time within which an action or claim can be raised. Now commonly called negative p. 1474. b. Uninterrupted use or possession from time

immemorial, or for a period fixed by law as giving a title or right; hence, title or right acquired by such use or possession; sometimes called positve p. late ME".

Regarding the limitation of time within which an action or claim can be raised, this only takes away the remedies by action but it leaves the right otherwise untouched. In this sense it cannot be said that this term provides from the discharge from all liability in respect of loss or damage unless a suit is brought within six moths after the delivery date of the landed goods. The words "on penalty of prescription" cannot be taken as providing for a release or forfeiture of rights, if no suit is brought within the period stipulated in the agreement, in which case this provision would have been outside the scope of section 28 and binding between the parties.

The suspension of the operation of the Limitation of Actions Law, Cap. 15 by virtue of the Limitations of Actions (Suspension) Law, 1964 (Law No. 57 of 1964) as amended by Law 25 of 1971 and the orders made thereunder by the Council of Ministers, does not affect the legal position as explained above, as it applies a fortiori to the cases where under the Law there is no limitation of time within which an action or claim can be raised, because the restriction imposed by the said article naturally limits the unlimited, from the point of view of time, right to file an action.

In view of this conclusion I need not really examine whether the words "on penalty of prescription within six months" should have been read solely in conjunction with the preceding phrase "that the suit must be brought before the competent Court at Venice", a situation which has not arisen in the present case.

The position being as above it only remains for me to say that the amount claimed by the plaintiffs as damages is duly warranted by the evidence adduced and that they are entitled to it as the defendants 1 are liable in Law for that amount. The damage complained of was clearly caused whilst the goods were on board the ship and in the possession and control of defendants 1 who are liable for breach of their Common Law duty as carriers.

With regard to this, the Common Law Rules governing the

liability of a shipowner who receives goods to be carried for reward are set out in Carriage by Sea 12th edition vol. 1 p. 19; they are the following:

"Where, then, a shipowner receives goods to be carried for reward, whether in a general ship with goods of other shippers, or in a chartered ship whose services are entirely at the disposal of the one freighter, it is implied in common law, in the absence of express contract—

That he is to carry and deliver the goods in safety, answering for all loss or damage which may happen to them while they are in his hands as carrier:

Unless that has been caused by some act of God, or of the King's enemies; or by some defect or infirmity of the goods themselves, or their packages; or through a voluntary sacrifice for the general safety;

And, that those exceptions are not to excuse him if he had not been reasonably careful to avoid or guard against the cause of loss, or damage; or has met with it after a departure from the proper course of the voyage; or, if the loss or damage has been due to some unfitness of the ship to receive the cargo, or to unseaworthiness which existed when she commenced her voyage".

This exposition of the Law (as appearing in the 10th edition of the same textbook) was cited with approval also in the case of *Yiannakouri and another No. 3* v. *Cyprus Sea-Cruises (Limassol) Ltd* (1965) 1 C.L.R. p. 397 at p. 413 where a reference was made also to the cases of *Baxter's Leather Company* v. *Royal Mail Steam Packet Company* [1908] 2 K.B. 626, C.A. at p. 630; and in *Beaumont-Thomas* v. *Blue Star Line* [1939] 3 All E.R. 127 at p. 130, which deal with the legal position of shipowners and shippers of goods and the question whether they are common carriers or bailees, is also expounded.

Before concluding I shall deal briefly with regard to the liability of defendants 2 who have been sued merely because they acted as the agents of defendants 1 and for no other reason.

The legal principles governing such a position have been

explained in the case of *Djemal* v. *Zim Israel Navigation Co.* Ltd. and Another (1967) 1 C.L.R. 227; (1968) 1 C.L.R. 309 (C.A. applied), followed recently in the case of *Skapoullaros*, v. 1. *Nippon Yusen Kaisha*, 2 *A.L. Mantovani & Sons Ltd.*, (1979) 1 C.L.R. p. 448. I need not therefore repeat them.

On the strength of these authorities and on the evidence adduced, which suggests nothing else than that defendants 2 were acting solely as agents of a disclosed principal and they were so treated by the plaintiffs themselves, the action against them cannot stand.

For all the above reasons there will be judgment for the plaintiffs against defendants 1 for £947.250 mils with legal interest and costs and the action against defendants 2 is dismissed with costs.

Judgment against defendants 1 *for* £947.250 *mils with costs. Action against defendants* 2 *dismissed with costs.*