1984 May 24

[TRIANTAFYLLIDES, P., L. LOIZOU, HADJIANASTASSIOU, DEMETRIADES, LORIS, PIKIS, JJ.]

MOUNIR BOUSTANI,

Appellant-Defendant.

v.

LINMARE SHIPPING COMPANY LIMITED,

Respondents-Plaintiffs.

(*Civil Appeal No.* 6324).

Civil Procedure—Findings of trial Court and evaluation of the evidence—Finding not warranted by the evidence—And trial Judge failed to evaluate the evidence bearing on the relationship of the parties in its entirety—Retrial ordered—Further retrial necessary because estoppel on the basis of which judgment was given was not clearly made part of the case of the plaintiffs as defined by their petition.

Estoppel—Equitable estoppel—Proprietary estoppel—Principles applicable.

The trial Court adjudged the defendant to pay to plaintiffs the sum of US $28,429.70 on the strength of an undertaking given to plaintiffs to make good a claim for demurrages plaintiffs had against third parties, namely, Agence Generale Maritime Sarl And/or Ets Camille B. Boustany And/Or Emile Boustany of Beirut, charterers of plaintiffs' ship "Brothers Luck". The trial Court found that the undertaking had been given to Mr. E. Montanios, advocate, acting in this connection as agent of the plaintiffs, the owners of the vessel; and that the undertaking gave rise to an estoppel in equity that fixed the defendant with liability in law to make his promise good.

The conversation between the defendant and Mr. Montanios was to the following effect: "I am a rich man, I have a lot of money, I can pay, but I want to know why there was the delay". The judgment of the Court was solely fastened to the effect of the conversation held between defendant and Mr. Montanios;

and it did not go into subsequent events relevant to the condition attached by the appellant. The Court did not direct itself to events subsequent to this meeting and their effect on the relationship of the parties.

Upon appeal by the defendant:

Held, that the conversation was inconclusive; that it certainly did not justify the finding that appellant gave an unqualified undertaking to pay for demurrages; and that inasmuch as the trial Judge failed to evaluate the evidence bearing on the relationship of the parties in its entirety, there is little option to this Court but to order a retrial; accordingly a retrial of the case before another Judge is directed in order to examine respondents' claim within the framework of their pleadings and decide on a proper appreciation of the facts in their entirety, whether the plaintiff is entitled to the remedies sought, or anyone of them.

Held, further, *after stating the principles governing equitable estoppel*, that a retrial of the case is made necessary because the basis upon which judgment was given, notably estoppel, is not clearly made part of the case of the respondent as defined by the petition.

Appeal allowed.

Retrial ordered.

Cases referred to:

Hadjiyiannis v. *Attorney-General of the Republic* (1970) 1 C.L.R. 32;

Xenopoulos v. *Constantinidou* (1979) 1 C.L.R. 521;

W. J. Alan & Co. v. *El Nasr Export and Import Co.* [1972] 2 All E.R. 127;

Stylianou v. *Papacleovoulou* (1982) 1 C.L.R. 542;

Odysseos v. *Pieris Estates and Others* (1982) 1 C.L.R. 557;

Inwarde v. *Baker* [1965] 1 All E.R. 446;

Crabb v. *Arun D.C.* [1975] 3 All E.R. 865;

Western Fish Products v. *Penwith D.C.* [1981] 2 All E.R. 204.

Appeal.

Appeal by defendant against the judgment of a Judge of the Supreme Court of Cyprus (Savvides, J.) dated the 9th October,

1981, (Admiralty Action No. 18/79)* whereby he was adjudged to pay to the plaintiffs the sum of U.S. $28,429.90 as demurrages.

St. McBride, for the appellant.

G. Michaelides, for the respondent.

Cur. adv. vult.

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

PIKIS J.: The trial Court adjudged the defendant to pay to plaintiffs the sum of US $28,429.70 on the strength of an undertaking given to plaintiffs to make good a claim for demurrages plaintiffs had against third parties, namely, Agence Generale Maritime Sarl And/Or Ets Camille M. Boustany And/Or Emile Boustany of Beirut, charterers of plaintiffs' ship "Brothers Luck". The undertaking, the Court found, had been given to Mr. E. Montanios, advocate, acting in this connection as agent of the plaintiffs, the owners of the vessel. The undertaking gave rise to an estoppel in equity that fixed the defendant with liability in law to make his promise good. The judgment was designed to enforce what is described as conduct giving rise to promissory estoppel.

Defendant contested, on appeal, the soundness of the legal proposition upon which judgment was founded, as well as disputed the inferences drawn from the findings of fact made by the Court. It was argued first that the undertaking, judged on its face, was inconclusive, lacking the clarity and certainty necessary to establish an estoppel. Supplementary to the above, counsel submitted that estoppel provides armoury for defence, a shield and not a weapon for attack, except where representations are made in relation to immovable property rights. Estoppel cannot found a litigable cause except in relation to rights over land.

