1984 January 23

[TRIANTAFYLLIDES, P., LORIS AND STYLIANIDES, JJ.]

CHRYSILIOS XENOPHONTOS,

Appellant

v.

NICOLAS MICHAEL TYRIMOU,

Respondent

(*Civil Appeal No.* 646

Contract—Frustration—Impossibility of performance—Section 56 of the Contract Law, Cap. 149—Principles applicable—Contract for sale of building site—Vendor undertaking to take all necessary steps for the division permit issue of separate title for the building site and transfer thereof to purchaser—Division permit not issued because appropriate authority imposed terms which would have made division more expensive than as at time of contract—Such increase in expense not a ground of frustration

Damages—Breach of contract for sale of land—Measure of damages—Date at which damages are to be assessed

In 1958 the appellant, who was the owner of land at Kalo Chorion Klirou, decided to convert it into building sites, and on 1.4.59 he agreed to sell to the respondent one of those building sites at the stipulated price of £65. He, also, undertook to issue a separate title deed for the building site and transfer same into the name of the respondent. As the appellant did not complete the division by virtue of the division permit which was issued to him in 1958, when he applied for a division permit in 1970 he was informed by the appropriate authority that the division permit of 1958 had expired within a year from the issue thereof; and as nothing was done by the appellant it was necessary for him to submit a new application and new plans. Appellant submitted new plans but failed to comply with the request of the appropriate authority for the widening of the roads by 5 feet because his property would be divided into less building lots than the number originally envisaged by him. Had he complied

he would have secured a permit and thereafter a certificate of approval, for fewer building sites, and issue of title deeds; and thus transfer of the site in the name of respondent would have been rendered possible. The respondent, who through the years has been in possession of the building site and has incurred expenses for the levelling thereof, on 2.10.79 gave notice to the appellant to complete the contract within 15 days from receipt thereof. As there was no response from the appellant an action was instituted against him. The trial Court found that the appellant was guilty of breach of an existing contract of sale; that the breach occurred on the expiration of the notice served on the appellant in October, 1979, and assessed the damages on the evidence before it at £1,900.

Counsel for the appellant mainly contended:

(a) That the appellant was discharged from his obligation as the contract was frustrated;*

(b) If the contract was not frustrated, the time of the breach was not October, 1979, but 1970, and,

(c) The measure and assessment of damages were wrong.

Held, (1) that disappointed expectations even of both parties to a contract do not lead to frustrated contracts; that increase in expense is not a ground of frustration; that a contract is not frustrated merely because the circumstances in which it was made are altered; that the Courts have no power of absolving from performance of a contract merely because it has become onerous on account of unforeseen circumstances; that the request of the appropriate authority was neither impracticable in the ordinary sense nor made the performance of the contract impossible; that there was neither a physical nor a legal impossibility in the way of the performance of the contract; that the alleged impossibility was one that might have been anticipated and guarded against; that a building permit, a certificate of approval and a title deed in respect of the building site in question could have been issued, and transfer in the name of the respondent could have been effected, though it was more onerous and more expensive than at the time of the contract; that the appellant was in a position to perform the contract; that in

* The position is governed by section 56 of the Contract Law, Cap. 149 which is quoted at p. 29 post.

these circumstances it is absurd that the seller should escape from his bargain or be in a better position than any other promisor who has failed to perform his promise when he could do so; accordingly contention (a) should fail.

(2) That where no time for performance is specified by the contract, the law implies an undertaking by each party to perform his part of the contract within a time which is reasonable having regard to the circumstances of the case; that since the respondent was ready and willing to complete at the date when the notice was served and indeed at all times; that since the notice was a reasonable one; and that since the appellant did nothing this Court is in full agreement with the finding of the trial Court that the breach occurred on the expiration of the notice to complete served by the respondent in October, 1979, accordingly contention (b) should fail.

(3) That the measure of damages is the difference between the contract price and the market price of an approved comparable building site and that the time at which damages should be assessed is the time of the breach; that this Court has not been persuaded by the appellant that the assessment of the damages by the trial Court is either wrong in law or extremely high as to make it an entirely erroneous award for it to interfere with; accordingly contention (c) should, also, fail.

