1982 October 19

[HADJIANASTASSIOU, LORIS, PIKIS, JJ.]

1. MICHEL SAAB,
2. MEDITERRANEAN PAPER MANUFACTURERS LIMITED,
Appellants-Plaintiffs,

v.

THE HOLY MONASTERY OF AYIOS NEOPHYTOS,
Respondents-Defendants.

(*Civil Appeal No.* 6176).

Contract—Certainty of its terms—Principles applicable—So long as the essential terms of the agreement are ascertainable by a reading of the contract as a whole, effect will be given to the agreement of the parties—Section 29 *of the Contract Law, Cap.* 149.

Contract—Alien—Purchase of land—An alien is a competent contracting party—Section 11 *of the Contract Law, Cap.* 149—*Position unaffected by provisions of section* 3(3) *of the Immovable Property Acquisition (Aliens) Law, Cap.* 109 (*as amended by Law* 55/72) *which only restricts the registration, in the name of an alien, of immovable property—But does not affect the validity of the agreement.*

Contract—Construction—A matter of law to be determined by the trial Court—And Court of Appeal equally well placed as the trial Court to discern meaning of a document—Construction of "on account of" in a contract.

Contract—Non existing principal—A party entering into an agreement on behalf of, becomes liable thereunder and acquires a right to sue so long as personal liability is not expressly or by necessary implication excluded.

Contract—Sale of land—Specific performance—Existence of separate registration covering land under sale a condition precedent to the specific performance of a contract—Proviso to section 3 *of the Sale of Land Specific Performance Law, Cap.* 232 (*as amended by Law* 26/72).

Time—"Month"—Calendar month—Method of calculation of period that elapses after the occurrence of a given event—Section 31, para. (a), of the Interpretation Law, Cap. 1, and section 2, definition of "Month".

Damages—Breach of contract—Principles applicable—Though normally damages are assessed as at the date of breach, where the party persists for good cause to have the contract enforced, notwithstanding the breach, damages may be assessed as at a subsequent date—In this sense Principle of Wroth v. Tyler [1973] 1 *All E.R.* 897 *not exceptional but in line with the common law rule for the assessment of damages.*

Interest—Recovery of, as an item of special damage in case of a breach of contract—Though a remote item of damage which is not ordinarily recoverable it may be recovered when it is specifically pleaded and it appears that loss of interest ought reasonably to have been within the contemplation of the parties at the time of execution of the contract.

Costs—Rule that costs follow the event—Should not be followed with the same strictness where two or more plaintiffs with a close, if not identical interest, pursue an action jointly and one of them is successful—Court must examine whether the joinder has added to the costs of the proceedings.

On December 5, 1976, appellant 1, a Lebanese banker, entered into a written agreement with the respondents for the purchase from them of an area of 200 donums of land for £24,000. The land was not covered by separate registration but formed part of two adjoining plots. The contracting parties were described in the body of the agreement, in the introductory part, and were, the Holy Monastery of Ay. Neophytos, as vendors, and appellant 1 "διὰ λογαριασμὸν" – "on account of" – MEDITERRANEAN PAPER MANUFACTURERS LIMITED, the purchasers. The company was not yet in existence. It had not yet been incorporated. The contract was signed on behalf of the purchasers by appellant 1 whose signature was not accompanied by any qualification.

On February 5, 1977, appellant 1 sought to have the agreement deposited at the Paphos District Lands Office under the provisions of the Sale of Land (Specific Performance) Law, Cap. 232

but registration was refused on the ground that the contract was produced for registration after 12 noon, the hour at which the Lands Department closes for business with the public. Following representations by appellant to the superiors of the Paphos Lands Officer directions were given to him on February 9, 1977 to accept registration of the contract with retrospective effect, that is with effect from February 5, 1977, the date on which the attempt was made to have the contract deposited. In the meantime steps were taken to have the abovenamed company incorporated and to secure a licence from the Council of Ministers for the acquisition of the land. Both these objectives were accomplished by March 3, 1977; but when appellant 1, acting as the agent of the above company presented himself at the Lands Office for the purpose of accepting registration of the property purchased, the respondents refused to transfer the entire area of land agreed upon. Hence an action by appellant 1 and the Company for specific performance of the agreement and damages in the alternative.

The trial Court found and concluded as follows:

(a) The terms of the contract were sufficiently certain and the land was properly identifiable. Hence, there was no obstacle to its enforcement from this viewpoint.

(b) Appellant 1 purported to execute this agreement not in a personal but in a representative capacity, as the agent of MEDITERRANEAN PAPER MANUFACTURERS LTD. Consequently, the contract was unenforceable at the instance of the company, in accordance with the well established principles of Company Law, making impossible execution by a company of a contract before incorporation. The company had, therefore, no locus standi in the proceedings and their action was dismissed with costs.

(c) Appellant 1 had a personal right to enforce the contract, on the principle that an agent who enters into an agreement on behalf of a non existing principal, can sue and can be sued under the agreement, so long as he does not expressly or by necessary implication exclude personal liability thereunder. So, the contract was enforceable at the instance of appellant 1 who was

found to be entitled to the remedies warranted in the circumstances.

(d) The contract was not specifically enforceable, because of lack of registration, within two months. The subsequent decision of the L.R.O. authorities to have the contract registered retrospectively, left the position unaffected.

(e) The refusal of the vendors to transfer an important portion of the land agreed to be sold, entitled appellants to treat the contract at an end and sue for breach.

Upon appeal by appellant 1, which was mainly directed against the withholding of specific performance and the date of assessment of damages, an appeal by the Company directed against the order ordering them to pay costs and a cross-appeal by respondents directed against the upholding of the validity of the contract the following issues arose for consideration:

(1) The validity of the contract with particular reference to the certainty of its terms.