For the respondents it was contended the judgment was well founded in fact and law; therefore, the trial Court rightly gave judgment for the respondents on the strength of the representations of the appellant that prevented him thereafter from going

* Reported in (1981) 1 C.L.R. 386

back on his promise to pay sums owing by the third parties to his clients.

As the learned trial Judge made clear, the judgment rested exclusively on the undertaking given by the respondents and the obligations arising therefrom in law. Extensive reference was made to the doctrine of promissory estoppel, accepted by the Supreme Court as a basic feature of our law in *Georghios Hadji-Yiannis* v. *Attorney-General of the Republic* (1970) 1 C.L.R. 32. To the same effect, is *Xenopoulos* v. *Constantinidou* (1979) 1 C.L.R. 521, also cited by the trial Court. Reference is also made to the decision of *Lord Denning, M.R.*, in *W.J. Alan & Co. Ltd.* v. *El Nasr Export and Import Co.* [1972] 2 All E.R. 127, explaining the juridical basis of the doctrine in present-day times.

It is of the first importance to examine the factual substratum of the case in order to appreciate the premises upon which the judgment rests. This will make possible proper appreciation of the major issues necessitating resolution in this appeal.

The respondents chartered their vessel to the third parties for the carriage of 5,000 M.R. of cement from an Albanian port to Beirut. The terms and conditions under which the vessel was chartered were embodied in the charterparty of 27.6.1978. It was supplemented by two addendums, the first substituting an Egyptian Mediterranean port for Beirut as the port of discharge and, the second, nominating that port to be Port-Said. In virtue of the terms of the charterparty, the charterers were liable for demurrages, while clause 8 of the agreement granted a lien to the owners, over the cargo, for any charges paid in this respect.

Appellant was a stranger to the agreement and generally to dealings between the owners and charterers. The only reference made to him was in the second addendum to the charterparty, enjoining the owners to notify the appellant of the arrival of the vessel at the port of discharge. The ship arrived at its destination on 16.8.1978. Notice of readiness to discharge was immediately served upon the charterers who accepted it on the same day. It was the case of respondents that the ship went on demurrages, entitling them to advance payment of expenses anticipated to be incurred in this regard. The charter-

ers referred the respondents to the appellant, allegedly the owner or buyer of the goods on board and his agent, a certain Naoum, running a shipping agency at Limassol.

As the learned trial Judge acknowledged, none of the above exchanges, or for that matter the provisions of addendum 2, constituted evidence against the appellant. Appellant's liability was found to emanate solely from the conversation he had with Mr. Montanios acting on behalf of the owners.

Following a series of exchanges between the respondents on the one hand and, the charterers and Mr. Naoum on the other, Mr. Montanios was instructed to contact the appellant at Limassol and seek payment of demurrages as a condition precedent to a waiver of the lien and discharge of the goods at Port-Said. On his initiative, a meeting was held at his office with the appellant, in the presence of Mr. Naoum who accompanied him. Before the trial Court there was a conflict of evidence between Mr. Montanios and the appellant, as to the content and effect of their conversation. The only other party who could enlighten the Court on what had been exchanged, Mr. Naoum, was not called as a witness, a fact noticed by the Court. Appellant denied accepting liability to pay demurrages. He maintained his interest in the matter was confined to assisting the charterers find a purchaser for the cargo. The evidence of Mr. Montanios was totally different. He testified their conversation revolved round the readiness of the appellant to pay sums due or to become due for demurrages. However, the matter does not end there.

It was submitted on behalf of appellant, that acceptance of the evidence of Mr. Montanios could not lead to the conclusion arrived at by the trial Court of an unqualified undertaking having been given by the appellant to pay demurrages. Moreover, even if such undertaking had been given, it could not render the appellant liable in law to pay the sums due under the charterparty.

The following facts were established by the evidence of Mr. Montanios:-

(a) Appellant had an interest in the cargo, then on board "Brothers Luck". The nature of his interest was not established or identified.

(b) Mr. Naoum was acting as the agent of the appellant. Appellant expressed readiness to accept liability for the payment of demurrages. Whether this readiness amounted to an unqualified undertaking, was the subject of rival submissions before us to which we shall turn presently.

