1983 February 22

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

CHARLES GUENDJIAN,

Appellant-Plaintiff,

v.

SOCIETE TUNISIENNE DE BANQUE, S.A.,

Respondents-Defendants.

(*Civil Appeal No.* 5120).

Practice—Jurisdiction—Conditional appearance—Application to set aside writ of summons for lack of jurisdiction filed after the lapse of period of time prescribed for this purpose, when leave to enter a conditional appearance was granted and application for extension of such time dismissed—Whether defendants may raise issue of jurisdiction in statement of defence.

Stay of proceedings—Lack of jurisdiction—Conditions which must be satisfied—Action arising out of a bank guarantee—Both parties residing in Beirut and main transaction concluded in Beirut —Proceedings relating to bank guarantee already instituted in Beirut prior to the filing of the action in Cyprus—Existence of forum, other than of the trial Court in Cyprus, to whose jurisdiction present dispute between the parties was amenable and where justice could have been done between them at substantially less inconvenience—And refusal of jurisdiction did not deprive appellant of any legitimate advantage which would be available to him by invoking the jurisdiction of the trial Court in Cyprus.

The respondents, bankers carrying on business in Beirut, concluded a transaction in Beirut with appellant, a Lebanese national, living in Beirut, as a result of which the former gave a bank guarantee in favour of the latter in respect of the sum of £12,000. Following a dispute which arose in relation to the said bank guarantee the appellant sued the respondent Bank and the latter entered a conditional appearance with the Court's leave. The respondent, through inadvertence failed to file the application for setting aside the writ of summons for lack

of jurisdiction within the prescribed time and their application was withdrawn and dismissed. After an application for extension of the time within which to apply was dismissed, the conditional appearance of the respondents became an unconditional one, but when the application for extension of time was dismissed the judge who dealt with it expressed the view that the respondents were still entitled to raise an objection as to the jurisdiction of the Nicosia District Court by their statement of defence; and they actually did so whereupon the trial Court refused jurisdiction and hence this appeal.

Held, (1) that the basic transaction was that which was concluded between the parties in Beirut in relation to the aforementioned bank guarantee of £12,000 and any subsequent transactions between the parties, in some of which there were, also, involved goods to be found in Cyprus, were merely ancillary and consequential to the said main transaction; furthermore, as a result of such main transaction in Beirut a proceeding known as "execution" had already been instituted, prior to the filing of the action by the appellant in Cyprus, against the appellant by the respondents in Beirut, in respect of the obligation of the appellant to the respondents which emanated from the aforesaid bank guarantee.

(2) That in the light of the special procedural history of this case this Court would not be prepared to find that the respondents waived their right to object to the jurisdiction of the trial Court; and, therefore, they were not precluded from raising such issue by their statement of defence.

(3) That in order to justify a stay two conditions must be satisfied, one positive and the other negative:

(a) the defendant must satisfy the Court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and

(b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the Cyprus Court; that in the light of all the considerations including that of effectiveness of its jurisdiction which was expressly relied on by the trial Court, there existed

a forum, other than that of the trial Court in Cyprus, to whose jurisdiction the present dispute between the parties was amenable and where justice could have been done between them at substantially less inconvenience and that the refusal of jurisdiction by the trial Court did not actually deprive the appellant of any legitimate advantage which would be available to him by invoking the jurisdiction of the trial Court here in Cyprus; accordingly the judgment of the trial Court as regards jurisdiction should be upheld.

Appeal dismissed.

Cases referred to:

St. Pierre v. *South American Stores Ltd.* [1936] 1 K.B. 382 at p. 398;

Atlantic Star [1974] A.C. 436 at p. 468;

MacShannon v. *Rockware Glass Ltd.* [1978] A.C. 795 at pp. 811, 812, 819, 822, 829;

Castanho v. *Brown & Root (U.K.) Ltd.* [1981] 1 All E.R. 143 at pp. 150, 151;

Jadranska Slobodna Plovidba v. *Photos Photiades & Co.* (1965) 1 C.L.R. 58 at p. 70.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Stavrinakis, P.D.C. and Papadopoullos, S.D.J.) dated the 25th October, 1972 (Action No. 2811/69) whereby the plaintiff was refused jurisdiction in relation to an action filed by him against the defendants regarding a bank guarantee given in his favour by the defendants in respect of the sum of £12,000.–.