Appeal dismissed

Cases referred to:

Vincent Della Tolla v. Kyriakides, XX (2) C.L.R. 89;

Cyprus Cinema & Theatre Co. Ltd. v. Karniotis (1967) 1 C.L.R. 42;

Tamlin S.S. Co. v. The Anglo-Mexican Petroleum Products Co. [1916] 2 A.C. 397 at p. 406;

W.G. Tatem Ltd. v. Gamboa [1938] 3 All E.R. 135;

Denny, Mott and Dickinson Ltd. v. James B. Frazer & Co. Ltd. [1944] 1 All E.R. 678;

Davies Contractors Ltd. v. Fareham U.D.C. [1956] 2 All E.R. 145;

Satyabrata Ghose v. Mugneeram Bangur and Co. [1954] S.C.R. 310 at pp. 317-318;

Hillingdon Estate v. Stonefield Estates [1952] 1 All E.R. 853 at p. 856;

Alopi Parshad v. Union of India, A.I.R. 1960 SC. 588 at pp. 593-594;

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

Leonidou and Another v. Kourris (1977) 1 C.L.R. 261;

Charalambous v. Vakanas (1982) 1 C.L.R. 310;

Saab and Another v. Holy Monastery of Ay. Neophytos (1982) 1 C.L.R. 499;

Johnson and Another v. Agnew [1979] 1 All E.R. 883 at p. 896;

Sansom v. Rhodes, 133 E.R. 103;

Horsler v. Zorro [1975] 1 All E.R. 584 at p. 586.

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Demetriou, Ag. P.D.C.) dated the 10th June, 1982 (Action No. 5351/79) whereby he was adjudged to pay £1,900.- as damages for breach of contract of sale of a building site and £20.- as part of purchase price received by him.

C. Gavrielides, for the appellant.

P. Lyssandrou, for the respondent.

TRIANTAFYLLIDES P.: The Judgment of the Court will be delivered by Mr. Justice Stylianides.

STYLIANIDES J.: This is an appeal from the judgment of the District Court of Nicosia whereby the appellant was adjudged to pay £1,920.-, i.e. £1,900.- damages for breach of contract of sale of a building site and £20.- part of the purchase price received by him, and the costs.

The appellant was the owner of land at Kalon Chorion, Klirou, which in 1958 he decided to convert into building sites. On 1.4.59 the appellant agreed to sell and the respondent agreed to purchase one of those building sites at the stipulated price of £65.-.

In 1958 on the application of the appellant a division permit was issued by the District Officer in Application No. 3145/58.

Until 1965, however, he did not complete the division; he did not obtain a certificate of approval; consequentially no separate title deeds were issued and the building site was not transferred by the vendor in the name of the purchaser.

The parties on 9.1.65 entered into a new written contract (exhibit No. 9) in which reference is made to the contract of sale of 1.4.59 and it stated that as the vendor did not register the said building site in the name of the purchaser due to the non-issuing of a separate title, the parties agreed and the vendor undertook to take all necessary steps for the issue of a separate title for the said building site, incurring all required expenses, and upon the issue of such title the vendor further undertook to transfer and register the site in the name of the purchaser who would then pay the balance of £45.- of the agreed purchase price.

It is lastly provided in the contract of 9.1.65 that if the vendor failed to register the said building site in the name of the purchaser, he would pay the legal damages resulting from such breach and any amount he had received as downpayment.

Term (d) of the contract provided that the appellant would be in possession of the subject-matter of the contract without any let or hindrance by the other contracting party.

The file of Application D.3145/58 was in the office of the District Officer which was housed prior to the events of December, 1963, in what is now known as "the Turkish Quarter of Nicosia." Therefore, it was not available to the Authorities as from December, 1963, when that area became beyond the reach of the State.

The appellant in 1968-69 employed D.W.3, Charilaos Hariklis, a building technician, to take the necessary steps for the obtaining of a division permit and the issue of the respective title deeds for only 16 of the building sites in which he subdivided his land. The appellant suffered and/or allowed three other purchasers of his building sites to erect houses thereon; thereafter he was hard pressed by the owners of the houses to issue title deeds to them.

On 13.1.70 the appellant submitted an application to the appropriate authority - the District Officer. On 17.5.70 the District Officer informed him by exhibit No. 3 that the division

permit of 1958 had expired within a year from the issue thereof and as nothing was done by the appellant, it was necessary for him to submit a new application and new plans.