(2) The right of an alien to sue on a contract for the purchase of land.

(3) The right of Michel Saab to sue under the agreement.

(4) Specific performance of the agreement under consideration and, lastly, if the judgment of the trial Court in this regard is upheld to examine

(5) the damages to which appellant 1 is entitled, for breach of contract.

Held, (1) that so long as the essential terms of the agreement are ascertainable by a reading of the contract as a whole, effect will be given to the agreement of the parties; that this was found to be the case in the present action; that having carefully perused the agreement of the parties, this Court agrees with the trial Court that the subject-matter was defined with sufficient certainty, as to make the agreement of the parties enforceable; that this being so, the vendors were guilty of breach, entitling the appellant, provided he possessed a right to sue, to claim an appropriate remedy (see s.29 of the Contract Law, Cap. 149).

(2) That the capacity of a person to enter into a valid agree-

ment is in no way qualified by reference to his nationality (see s.11 of the Contract Law, Cap. 149); that the alien is, therefore, a competent contracting party under the provisions of the Contract Law; that consequently, unless any other law restricts this right, an alien is, like any other person, competent, under Cyprus law, to enter into a valid agreement; that the provisions of s.3(3) of Cap. 109, as amended by Law 55/72, leave this position unaffected; that a contract by an alien for the purchase of land, is, like any other contract, valid, provided the prerequisites envisaged by the Contract Law for a valid contract are satisfied; that the law merely restricts the registration, in the name of an alien, of immovable property without prior approval by the Council of Ministers; that what the implications of such a failure may be upon the liability of the parties under the agreement, must be decided in each case by reference to its particular facts; but, certainly, the agreement is valid at its inception, and binding on the parties.

(3)(a) That the trial Court found that the employment of the expression "on account of" meant that appellant 1 executed the sale agreement as an agent of an unincorporated company; that the construction of a document is a matter of law to be determined as such by the Court; that, therefore, the Appeal Court is equally well placed as the trial Court to discern the meaning of a document in accordance with the established canons of construction; that the meaning of a term of an agreement must be gathered from the expression used, read in the context of the agreement as a whole; that this Court agrees with the trial Court that the employment of the expression "on account of", in the context of this document, is sufficiently revealing of the intention of the parties with regard to the identification of the purchaser, as well as the capacity in which appellant 1 signed the agreement; that appellant 1 entered into this agreement as agent, on behalf of the company he had in mind to set up, which acquired a juridical personality in due course, with the coming into being of appellants 2; that, therefore, the judgment of the trial Court in this area, must be upheld.

3(b) That a party entering into an agreement on behalf of a non existing principal becomes liable thereunder, as well as acquires a right to sue, so long as personal liability is not expres-

sly or, by necessary implication, excluded by the terms of the agreement; and that, therefore, this Court is in agreement with the trial Court that appellant had a right to sue.

(4)(a) (*After considering it unnecessary to give a final answer to the question whether specific performance on the above ground was properly refused, although inclined to the view that it was wrongly refused because the power of hierarchically superior organs of administration to review and, where necessary, correct decisions of their subordinates, would be meaningless if its exercise left the original decision intact*) that the proviso to section 3 of Cap. 232, as amended by Law 26/72, makes the existence of a separate registration a condition precedent to the specific performance of a contract; that the Court has no discretion to relax this provision; that in the absence of a separate registration covering the immovable property under sale specific performance was impossible; and that, therefore, the decision of the trial Court in refusing to order specific performance must be sustained though, for somewhat different reasons from those advanced by the trial Court.

(4)(b) *On the submission of counsel for the appellants that the 5th February,* 1977 *was not the last day of the two-month period within which the contract of* 5.12.76 *had to be deposited:*

That "month", in accordance with s.2 of the Interpretation Law, Cap. 1, means a calendar month; that in calculating the period that had elapsed after the occurrence of a given event, in this case execution of the contract, the date on which the event occurred is to be excluded from reckoning (see s.31, para. (a), Cap. 1); and that, therefore, a two-month calendar period ends on the fifth corresponding day of the second month and not on the fourth.

(5) That the principles regulating the award of damages for breach of contract at common law, do not require of necessity that damage should be assessed as at the date of breach; that where the justice of the case so necessitates, they may be assessed at a subsequent date; that normally, damages are assessed as at the date of breach because the damage suffered by the innocent party crystallizes on that day; that where a party persists for good cause to have the contract enforced, notwithstanding the breach, as it often happens where a party is seeking the

specific enforcement of the contract, there is valid ground for assessing damages as at a subsequent date; that the damage crystallizes when specific performance is refused in the exercise of the Court's discretion; that in this sense the principle of *Wroth v. Tyler* [1973] 1 All E.R. 897, which is to the effect that where specific performance is withheld in the exercise of the discretionary powers of the Court, damages should be calculated as at the date of trial, is not exceptional but in line with the general rule at common law for the assessment of damages; that in the present case, the persistence of the appellant to have the contract specifically enforced had no reasonable chance of success, in view of the absence of a separate registration of the property; that specific performance was withheld, not in the exercise of any discretionary powers of the Court but as a result of the mandatory application of the provisions of Cap. 232, as earlier indicated in this judgment; that under s.8 of Cap. 232 the Court has discretion to refuse specific performance, despite compliance with the mandatory provisions of Cap. 232 as to registration of the contract and other formalities; that in that case, there may be good reason for assessing damages, as at the date of the trial; that in the judgment of this Court the trial Court rightly assessed damages in this case, as at the date of breach; and that, further, the assessment made was reasonable in the light of the evidence before the Court.