Before turning to this issue, we may note, in order to complete reference to the salient features of the facts of the case that, following the conversation between Mr. Montanios and the appellant, instructions were given for unloading the cargo, the respondents waiving the lien thereon. Mr. McBride drew our attention to the printed record of the evidence of Mr. Montanios in support of his submission that acceptance of it did not establish that appellant had given an unqualified undertaking to pay for demurrages, as the learned trial Judge had found. Examination of the printed record of the evidence of Mr. Montanios lends support to this submission. Sifting the evidence of this witness as well as we can, what emerges is that while the appellant professed readiness to pay for demurrages, he wanted first to find out why there was delay in the delivery of the cargo. Mr. Montanios reproduced the statement made by the appellant, to the following effect: "I am a rich man, I have a lot of money, I can pay, but I want to know why there was the delay". At best, his promise was conditional on first discovering the reasons for delay. The judgment of the Court is solely fastened to the effect of the conversation held between appellant and Mr. Montanios. It does not go into subsequent events relevant to the condition attached by the appellant. The Court did not direct itself to events subsequent to this meeting and their effect on the relationship of the parties. There was one event in particular, that merited specific evaluation, a telex by Naoum to the respondents, giving excuses for the delay to pay demurrages. Given the relationship between appellant and Naoum, this communication might be construed and interpreted as finalising the undertaking of the appellant. This aspect of the case was not touched upon by the Court. Liability, we repeat, was solely found to arise from the conversation held with Mr. Montanios.

In our judgment, the conversation was inconclusive. It certainly did not justify the finding that appellant gave an

unqualified undertaking to pay for demurrages. And inasmuch as the learned trial Judge failed to evaluate the evidence bearing on the relationship of the parties in its entirety, we feel there is little option but to order a retrial.

The retrial of the case is also made necessary because the basis upon which judgment was given, notably estoppel, is not clearly made part of the case of the appellant, as defined by the petition. Nowhere in their petition do the respondents aver an estoppel arising in consequence of the conduct of the appellant. Reference is merely made to respondents agreeing to deliver the cargo "in consideration of an undertaking given to the plaintiffs by the defendant that he would pay all demurrage incurred.....". A contractual relationship is prima facie envisaged, also evidenced by the second prayer of the respendents for relief, cast in these terms: "Alternatively, the same amount as damages for breach by the defendants of an agreement and/or an undertaking made on or about.....". Whether an agreement came into being, as a result of the conversation held between appellant and Mr. Montanios and events subsequent thereto, is not at all touched upon in the judgment of the Court. Arguably, this is the proper context in which the relationship of the parties ought to have been examined. There was no prior legal relationship between appellant and respondents that would be modified by representations of the appellant in circumstances that would make it inequitable for him to resile therefrom. The source of liability of the appellant arose from the arrangement entered into with the respondents. This arrangement did not purport to modify existing rights in circumstances making applicable promissory estoppel as an answer to the enforcement of legal rights. Promissory estoppel is primarily designed to afford relief from the enforcement of legal rights in circumstances where such enforcement would be inequitable. There is force in the submission that a promissory estoppel is primarily a shield. In order to be invoked, under any circumstances, the undertaking must be clear and unequivocal, as the authorities consistently stress. To say the least, the undertaking given by appellant to Mr. Montanios, was not unequivocal.

As we had occasion to explain in the cases of *Stylianou* v. *Papacleovoulou* (1982) 1 C.L.R. 542 and, *Odysseos* v. *Pieris*

Estates And Others (1982) 1 C.L.R. 557, there has been a steady evolution in the precepts and application of the doctrine of equitable estoppel. One can say the doctrine was revolutionalised. From a rule of equity it has been transformed into a corner stone of the administration of justice. It does not merely confer a defence as the doctrine was originally applied. It can, in appropriate circumstances, confer a cause of action (see, *Inwarde* v. *Baker* [1965] 1 All E.R. 446; *Crabb* v. *Arun D.C.* [1975] 3 All E.R. 865). The area of application of proprietery estoppel has not been clearly charted and, as we noted in *Stylianou*, supra, the decision in *Western Fish Products* v. *Penwith D.C*, [1981] 2 All E.R. 204, suggests that proprietary estoppel should, in its application, be confined to the acquisition of rights in land. We consider it unnecessary to probe the issue of proprietary estoppel further for, the learned trial Judge did not examine the facts of the case from that angle, nor did he base his judgment on proprietary estoppel. Moreover, as we heeded above, the remedies sought by the respondents were primarily modelled on breach of contractual obligations. Certainly, this is not the proper case to examine the relationship between proprietary estoppel, on the one hand and, a binding agreement, on the other.

For all the foregoing reasons, a retrial of the case is necessary, in order to examine respondents' claim within the framework of their pleadings and decide on a proper appreciation of the facts in their entirety, whether the plaintiff is entitled to the remedies sought, or anyone of them.

The appeal is allowed. We direct a retrial of the case, naturally before another Judge. The appellant is entitled to the costs of the appeal. The cost. of the trial will be costs in the cause. Order accordingly.

Appeal allowed. Retrial ordered. Order for costs as above.