Privy Council Appeal No. 18 of 1943

The Cyprus Palestine Plantations Company Limited – *Appellant*

v.

Olivier & Company (Cyprus) Limited – – – *Respondents*

FROM

THE SUPREME COURT OF CYPRUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH DECEMBER, 1944.

Present at the Hearing:

LORD THANKERTON
LORD PORTER
LORD GODDARD

[*Delivered by* LORD GODDARD]

This is an appeal from a judgment of the Supreme Court of Cyprus reversing a judgment of the District Court of Larnaca which awarded the appellants, the plaintiffs in the action, £2,390 3s. 6d. as damages for breach of contract. Apart from the amount of damages there were two questions raised in the case, (1) was there a concluded contract between the parties; (2) if yea, was performance by the respondents rendered impossible by reason of the war. The District Court found for the appellants on both points, and the Supreme Court decided in favour of the respondents on both. The appellants are shippers of citrus fruits to London and the respondents are agents for shipping companies calling at Cyprus; both parties had offices at Limassol, and the respondents also had one at Larnaca. On 18th August, 1938, the appellants jointly with several other fruit exporters in the Island entered into a freight agreement with the respondents for the shipment of their fruit to London. Under that agreement, which was for the season 1st November, 1938, to 30th April, 1939, the minimum rate of freight was 1s. 9d. a box subject to certain rebates payable at the end of the season according to the number of boxes shipped. Under this agreement the respondents undertook to berth steamers regularly once a fortnight at Famagusta, whence they were to proceed direct to London with the option of calling at one port for bunkering, and it was provided that steamers could load fruit at any other ports in Cyprus before Famagusta belonging to the shippers who were parties to the agreement, other shippers being excluded. The same restriction applied to fruit shipped at that port. The respondents were to give 10 days' notice of exact date of arrival and it was provided that the interval between dates of arrival should be not less than 13 nor more than 17 days. The ships were to be efficient for the conveyance of fruit and to be of the same type as certain vessels which were named in the contract. In October, 1938, letters passed between the appellants and respondents, which modified the contract in favour of the latter by providing that the steamers should call at Limassol for any quanity they desired to load, and that if the weather proved unworkable, which was the expression used in the letters, the appellants would send on their goods to Famagusta and the respondents would pay transport expenses less carriage. These were the material provisions of the 1938 agreement. In March, 1939, the appellants and respondents negotiated for the renewal of this agreement, and to these negotiations the other shippers were not parties.

On 25th March there was a meeting between some of the directors of the appellants of whom Mr. Williamson was one and Mr. Peter Mantovani a director of the respondents. According to the evidence of Mr. Williamson, and there was no other witness called as to this interview, it was agreed that the contract should be renewed at a freight rate of 1s. a box subject to confirmation by the directors of the respondent company and that all the directors of the appellant company agreed to this. On 29th March the respondents wrote to the appellants this letter:—

> DEAR SIRS,—Please take note that we agree to renew the contract for the transport of your citrus fruit from Limassol to London during the period as from August, 1939, to April, 1940, on the same conditions of the contract for the period of 1938-1939 with the following exceptions: rate of freight will be at 1s. 6d. less 6d. rebate per case. Owners will be at liberty to accept citrus from any other shipper in Cyprus. In the case of any better conditions eventually made to any other citrus shipper or shippers we undertake to allow you the same reduction.
>
> Yours faithfully,
>
> For and on behalf of OLIVIER & CO. (CYPRUS), LTD.,
>
> P. MANTOVANI.

It will be noticed that Mr. Williamson had not deposed in his evidence to anything being said at the interview of 25th March as to other shippers being at liberty to send their citrus by the same steamer as took the appellants' fruit: in fact he said that the only matter discussed was freight. It was however a very natural and indeed one would suppose an inevitable condition for the respondents to impose, as they were contemplating a contract with the appellants alone and not as previously jointly with other shippers, and it is not to be supposed that the appellants alone would be able to furnish a full cargo.

It is not suggested that this letter amounted to more than an offer by the respondents. On the next day Mr. Williamson called on the appellants and saw their manager, Mr. Araouzos. He handed him the appellants' answer to their letter of the 29th which was in these terms:—

> We beg to acknowledge the receipt of your favour of 29th inst. in regard to freight for citrus during the period August, 1939, to April, 1940, and we confirm the rate offered as acceptable.
>
> Yours faithfully,
>
> THE CYPRUS PALESTINE PLANTATION CO., LTD.
>
> H. MARTIN WILLIAMSON.