(6) That where loss of interest is specifically pleaded as an item of special damage, there is no rule preventing its recovery where it appears that such loss ought reasonably to have been within the contemplation of the parties at the time of the execution of the agreement; that normally the recovery of interest is treated as a remote item of damage not ordinarily recoverable; that neither the pleading of the appellant, nor the evidence adduced, taken together, justify the award of interest as an item of damage properly recoverable; and, therefore, this aspect of the judgment of the trial Court is also sustainable.

(7) The costs normally follow the event; that if this rule is strictly applied, the ruling of the trial Court, that appellants 2 should pay the costs, occasioned by their action, to the defendant, should be sustained; that where, however, as in this case, two or more plaintiffs with a close, if not identical interest, join forces in the pursuit of an action and one of them is succes-

eful, the rule that costs follow the event should not be followed with the same strictness; that the Court must examine whether the joinder has added to the costs of the proceedings; and if so, make an appropriate order as to costs; that in this case, there is nothing to suggest that the joinder had this result; and that, therefore, the appropriate order as to costs between appellants 2 and defendants should be - no order as to costs; and to this extent, the order of the trial Court as to costs should be varied.

Appeal and cross-appeal dismissed.

Cases referred to:

Honk Kong Fir Case [1962] 1 All E.R. 474 at p. 481;

Bunge Corporation v. Tradex S.A. [1981] 2 All E.R. 513 (H.L.);

Wroth v. Tyler [1973] 1 All E.R. 897;

Horrocks v. Forray [1976] 1 All E.R. 737 (C.A.);

Charles Clay & Sons Ltd. v. B.R. Board [1971] 1 All E.R. 1007 (C.A.);

Brown v. Gould [1971] 2 All E.R. 1505;

Bushwell Properties v. Vortex Properties [1976] 2 All E.R. 283 (C.A.);

Iosifakis and Others v. Ghani (1967) 1 C.L.R. 190;

Halfdan Grieg v. Sterling Coal Corpn. [1973] 1 All E.R. 545 per Kerr, J.;

Kelner v. Baxter and Others, Law Reports - Common Pleas Cases - Vol. II p. 174;

Newborne v. Sensolid (Gr. Britain) LD. [1954] 1 Q.B.45;

Phonogram Ltd. v. Lane [1981] 3 All E.R. 182 at p. 188;

Republic v. M.D.M. Estate Developments Limited [1982] 3 C.L.R. 642;

Kalisperas v. Ministry of Interior (1982) 3 C.L.R. 509;

Dodds v. Walker [1982] 2 All E.R. 609;

Hadley v. Baxendale [1843-60] All E.R. Rep. 461;

Marcou v. Michael, 19 C.L.R. 282;

Heron II [1967] 3 All E.R. 686;

Soleada S.A. v. Hamoor Tanker Corporation Inc. [1981] 1 All E.R. 856 (C.A.);

C.R. Taylor (Wholesale) Limited v. Hepworths [1977] 2 All E.R. 784;

Lamb v. L.B. of Camden [1981] 2 All E.R. 408;
Lloyd v. Stanbury [1971] 2 All E.R. 267;
Warnigton v. Miller [1973] 2 All E.R. 372 (C.A.);
Grant v. Dawkins [1973] 3 All E.R. 897;
Malhotra v. Choudhury [1979] 1 All E.R. 186 (C.A.);
Johnson v. Agnew [1979] 1 All E.R. 883;
Wadsworth v. Lydall [1981] 2 All E.R. 401;
Techno-Impex v. Von Weelde BV [1981] 2 All E.R. 689.

Appeal.

Appeal by plaintiffs and cross-appeal by defendants against the judgment of the District Court of Paphos (Kourris, P.D.C. and Demetriou, S.D.J.) dated the 4th September, 1980 (Action No. 337/77) whereby the defendants were ordered to pay to the plaintiffs the sum of £2,400.- as damages for breach of contract for sale of land.

T. Papadopoulos with *M. Marangou* (*Miss*), for the appellants.

E. Komodromos with *J. Droushiotis*, for the respondents.

Cur. adv. vult.

HADJIANASTASSIOU J.: The judgment of the Court will be delivered by Pikis, J.

PIKIS J.: Michel Saab, a Lebanese banker, came to Cyprus in 1976, in the wake of civil strife in the Lebanon, with a view to establishing a seat in Cyprus for the Federal Bank of Lebanon, of which he was president, as well as set up some business of his own. A licence was issued by the Central Bank, authorising the Federal Bank of Lebanon to operate an office in Nicosia for the transaction of its international affairs. Mr. Saab was himself interested to establish a paper factory for the production of tissue paper, a project designed to be financed by the Federal Bank of Lebanon. He began searches for the purpose of finding an appropriate site for the setting up of the factory. It was within the contemplation of Mr. Saab that the factory and the business connected therewith, would be conducted by a family company to be incorporated in Cyprus under the name of "MEDITERRANEAN PAPER MANUFACTURERS LIMITED". Apparently, the word "Mediterranean" was meant to signify the scale of the operations of the company. The specifications for the factory required

that the site that would accommodate the factory should have a certain scaping to facilitate the easy flow of water needed for the operation of the factory. Hence the site had to have a certain elevation, the gradient of which would meet the requirements of water supply to the factory.