On 11.6.70 the said Hariklis on behalf of the appellant addressed exhibit No. 5 to the District Officer in relation to the division. The District Officer in reply (see exhibit No. 4 dated 21.1.71) informed him that after a local inquiry it was ascertained that the division was not in accordance with the approved plans and the conditions imposed in Division Permit 3145 of 27th December, 1958, and he was advised that for the issue of a covering permit he had to submit new plans, representing the position as at the site. The appellant, anxious to satisfy the three purchasers who had erected houses, submitted plans for division and architectural drawings for the houses. The necessary permits in respect of those sites and the houses built thereon were issued on 22.12.72.

For consideration of the application for division permit for the other building sites, including the subject-matter of the contract of sale between the parties in this appeal, the District Officer requested the widening of the roads by 5 ft. and new plans. This could be done by the appellant but his property would be divided into less building sites than the number originally envisaged by him.

On 16.12.74 he protested in writing against such request. From the record of the District Officer it emerges that the appellant did not comply with the requirements. Had he done so, he would have secured a permit and thereafter a certificate of approval but for fewer building sites. There is no evidence that the requirements of the District Officer would have affected the building site sold to the respondent. Compliance by the appellant would be more onerous and expensive than the conditions of the 1958 permit.

Through the years the respondent was in possession of the building site and he incurred expenses for the levelling thereof. He patiently waited for the appellant to issue a title deed and perform his contractual obligation.

On 2.10.79 respondent's advocate, on instructions, gave notice (exhibit No. 10) to the appellant to complete the con-

tract within 15 days from receipt thereof. It is common ground that the respondent was always ready and willing to pay the balance of the stipulated price. As there was no response, this action was instituted.

The trial Court found that the appellant was guilty of breach of an existing contract of sale; the breach occurred on the expiration of the notice served on the appellant in October, 1979, and assessed the damages on the evidence before it at £1,900.-.

The grounds on which the appeal was argued before us are:-

(a) That the appellant was discharged from his obligation as the contract was frustrated;

(b) If the contract was not frustrated, the time of the breach was not October, 1979, but 1970; and,

(c) The measure and assessment of damages were wrong

FRUSTRATION:

The relevant statutory provision in our Law is s.56 of the Contract Law, Cap. 149, which reads:-

"56. (1) An agreement to do an act impossible in itself is void.

(2) A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

(3) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

The material part for this case is subsection (2). This subsection was judicially considered by the Supreme Court in *Vincent Della Tolla v. Fidias S. Kyriakides*, XX (2) C.L.R. 89, and in *Cyprus Cinema & Theatre Co. Ltd. v. Christodoulos Karmiotis*, (1967) 1 C.L.R. 42.

Section 56 of our Contract Law is a replica of the corresponding section in the Indian Contract Act. In *Pollock and Mulla*, 9th Edition, p. 327, it is stated that the section varies the Common Law to a large extent:-

> "English authorities, therefore, can be of very little use as guides to the literal application of the section. The tendency, however, is to follow their spirit."

In *Kyriakides* it was accepted by the Supreme Court that this statutory provision constitutes a departure from the English Common Law but the spirit of the English authorities should be followed, and it was held that s.56(2) only applies to an impossibility which destroys the foundation of the contract. The relevant passage from the judgment of Hallinan, C.J., at p.92, reads:-

> "In our view whether a Court applies the statutory rule concerning impossibility of performance contained in s.56(2) or applies the English doctrine of an implied term, in order that a supervening impossibility of performance should excuse the non-performance of a contract, the underlying principle for not enforcing the contract is the same. This principle was stated by Lord Haldane in *Tamplin S.S. Co. v. The AngloMexican Petroleum Products Co.*, [1916] 2 A.C. 397 at 406): 'The occurrence itself' (i.e. the occurrence preventing the performance of the contract) 'may yet be of a character and an extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared and the contract itself has vanished with that foundation'. We consider that the spirit of the English authorities should be followed and that section 56(2) only applies to an impossibility which destroys the foundation of the contract."

The doctrine of frustration in England has been variously stated to depend on an implied condition (*Tamplin* case), the disappearance of the foundation of the contract (W. G. *Tatem Ltd. v. Gamboa*, [1938] 3 All E.R. 135), the intervention of the Law to impose a just and reasonable solution (*Denny, Mott and Dickson Ltd. v. James B. Frazer and Co. Ltd.*, [1944] 1 All E.R. 678) and the now predominant view of the radical change in the character of the obligation.