L. Papaphilippou, for the appellant.

M. Christophides, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. The appeal has been made against a judgment of the District Court of Nicosia by means of which it has, in effect, refused

jurisdiction in relation to the determination of an action which was filed by the appellant, as plaintiff, against the respondents, as defendants.

The appellant was, at the material time, a Lebanese national living in Beirut and the respondents were bankers carrying on business in Beirut, too.

The dispuse which led to the present proceedings arose in relation to a bank guarantee given in favour of the appellant by the respondents in respect of the sum of £12,000.

After the appellant had filed his action in question in the District Court of Nicosia and had served, with the leave of the Court, notice of the writ of summons on the respondents in Beirut, they obtained, by means of an ex parte application, leave to enter a conditional appearance and they did so.

Then, an application of the respondents for setting aside the writ of summons for lack of jurisdiction of the Nicosia District Court was, through inadvertence on their part, filed after the lapse of the period of time that was prescribed for this purpose when leave to enter a conditional appearance was granted to the respondents; consequently, the said application was withdrawn and dismissed; and, after an application for extension of the said period of time was dismissed, the conditional appearance of the respondents became an unconditional one, but it has to be noted that when the application for extension of time was dismissed the judge who dealt with it expressed the view that the respondents were still entitled to raise an objection as to the jurisdiction of the Nicosia District Court by their statement of defence; and they, actually, did so.

It may be mentioned, also, at this stage, that while the initially filed application for setting aside the writ of summons for lack of jurisdiction was pending the respondents applied that the appellant should give security for costs but, after an arrangement was reached between counsel in this respect, such application was withdrawn.

In the light of the foregoing special procedural history of this case we would not be prepared to find that the respondents waived their right to object to the jurisdiction of the trial Court;

and, therefore, they were not precluded from raising such issue by their statement of defence.

In view not only of the reasoning of the trial Court but, also, of the arguments advanced during the hearing of this appeal by counsel for the parties, we think that, in essence, what we have to decide is whether or not the claim in the action in question of the appellant and the counter-claim of the respondents—(which was clearly made without prejudice to their objection as to the issue of jurisdiction)—ought to have been adjudicated upon by the trial Court.

In this respect the proper test, which was expounded in, inter alia, *St. Pierre* v. *South American Stores Ltd.*, [1936] 1 K.B. 382, 398, has to be applied as it has been developed in subsequent case-law such as the *Atlantic Star*, [1974] A.C. 436, 468, *MacShannon* v. *Rockware Glass Ltd.*, [1978] A.C. 795, 811, 812, 819, 822, 829 and *Castanho* v. *Brown & Root (U.K.) Ltd.*, [1981] 1 All E.R. 143, 150, 151 (see, also, in this connection, Dicey & Morris on the Conflict of Laws, 10th ed., vol. 1, pp. 247-250).

In *Jadranska Slobodna Plovidba* v. *Photos Photiades & Co.*, (1965) 1 C.L.R. 58, 70, our Supreme Court referred to the aspect of "forum conveniens", without, however, having had to decide to what extent the doctrine of "forum conveniens" in applicable in English Private International Law, which is the same as Cypriot Private International Law. It appears to us, on the basis of the above referred to case-law, that the said doctrine is not to be treated as being applicable, as yet, as part of English Private International Law in the same manner as such doctrine is applied in Scotland and in the United States of America; it seems, on the other hand, that in actual practice the distinction between the Scottish doctrine of "forum non conveniens" and the currently adopted, as a result of the aforementioned case-law, approach to the same matter in England "might on examination prove to be a fine one" (per Lord Diplock in the *MacShannon* case, supra, at p. 812) and "the same result is reached by the application of tests that differ more in theoretical approach than in practical substance from those that would have been applicable in Scotland" (per Lord Fraser of Tullybelton in the *MacShannon* case, supra, at p. 822).