The Holy Monastery of Ayios Neophytos are the owners of a large plot of land consisting of hundreds of donums in extent, at Ay. Varvara village in the district of Paphos. A portion of this land was considered appropriate for the location of the factory, meeting the basic requirements for its building and operation. Negotiations were conducted between Mr. Michel Saab on the one hand, and the Abbot of the Monastery, now Bishop of Paphos, on the other, for the purchase of part of the land of the Monastery. The purpose for which the land was required, was communicated to the owners of the land. The parties visited the site in the course of the negotiations and the area contemplated to be sold, was identified on the spot.

The negotiations culminated in an agreement between the parties, embodied in a written contract of sale (exhibit 15). An area of 200 donums, identified in a plan attached to the agreement, was sold for £24,000.– under terms and conditions specified therein. The land formed part of two adjoining plots, notably plots 53 and 54, of Sheet/Plan LI/21. A sum of £2,400.– was paid upon execution of the agreement, whereas the balance would be paid upon the conveyance of the property.

The contracting parties were described in the body of the agreement, in the introductory part, and were, the Holy Monastery of Ay. Neophytos, as vendors, and Michel Saab "διὰ λογαριασμὸν"—"on account of"—MEDITERRANEAN PAPER MANUFACTURERS LIMITED the purchasers. The company was not yet in existence. It had not yet been incorporated. The contract was signed on behalf of the purchasers by Michel Saab. The signature of Michel Saab was not accompanied by any qualification. A term of the agreement conferred a right to the purchasers to withdraw in the event of the authorities refusing registration of the company or the establishment of the industrial project under consideration, provided this option was exercised within three months.

On 5th February, 1977, Michel Saab sought to have the agreement deposited at the Paphos lands office under the provisions of the Sale of Land (Specific Performance) Law, Cap. 232, as amended by Laws 50/70 and 96/72. The object was to have the contract registered within the statutory period of two months, a vital prerequisite for the specific enforcement of the agreement in due course. Registration of the agreement was refused on the ground that the contract was produced for registration after 12 noon, the hour at which the Lands Department closes for business with the public. The purchasers protested at this decision and apparently took the matter up with the superiors of the Paphos lands officer.. The decision in question was reversed, following advice from the Office of the Attorney-General and directions issued for the purpose to the Paphos District Lands Office. On 9.2.1977 instructions were given that the contract be entered into the appropriate registry of the Paphos Lands Department with retrospective effect, that is with effect from 5.2.1977, the date on which the attempt was made to have the contract deposited. In the meantime, steps were afoot to have the company incorporated and secure licence from the Council of Ministers for its acquisition. Both objectives were accomplished by 3.3.1977, so the way was paved for the conveyance of the land in the name of the company. On 5.3.1977, Michel Saab, acting as the agent of the aforementioned family company, presented himself at the Paphos Lands Department for the purpose of accepting registration of the property purchased. We find it unnecessary to recite the details of what went on between the parties on that day, a facet of the case analysed in detail in the judgment of the trial Court. We content ourselves with holding that the findings of the trial Court on this subject were fully warranted by the evidence before the Court, and nothing that has been said before us justifies interference with them. The trial Court rejected the contention of the vendors that, as a result of fresh negotiations, the original agreement was rescinded and in its stead a new contract was orally agreed upon between the parties.

The findings of the trial Court as to what happened on 5.3.1977 can be summarised as follows:

The vendors refused to transfer the entire area of the land agreed upon, defaulting in the discharge of their contractual

obligations. What they refused to transfer was an important part of the whole area of about eight donums, severance of which had a serious bearing on the appropriateness of the site for the location of their factory because of a consequential variation of the gradient of the land. The default of the vendors arose from the fact that they had covenanted to sell the strip of land in question to a co-operative society, as far back as July, 1976, and, in fact, conveyed it shortly after their refusal to honour their obligations to the purchasers. In this case, the land was transferred to a co-operative society on 18.3.1977. A short while later, in April, 1977, Michel Saab and the MEDITERRANEAN PAPER MANUFACTURERS LTD., joined in the pursuit of the present proceedings, raised before the District Court of Paphos, asking for the specific enforcement of the agreement with the Holy Monastery of Ayios Neophytos, and damages in the alternative.

The defendants refuted liability on a number of grounds:

Firstly, they contended that the terms of the contract were uncertain in a vital respect, concerning the subject-matter of the agreement, viz. the identification of the land sold, contending that the contract was invalid on that account. The agreement was, in their contention, unenforceable for yet another reason, the submission being that it was a contract with a non existing entity, inasmuch as MEDITERRANEAN PAPER MANUFACTURERS LTD., was not in existence at the time of the formation of the contract. Nor was the contract enforceable at the instance of Michel Saab who, in their contention, was not a party to it, and, in any event, he could not enforce it in the absence of a licence from the Council of Ministers entitling him to acquire it, in accordance with the Immovable Property Acquisition (Aliens) Law, Cap. 109, as amended by Law 52/69. But even if the contract was held to be enforceable at the instance of either of the plaintiffs, they disputed the right of the purchasers to specific performance, for the reason that they had not complied with the prerequisites laid down in the Sale of Land (Specific Performance) Law, Cap. 232, as amended.

The trial Court examined in detail every aspect of the case. Their findings and conclusions were, in brief, as follows:-

(a) The terms of the contract were sufficiently certain

and the land was properly identifiable. Hence, there was no obstacle to its enforcement from this viewpoint.

(b) Michel Saab purported to execute this agreement not in a personal but in a representative capacity, as the agent of MEDITERRANEAN PAPER MANUFACTURERS LTD. Consequently, the contract was unenforceable at the instance of the company, in accordance with the well established principles of Company Law, making impossible execution by a company of a contract before incorporation. A non existing entity cannot enter into any kind of legal relationship before its incorporation. Nor, indeed, can it ratify acts done purportedly on its behalf before incorporation or for that matter adopt such acts. The company was found to have no locus standi in the proceedings. Their action was dismissed with costs.