Before the *Karmiotis* case (supra) the majority of the House of Lords in *Davis Contractors Ltd. v. Fareham U.D.C.*, [1956] 2 All E.R. 145, rejected the "implied term" theory and stated that the doctrine of frustration depends on the fact of a radical change in the character of the obligation. This is now the predominant view in England.

Lord Radcliffe said at p. 160:-

"In their place (the parties') there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be, the court itself. So, perhaps, it would be simpler to say at the outset that frustration occurs whenever the Law recognizes that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

Non haec in foedera veni. It was not this that I promised to do. There is, however, no uncertainty as to materials on which the Court must proceed.

The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the surrounding circumstances, and, on the other hand, the events which have occurred. (*Denny, Mott & Dickson, Ltd. v. James B. Fraser & Co. Ltd.*, [1944] 1 All E.R. 678, at p.683, per Lord Wright).

In the nature of things there is often no room for any elaborate inquiry. The Court must act on a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

In India the Supreme Court has in *Satyabrata Ghose v. Mugneeram Bangur and Co.*, (1954) S.C.R. 310, interpreted section 56. Mukhergea, J., said at pp. 317-318:-

> "The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the Law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view, and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do."

In *Karmiotis* case (supra), decided in 1967, the Supreme Court relied on the test laid down in the *Davis* case (1956) and formulated the test for impossibility of performance thus:-

> "If the literal words of the contract were to be enforced in the changed circumstances, would this involve a significant or radical change from the obligation originally undertaken?"

We see no reason to depart from this test.

In England there is a remarkable absence of authority relating to the application of the doctrine of frustration in cases of sale of land. Vaisey, J., said that the complete absence of authority does rather suggest that the doctrine of frustration does not operate normally in the case of contract for the sale of land as the purchaser acquires a beneficial interest in the land. (*Hillingdon Estate v. Stonefield Estates*, [1952] 1 All E.R. 853, at p. 856). In India, however, it is applicable to contracts of sale

of land as they create no interest in the land to be sold. (*Satyabrata* case (supra.).

In Cyprus a contract of sale of immovable property creates merely a contractual obligation and no more, and, therefore, if the requirements of section 56(2) are satisfied, then the parties to such a contract are discharged from the obligation to perform their contract.

In *Pollock and Mulla, Indian Contract and Specific Relief Acts*, 9th Edition, p. 417, we read:-

> "Frustration is not to be lightly held to have occurred. It is useful within its proper limits. Disappointed expectations do not lead to frustration. .. A contract is not frustrated because its performance has become more onerous."

The Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it. Disappointed expectations even of both parties to a contract do not lead to frustrated contracts. An increase in expense is not a ground of frustration. A contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no power of absolving from performance of a contract merely because it has become onerous on account of unforeseen circumstances.

Can it be said in the present case that the appellant was discharged from the obligation to perform his contract? The obligation of the appellant was plainly set out in the contract of 9.1.65. He undertook to issue a separate title deed for the subject building site and transfer same into the name of the respondent. There was no change in the character of his obligation. The request of the appropriate authority was neither impracticable in the ordinary sense nor made the performance of the contract impossible. There was neither a physical nor a legal impossibility in the way of the performance of the contract. The alleged impossibility was one that might have been anticipated and guarded against. But even the parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in prices, a sudden

depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made.

There is no general liberty reserved to the Courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is no general rule to which recourse may be had relying upon which a party may ignore the express covenants on account of an uncontemplated turn of events since the date of the contract. (*Alopi Parshad v. Union of India,* A.I.R. 1960 S.C. 588, 593, 594; *A. C. Dutt on The Indian Contract Act,* 4th Edition, p. 492).

A building permit, a certificate of approval and a title deed in respect of the building site in question could have been issued, and transfer in the name of the respondent could have been effected, though it was more onerous and more expensive than at the time of the contract. The appellant was in a position to perform the contract. In these circumstances it is absurd that the seller should escape from his bargain or be in a better position than any other promisor who has failed to perform his promise when he could do so.

DAMAGES:

We shall consider now the question of damages. The trial Court in determining this question proceeded on the basis that the breach occurred in October, 1979, and that the measure of damages is the difference between the sale price and the market price of a building site in the area at that time.