It is useful to quote in this connection the following passage from the judgment of Lord Scarman in the House of Lords in England in the *Castanho* case, supra (at pp. 150-151):

> "The principle is the same whether the remedy sought is a stay of English proceedings or a restraint on foreign proceedings. The modern statement of the law is to be found in the majority speeches in *The Atlantic Star* [1973] 2 All E.R. 175, [1974] A.C. 436. It had been thought that the criteria for staying (or restraining) proceedings were two-fold: (1) that to allow the proceedings to continue would be oppressive or vexatious, and (2) that to stay (or restrain) them would not cause injustice to the plaintiff (see Scott L.J. in *St. Pierre v. South American Stores (Gath and Chaves)* Ltd [1936] 1 K.B. 382 and 398, [1935] All E.R. Rep. 408 at 414). In *The Atlantic Star* this House, while refusing to go as far as the Scottish doctrine of forum non conveniens, extended and reformulated the criteria, treating the epithets 'vexatious' and 'oppressive' as illustrating but not confining the jurisdiction. Lord Wilberforce put it in this way. The 'critical equation', he said, was between 'any advantage to the plaintiff' and 'any disadvantage to the defendant'. Though this is essentially a matter for the court's discretion, it is possible, he said, to 'make explicit' some elements. He then went on [1973] 2 All E.R. 175 at 194, [1974] A.C. 436 at 468-469):
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> > 'The cases say that the advantage must not be 'fanciful' - that 'a substantial advantage' is enough — A bona fide advantage to a plaintiff is a solid weight in the scale, often a decisive weight, but not always so. Then the disadvantage to the defendant: to be taken into account at all this must be serious, more than the mere disadvantage of multiple suits — I think too that there must be a relative element in assessing both advantage and disadvantage - relative to the individual circumstances of the plaintiff and defendant.' (Emphasis mine).

In *MacShannon v. Rockware Glass Ltd* [1978] 1 All E.R. 625 at 630, [1978] A.C. 795 at 812 Lord Diplock interpreted the majority speeches in *The Atlantic Star* as an invitation to drop the use of the words 'vexatious' and 'oppressive' (an

invitation which I gladly accept) and formulated his distillation of principle in words which are now very familiar:

> 'In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court".

We shall now proceed to apply the above test to the present case:

In our opinion, the basic transaction is that which was concluded between the parties in Beirut in relation to the aforementioned bank guarantee of £12,000 and any subsequent transactions between the parties, in some of which there were, also, involved goods to be found in Cyprus, were merely ancillary and consequential to the said main transaction.

Furthermore, as a result of such main transaction in Beirut a proceeding known as "execution" had already been instituted, prior to the filing of the action by the appellant in Cyprus, against the appellant by the respondents in Beirut, in respect of the obligation of the appellant to the respondents which emanated from the aforesaid bank guarantee.

In the light of all the foregoing considerations, including that of effectiveness of its jurisdiction which was expressly relied on by the trial Court, we are satisfied that there existed a forum, other than that of the trial Court in Cyprus, to whose jurisdiction the present dispute between the parties was amenable and where justice could have been done between them at substantially less inconvenience; and that the refusal of jurisdiction by the trial Court did not actually deprive the appellant of any legitimate advantage which would be available to him by invoking the jurisdiction of the trial Court here in Cyprus.

We, consequently, have reached the conclusion that the judgment of the trial Court as regards jurisdiction should be upheld

with the result that this appeal fails and should be dismissed; but, in view of the nature of this case, and in line with the approach adopted in this respect by the trial Court, we have decided not to make any order as to its costs.

Appeal dismissed with no order as to costs.