(c) Michel Saab had a personal right to enforce the contract, on the principle that an agent who enters into an agreement on behalf of a non existing principal, *can sue and can be sued under the agreement, so* long as he does not expressly or by necessary implication exclude personal liability thereunder. So, the contract was enforceable at the instance of Michel Saab, who was found to be entitled to the remedies warranted in the circumstances.

(c) The contract was not specifically enforceable, because of lack of registration, within two months. The subsequent decision of the L.R.O. authorities to have the contract registered retrospectively, left the position unaffected. What the law required, in the view of the trial Judges, was registration as such, within two months. They accepted as a fact that Michel Saab purported to have the contract registered on 5.2.1977 but after 12 noon, the hour at which the L.R.O. closes for business with the public. Therefore, their refusal to accept deposit of the contract was found to be justified.

The Holy Monastery of Ay. Neophytos were found to be guilty of a breach of contract that entitled Michel

Saab to treat the contract as at an end and sue for damages.

The Court took the view on a proper construction of the contract and what the vendors expressed readiness to convey something other than they contracted for and that the difference between the two was sufficiently important to entitle the purchasers to treat the contract as at an end, on account of the breach of the vendors, thereby acquiring a right to claim remedies warranted in law for the breach of the agreement. The decision of the trial Court in this area is perfectly well founded and fully consonant with the authorities. Assuming the contract was valid and enforceable at the instance of Michel Saab, the refusal of the vendors to transfer an important portion of the land agreed to be sold, entitled them to treat the contract at an end and sue for breach. (For an analysis of the law on the implications of the breach of a term of an agreement, see the judgment of Diplock, L.J., as he then was, in the *Hong Kong Fir Case* [1962] 1 All E.R. 474, 481, recently proclaimed by the House of Lords as a classical exposition of the law on the subject—*Bunge Corporation* v. *Tradex S.A.* [1981] 2 All E.R. 513 (H.L.)).

Michel Saab was awarded £2,400.– damages, that is the difference between the value of the property at the time of purchase and the time of breach, plus £2,400.– return of the deposit of the purchaser. However, the Court refused the claim of Michel Saab to interest, as from the date of the deposit.

Michel Saab, the appellant, appealed, mainly contesting the correctness of the judgment in two respects: Firstly, the decision whereby specific performance was withheld, and, secondly, the date of the assessment of damages. In view of the refusal to order specific performance, damages ought to have been assessed as at the date of trial, when they would run to a figure of about £26,000.– instead of £2,400.–. The submission here was advanced on the authority of *Wroth* v. *Tyler* [1973] 1 All E.R. 897 (Megarry, J.).

Mediterranean Paper Manufacturers Limited, the second appellants, raised an appeal directed against the order, directing them to pay costs. The Holy Monastery of Ayios Neophytos raised a cross-appeal, contending that the decision of the trial Court, upholding the validity of the contract, was wrong, therefore, they ought to have been exonerated of any liability thereunder.

The appeal was vigorously argued on both sides. Extensive reference was made to the case-law and statutory provisions, on the subjects of the validity of contracts, the specific enforceability of agreements for the sale of land and, the damages recoverable for breach of contract. We propose to deal with the questions raised by the appeal and cross-appeal, in the following order:-

(1) The validity of the contract with particular reference to the certainty of its terms.

(2) The right of an alien to sue on a contract for the purchase of land.

(3) The right of Michel Saab to sue under the agreement.

(4) Specific performance of the agreement under consideration and, lastly, if we uphold the judgment of the trial Court in this regard, we shall examine

(5) the damages to which appellant 1 is entitled, for breach of contract.

1. *TERMS OF THE AGREEMENT — CERTAINTY REQUIRED FOR A VALID CONTRACT*:

It was submitted on behalf of the respondents that the agreement was invalid on the ground that its terms are uncertain with regard to the definition of the subject-matter, viz. the area and extent of the land sold. Section 29 of the Contract Law, Cap. 149, lays down that agreements, the meaning of which is not certain, or capable of being certain, are void. In *Pollock and Mulla, 9th ed., on the Indian Law of Contract*, there is a discussion of the implications of a similar provision embodied in the Indian Contract Law (see p. 300 et seq.). In fact, s.29 of our law is a replica of the corresponding provision in the Indian Law. Of particular relevance is a note at p. 303 of

Pollock and Mulla, supra, indicating that the expression "approximating", in the definition of a vital term of the agreement, does not make a contract vulnerable on grounds of uncertainty. Section 29 aims to incorporate in our statute on Contracts the common law rule, that, only agreements, the terms of which are certain, are enforceable in law. The ingredients of a valid contract were listed in *Horrocks* v. *Forray* [1976] 1 All E.R. 737 (C.A.). They are:-

(a) A meeting of the minds of the contracting parties.

(b) Reasonable certainty as to the terms of the contract. The essential terms of the contract must be clearly made out.

(c) The agreement must be accompanied by an intention to affect legal relations of the contracting parties and, lastly,

(d) there must be consideration moving from the promisee.