It was argued on behalf of the appellant that the breach occurred in 1970 when the appellant in substance and in fact ceased his endeavours for the issue of the required permits and that the damages should be calculated on the basis of the market value of a building site with no roads or no title or of the value of undivided land. We do not agree with this submission.

The matter is governed by s.73(1) of the Contract Law, Cap. 149, which reads as follows:-

> "When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who

has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

This section is declaratory of the Common Law as to damages. (*Hadley v. Baxendale*, [1843-60] All E.R. Rep. 461; *Marcou v. Michael*, 19 C.L.R. 282; *Pollock and Mulla*, 9th Ed., p.529).

A party to a contract contemplates the performance and not the breach of the contract. A defaulter is liable to make good those injuries which he is aware that his default may occasion to the other contracting party. He cannot be in a better position by reason of his own default than if he has fulfilled his obligations. The damages that an innocent party is entitled are subject to the test of reasonableness and foreseeability and which may be regarded as within the contemplation of the parties. The measure of damages is the difference between the contract price and the market price of an approved comparable building site. (*Vincent Della Tolla v. Fidias S. Kyriakides*, (supra); *Loukis G. Leonidou and Another v. Omiros N. Kourris*, (1977) 1 C.L.R. 261; *Symeon Charalambous v. Androulla Vakana*, (1982) 1 C.L.R. 310; *Saab and Another v. The Holy Monastery of Ayios Neophytos*, (1982) 1 C.L.R. 499).

The time at which damages should be assessed was considered in a number of cases in the past. The view was repeatedly expressed that damages should be assessed at the time of the breach. Megarry, J., as he then was, in *Horsler v. Zorro*, [1975] 1 All E.R. 584, at p.586, indicated that there is no inflexible rule that common law damages must be assessed at the date of the breach.

In *Johnson and Another v. Agnew*, [1979] 1 All E.R. 883, (H.L.), Lord Wilberforce said at p. 896:-

"The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach, a principle recognised and embodied in s.51 of the Sale of Goods Act, 1893. But

this is not an absolute rule; if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost".

No date was fixed in the contract of sale for the completion of the purchase. The contract provided that the appellant would perform his obligation upon the issue of the title deed. Where no time for performance is specified by the contract, the law implies an undertaking by each party to perform his part of the contract within a time which is reasonable having regard to the circumstances of the case. (*Sansom v. Rhodes*, 133 E.R. 103 - time for deducing good title on sale of land).

Until 1974 the appellant was applying to the District Officer for a division permit. There is no evidence that thereafter he brought to the knowledge of the respondent-purchaser who was in occupation of the subject building site that he gave up his such endeavours. On the contrary, the appellant in his evidence stated: "The plaintiff waited until 1979. Until 1979 the contract was binding. I never denied him his rights under the contract. He even volunteered to construct the road. I could not secure the title deeds. Οὐδέποτε τὸν ἀπάλλαξα. Οὔτε αὐτὸς μὲ ἀπάλλαξε".

The purchaser could not, however, wait ad infinitum. The time was not of the essence of the contract. He had to give a reasonable notice to complete. He served the notice, exhibit No. 10. He was ready and willing to complete at the date when the notice was served and indeed at all times. The notice was, in our view, a reasonable one. The vendor did nothing. We are in full agreement with the finding of the trial Court that the breach occurred on the expiration of the notice to complete served by the respondent in October, 1979 - (see exhibit No. 10).

With regard to the quantum of damages the only evidence is that of P.W.1, Elias Danos, a valuer and estate agent. He

inspected the property; he testified that the value of an approved building site in that area, which is residential and commercial, on 3.12.80 was £2,500.-. He gave comparable sales of building sites in support of his such assessment.

The trial Court accepted the submission by respondent's counsel that the difference between the market value and the price at the time of the breach, which was about 14 months prior to the date of the valuation by the witness, was £1,800.-. This estimate, having regard to the galloping of prices of land and the sole uncontradicted evidence before the Court, is fully warranted.

The trial Court awarded also £100.- for actual expenses incurred by the respondent-purchaser for the improvement of the building site by levelling the ground. This was fully supported by the evidence before it.

We have not been persuaded by counsel for the appellant that the assessment of the damages by the trial Court at £1,900.- is either wrong in law or extremely high as to make it an entirely erroneous award for us to interfere with. We are of the view that it was a rather moderate estimate.

For all the above reasons this appeal is dismissed with costs.

Appeal dismissed with costs.