The Court is reluctant to reject a contract for uncertainty motivated by a desire to give effect, if at all possible, to the bargain of the parties. The instinct of the Court is, it was observed in *Charles Clay & Sons Ltd.* v. *B. R. Board* [1971] 1 All E.R. 1007 (C.A.), to uphold the agreement of the parties. Megarry, J. suggested, in *Brown* v. *Gould* [1971] 2 All E.R. 1505, the following test for determining whether the terms of a contract are sufficiently certain to render the agreement enforceable. It is this: Whether someone, genuinely seeking to discover its meaning, is able to do so. The case of *Bushwell Properties* v. *Vortex Properties* [1976] 2 All E.R. 283 (C.A.), illuminates some of the circumstances that may render a contract invalid for uncertainty. The Court refused to enforce a contract that failed to specify the portion of the land that would be transferred upon the payment of certain instalments. The contract provided for the piecemeal transfer of a large plot of land upon the payment of certain instalments, without indicating which part was to be conveyed upon the payment of anyone instalment. The Court ruled that, inasmuch as the uncertainty did not merely go to the machinery of ascertaining the subject-matter but was uncertain as to the subject-matter itself, no effect could be given to it.

The effect of the case-law is that, so long as the essential

terms of the agreement are ascertainable by a reading of the contract as a whole, effect will be given to the agreement of the parties. This was found to be the case in the present action. Having carefully perused the agreement of the parties, we agree with the trial Court that the subject-matter was defined with sufficient certainty, as to make the agreement of the parties enforceable. This being so, the vendors were, as we indicated above, guilty of breach, entitling the appellant, provided he possessed a right to sue, to claim an appropriate remedy.

2. *THE RIGHT OF AN ALIEN TO SUE ON A CONTRACT FOR THE PURCHASE OF LAND:*

The capacity of a person to enter into a valid agreement is in no way qualified by reference to his nationality (see s.11 of the Contract Law, Cap. 149). The alien is, therefore, a competent contracting party under the provisions of the Contract Law. Consequently, unless any other law restricts this right, an alien is, like any other person, competent, under Cyprus law, to enter into a valid agreement. The provisions of s.3(3) of Cap. 109, as amended by Law 55/72, leave, contrary to the submission of Mr. Komodromos, this position unaffected. A contract by an alien for the purchase of land, is, like any other contract, valid, provided the prerequisites envisaged by the Contract Law for a valid contract are satisfied. The law merely restricts the registration, in the name of an alien, of immovable property without prior approval by the Council of Ministers. What the implications of such a failure may be upon the liability of the parties under the agreement, must be decided in each case by reference to its particular facts. But, certainly, the agreement is valid at its inception, and binding on the parties. In the case of *Andriani A. Iosifakis and* 3 *Others* v. *Mohammed Abdul Ghani* (1967) 1 C.L.R. 190, the Supreme Court dismissed the suggestion that a contract for the purchase of land by an alien prior to obtaining the necessary permission from the Council of Ministers, was either illegal or invalid. As the Supreme Court pointed out, such licence may be obtained after the conclusion of the agreement, and in this case there was every indication that there would be no impediment to obtaining permission for the registration of the land in the name of appellant 1. In point of fact, permission had been granted for the registration of the land in the name of appellants 2.

In our judgment, the submission of the respondents to the contrary is untenable.

3. *CONTRACTS MADE BY PERSONS PURPORTING TO ACT AS AGENTS OF NON EXISTING PRINCIPALS*:

The Court found, in the first place, contrary to the submission made on behalf of the appellants, that Michel Saab purported to execute the sale agreement as an agent of an unincorporated company. The employment of the expression "διὰ λογαριασμὸν" at the outset of the agreement, was found by the Court to be conclusive as to the capacity in which appellant 1 entered into this agreement. The construction of a document is a matter of law to be determined as such by the Court (see *Halfdan Grieg* v. *Sterling Coal Corpn.* [1973] 1 All E.R. 545 (Kerr, J.)). Therefore, the Appeal Court is equally well placed as the trial Court to discern the meaning of a document in accordance with the established canons of construction. The meaning of a term of an agreement must be gathered from the expression used, read in the context of the agreement as a whole. We agree with the trial Court that the employment of the expression "on account of", in the context of this document, is sufficiently revealing of the intention of the parties with regard to the identification of the purchaser, as well as the capacity in which appellant 1 signed the agreement. Appellant 1 entered into this agreement as agent, on behalf of the family company he had in mind to set up, which acquired a juridical personality in due course, with the coming into being of appellants 2. We, therefore, uphold the judgment of the trial Court in this area.

Also, we are in agreement with the trial Court that appellant 1 acquired a right to sue under the agreement. The appreciation of the law on the subject, by the trial Court, is correct. A party entering into an agreement on behalf of a non existing principal becomes liable thereunder, as well as acquires a right to sue, so long as personal liability is not expressly or, by necessary implication, excluded by the terms of the agreement. This principle was established by the leading authority on the subject, the case of *Kelner* v. *Baxter and Others, Law Reports —Common Pleas Cases, Vol. II*, 1866–67, *p.* 174, the validity of which has never been successfully questioned in any subsequent decision. The decision in *Newborne* v. *Sensolid* (*Gr. Britain*) *LD* [1954] 1 Q.B. 45, to which extensive reference was

made in these proceedings, in no way derogates from the above principle of the law. In the fairly recent decision of *Phonogram Ltd.* v. *Lane* [1981] 3 All E.R. 182, there are powerful dicta that support the validity, as well as the logic, behind the principle in *Baxter*, supra (see the judgment of Oliver, L.J. at p. 188).

The conclusion to which the trial Court arrived at, is not only reasonable but inevitable, both on a reading of the contract itself, as well as upon examination of the background to it. The impression one is apt to form is that Michel Saab, far from expressly excluding personal liability, wanted himself to become a party to the agreement. In our judgment, appellant 1 had a legitimate right to claim performance of the agreement, and the respondents were accountable to him for its breach.

4. *SPECIFIC PERFORMANCE OF THE CONTRACT UNDER CONSIDERATION*:

The trial Court declined to decree specific performance of the sale agreement because, as already indicated, they found that appellant failed to deposit the contract with the Paphos lands office within two months, as it is necessary under Cap. 232. The defect could not, in the opinion of the trial Court, be remedied by the reversal of the decision of the Paphos district lands officer, by his superiors, and the retrospective registration of the contract as at 5.2.1977. Mr. Papadopoulos referred us to decisions of the Greek Council of State, tending to establish that decisions of hierarchically subordinate organs are inherently liable to review and correction by the superior authority (see *Conclusions from the Case-law of the Greek Council of State*, 1929–59, pp. 166, 167). One may argue that this power is necessary in the interests of both uniformity and legality.

The impression must not be given that we are reviewing, in any way, the propriety of an administrative decision, assuming a decision to accept registration of a contract is a matter of public law, a doubtful proposition in view of the recent decision of the Full Bench in *The Republic of Cyprus* v. *M.D.M. Estate Developments Limited*, (1982) 3 C.L.R. 642 and *Kalisperas* v. *Ministry of the Interior* (1982) 3 C.L.R. 509. Be that as it may, it is jurisdictionally competent for a civil court to evaluate, under any circumstances, the implications of an

administrative action on the civil law rights of the parties. We consider it unnecessary, for the reasons given hereunder, to give a final answer to the question raised here, although we rather incline to the view that the decision of the trial Court was wrong. The power of hierarchically superior organs of administration to review and, where necessary, correct decisions of their subordinates, would be meaningless if its exercise left the original decision intact. However, we shall not probe further into the issue for, in the light of the provisions of s.3, Cap. 232, as amended by Law 96/72, specific performance of the agreement was impossible in the absence of a separate registration covering the immovable property under sale. But before going into that, we may conveniently dispose of the submission of Mr. Papadopoulos that the 5th February, 1977 was not the last day of the two-month period within which the contract of 5.12.1976 had to be deposited. "Month", in accordance with s.2 of the Interpretation Act, Cap. 1, means a calendar month. In calculating the period that had elapsed after the occurrence of a given event, in this case execution of the contract, the date on which the event occurred is to be excluded from reckoning. (See s.31, para. (a), Cap. 1). Therefore, a two-month calendar period ends on the fifth corresponding day of the second month and not on the fourth. That this is so, is also settled by authority—notably the decision of the House of Lords in *Dodds* v. *Walker* [1981] 2 All E.R. 609. So, the 5th of February, 1977, was the last day on which the contract could be lawfully deposited, rejecting, as we do, the submission of Mr. Papadopoulos to the contrary.

The proviso to s.3 makes the existence of separate registration a condition precedent to the specific enforcement of the agreement. The property sold need not be covered by separate registration at the time of sale; a contract of sale affecting such property is registrable under s.2(b) of Cap. 232 (as amended by Law 96/72). But such registration is a prerequisite to its enforcement. The crucial time for examining whether separate registration exists, is, naturally, the date of hearing. Let us say that we regard this as a sensible provision, designed to avoid uncertainties in the enforcement of a court order. A court order must be certain in terms, and capable of being enforced unconditionally.

The absence of separate registration is fatal to the claim of

the appellant for specific performance. The Court has no discretion to relax this provision. Every purchaser who buys land not covered by separate registration, takes a risk with the enforceability of the agreement. We, therefore, sustain the decision of the trial Court in refusing to order specific performance, though, for somewhat different reasons from those advanced by the trial Court.

DAMAGES FOR BREACH OF CONTRACT:

The right to damages for breach of contract, as well as the quantum of damages recoverable, are regulated by the provisions of s.73(1) of the Contract Law, Cap. 149. It provides:

> "The innocent party is entitled to compensation for any loss of damage which naturally arose in the usual course of things from such a breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it".

The principle embodied in s.73(1) is subject to the rule barring the recovery of damage that is remote. One may, however, validly argue that foreseeability and remoteness are the two sides of the same coin, in that damage that is not foreseeable as naturally likely to arise, is, by definition, remote.

Section 73 aims to reproduce the common law rules on damages for breach of contract, as they crystallized and were fashioned in the case of *Hadley* v. *Baxendale* [1843-60] All E.R. Rep. 461. (See *Marcou* v. *Michael*, 19 C.L.R. 282). A similar view was taken of the corresponding provisions of the Indian Contract Law, that is that they reproduced the rules of the common law on damages. (See *Pollock and Mulla*, *9th ed.*, p. 529 et seq.). The question of damages, its juridical and practical implications, were the subject of discussion in numerous English cases during the last decade. Reinstatement lies at the core of the rules regulating the assessment of compensation for breach of contract. Damages aim to restore the party to the position he would be but for the breach. This is normally accomplished by awarding damages reasonably foreseeable at the time of execution of the agreement, as likely to arise upon breach. (See *Heron II* [1967] 3 All E.R. 686 (H.L.); *Soleada S.A.* v. *Hamoor Tanker Corporation Inc.* [1981] 1 All E.R. 856 (C.A.)). Foreseeability in turn, depends on

actual knowledge and reasonable forecast of what is likely to happen in a given eventuality. So, the plaintiff is normally entitled to recover damage that is objectively foreseeable, and in the face of special knowledge he may, in addition, recover what is thereby subjectively foreseeable.

Reason and good sense lie behind rules regulating compensation in both contract and tort. As May, J. pronounced in *C. R. Taylor (Wholesale) Limited* v. *Hepworths* [1977] 2 All E.R. 784, the rule as to reinstatement must always be matched with the other equally fundamental rule of the English common law, that damage must, in all circumstances, be reasonable as between plaintiff and defendant. In the case of *Lamb* v. *L. B. of Camden* [1981] 2 All E.R. 408, there are powerful dicta, that foreseeability must be determined from a practical perspective in the light of day to day realities of life.

In *Lloyd* v. *Stanbury* [1971] 2 All E.R. 267, Brightman, J. listed the items of damage that are normally recoverable in a breach of contract action. They are:-

(a) The legal costs of approving and executing a contract.

(b) The costs of performing an act required to be done by the contract, notwithstanding that the act is performed in anticipation of the execution of the agreement, and

(c) damage for any other loss which ought to be regarded as within the contemplation of the parties.

The extent of the damage likely to be suffered by the innocent party, is ordinarily discernible at the time of breach. The repercussions of breach become known thereupon. So, ordinarily, damage is estimated as at the date of breach, and in the case of a contract of sale, it takes the form of the difference between the contract price for the item sold at the time of execution of the agreement, and the value of the same item at the time of breach.

In *Wroth* v. *Tyler*, supra, Megarry, J. held that, where specific performance is withheld in the exercise of the discretionary powers of the Court, damages should be calculated as at the

date of trial; the reason is that the purchaser is deprived of the bargain, and his loss becomes quantifiable at that date, and not earlier. The decision in *Wroth* v. *Tyler*, supra, was followed in a number of subsequent cases. (See, inter alia, *Warnington* v. *Miller* [1973] 2 All E.R. 372 (C.A.); *Grant* v. *Dawkings* [1973] 3 All E.R. 897). In *Malhotra* v. *Choudhury* [1979] 1 All E.R. 186 (C.A.), the Court of Appeal held that the principle in *Wroth* v. *Tyler*, supra, is subject to the rule that a purchaser should not be allowed, by his own delay, to increase his damages.

The decision in *Wroth* v. *Tyler*, primarily rested on the implications of the provisions of s.2 of Lord Cairn's Act, 1856, that survived the repeal of the Act.

The implications of the decision in *Wroth* v. *Tyler*, as well as the principles applicable to the assessment of damages for breach of contract, were reviewed by the House of Lords in *Johnson* v. *Agnew* [1979] 1 All E.R. 883. The House observed that the provisions of s.2 of Lord Cairn's Act are not in discord to the general principles regulating damages at common law. Therefore, if the case of *Wroth* v. *Tyler*, supra, propounded any proposition different from the above, it was wrongly decided. The case of *Johnson* v. *Agnew*, supra, offers a most useful guidance on the general principles for the assessment of damages for breach of contract. The principles regulating the award of damages for breach of contract at common law, do not require of necessity that damage should be assessed as at the date of breach; where the justice of the case so necessitates, they may be assessed at a subsequent date. Normally, damages are assessed as at the date of breach because the damage suffered by the innocent party crystallizes on that day. Where a party persists for good cause to have the contract enforced, notwithstanding the breach, as it often happens where a party is seeking the specific enforcement of the contract, there is valid ground for assessing damages as at a subsequent date. The damage crystallizes when specific performance is refused in the exercise of the Court's discretion. In this sense, the principle of *Wroth* v. *Tyler*, supra, is not exceptional but in line with the general rule at common law for the assessment of damages. In the present case, the persistence of the appellant to have the contract specifically enforced had no reasonable chance of success, in

view of the absence of a separate registration of the property, coupled with the fact that a crucial part of the property sold was transferred to a third party, in March, 1977, the month when the breach of the contract occurred. Specific performance was withheld, not in the exercise of any discretionary powers of the Court but as a result of the mandatory application of the provisions of Cap. 232, as earlier indicated in this judgment. Under s.8 of Cap. 232 the Court has discretion to refuse specific performance, despite compliance with the mandatory provisions of Cap. 232 as to registration of the contract and other formalities. In that case, there may be good reason for assessing damages as at the date of the trial. In our judgment, the Court rightly assessed damages in this case, as at the date of breach. Further, the assessment made was reasonable in the light of the evidence before the Court.

Lastly, the complaint of appellant associated with the refusal of the Court to award interest on the money deposited as from the date of the execution of the agreement. In *Wadsworth* v. *Lydall* [1981] 2 All E.R. 401, it was held that where loss of interest is specifically pleaded as an item of special damage, there is no rule preventing its recovery where it appears that such loss ought reasonably to have been within the contemplation of the parties at the time of the execution of the agreement. Normally, as it was observed in the same case, the recovery of interest is treated as a remote item of damage not ordinarily recoverable*. Neither the pleading of the appellant, nor the evidence adduced, taken together, justify the award of interest as an item of damage properly recoverable. So, this aspect of the judgment of the trial Court is also sustainable.

Finally, the question of costs. Costs normally follow the event. If this rule is strictly applied, the ruling of the trial Court, that appellants 2 should pay the costs, occasioned by their action, to the defendant, should be sustained. Where, however, as in this case, two or more plaintiffs with a close, if not identical interest, join forces in the pursuit of an action and one of them is successful, the rule that costs follow the event should not be followed with the same strictness. The

* See also the decision in *Techo-Impex v. Von Weelde BV* [1981] 2 All E.R. 689.

Court must examine whether the joinder has added to the costs of the proceedings; and if so, make an appropriate order as to costs. In this case, there is nothing to suggest that the joinder had this result. In our judgment, the appropriate order as to costs between appellants 2 and defendants should be - no order as to costs. And to this extent, we vary the order of the trial Court as to costs.

In the result, the appeal and cross-appeal are dismissed. There will be no order as to costs with regard to proceedings on appeal.

The order of the trial Court as to costs is varied, as hereinabove indicated.

Appeal and cross-appeal dismissed.
Order for costs as above.