When he read this letter Mr. Araouzos said that it was not a full acceptance of his offer of the 29th, but that it dealt only with the rate of freight. A conversation then ensued and it is on what then took place between them that the first question in the case arises. Admittedly it was for the appellant to prove that a contract was completed at this interview, that is that every term was agreed and nothing was left for further discussion. Their case must be that the contract alleged by them was made partly by the letters set out above and partly orally and indeed is so pleaded. It is however observable that in their reply it is alleged that the former contract was renewed by verbal agreement made at the meeting on the 25th when the appellants' directors were present and was afterwards confirmed at the meeting of the two representatives of the parties on the 30th. There was no evidence at all of any agreement having been made on the 25th. Before examining the evidence it should be stated that the finding of the learned judges in the District Court was that at the interview on the 30th March Mr. Williamson accepted the renewal of the 1938-39 contract with the exceptions set out in the respondents' letter of 29th March, by which they meant, of course, that he agreed to those exceptions. In fact there was only one so-called exception, namely, that dealing with the right of the respondents to accept fruit from other shippers. If this case depended entirely on whether Mr. Williamson orally agreed to accept that term and there was no other consideration to be taken into account their Lordships would hesitate long before they differed from the Court who heard and saw the witnesses and could appreciate the general atmosphere of the

case far better than anyone else. But in view of the evidence of Mr. Araouzos, the fact that on one most vital point he was not cross-examined, and the subsequent documents, it is clear that this was not the only or real point which the Court ought to have considered. The crucial matter to be determined in their Lordships' opinion is how the matter was left at the close of the interview and on what footing did Mr. Williamson go to consult his directors, as he admittedly intended to do and did. When it is realised that this is the true matter for decision, a conclusion can be reached which involves no departure from the finding of fact which the District Court made. That finding can be accepted but it does not dispose of the case. Now it is common ground that Mr. Araouzos objected that the letter of acceptance was not unconditional; according to Mr. Williamson his objection was that nothing was said in it about other shippers being allowed to send their fruit on the same boats and that he there and then agreed to that term. He then said that Mr. Araouzos wrote on the letter in pencil, " *Agreed* with contents " and that on his asking whether Araouzos required a further letter it was decided that it was unnecessary as the freight was agreed. What Araouzos in fact wrote was " *Agree* with contents " and as he pencilled those words immediately under the words " confirm the rate offered as acceptable " it appears as though the words in pencil were not written merely as a memorandum that Williamson had agreed but as showing how in his opinion the letter ought to have been drafted. If that letter with the pencilled words were intended to stand as the record of the contract it is remarkable that Williamson did not and according to his evidence was not asked at least to initial this alteration in the letter, though if that were all the evidence it would be possible to support the District Court's finding that Williamson at the interview gave an unconditional oral acceptance of the letter of 29th March and consequently that there was a contract. His evidence in chief was that it was not till after this interview that any question arose as to the old agreement being reworded; that suggestion he said came from his directors who wanted to bring it more into line with " themselves alone ", as he put it, and that the old agreement had specified various shippers. There was, it may be observed, also this matter to be considered that whereas the old agreement contemplated Famagusta as the ordinary port of shipment, now that the appellants were alone concerned Limassol was to be the ordinary port. Williamson was obviously a very honest witness but it cannot be said that he was either precise or confident and when he came to be cross-examined his evidence took a different complexion. He said, when asked who wrote the pencilled words, " I believe Mr. Araouzos did, in my presence. I handed him the letter and the discussion arose immediately and he suggested that it would be better that the words were put in." Then the cross-examination continues: " And he left the letter with you? —(A.) I cannot say. (Q.) Because you wanted to consult your directors? —(A.) I am quite sure I did not take the letter with me; it remained in his office. (Q.) Is it not a fact that you did not consent to make the alterations suggested because you wanted to consult the other directors of your company?—(A.) *I cannot say*. (Q.) Did you consult the other directors with regard to this matter at all?—(A.) Yes, about the rewording of the agreement. (Q.) And they made suggestions to you as to the wording and terms of the new agreement?—(A.) The renewed agreement, yes." The evidence of Araouzos on this matter as recorded by the learned President is, " I insisted on his altering the wording and giving me a new letter according to my suggestion. I did not consider that letter as an acceptance of the proposal in Red 5 " (that is the letter of 29th March). " Williamson then told me he should submit the matter to his principals in Egypt because he understood they would like a new form of contract more in line with the Limassol shipments. We agreed that he should refer the matter to his principals and that on hearing from them we would draft a new agreement of which I advised Peter Mantovani at Larnaca." Araouzos was not cross-examined on this part of his evidence, which, unless because the other side felt they could not displace it, is the more remarkable wher it is remembered that Williamson had been examined on commission befor.

the trial so his evidence was known to all concerned. A new draft agreement was in fact submitted, dealing not only with the case of the other shippers and making Limassol the primary port of shipment but containing a number of other alterations as compared with the former agreement but nothing seems to have been done about it and it was never executed. The main reason that the Supreme Court gave for reversing the District Court on this part of the case was that as a new agreement was drafted by Williamson on the instructions of his company subsequent to the discussion on 30th March it was almost impossible for the appellants to contend that what took place at that interview amounted to a binding contract. Their Lordships do not decide this appeal on quite so narrow a ground. In their opinion a careful examination shows that the evidence of Williamson is not enough to prove that a complete agreement was come to at the interview and that there is no real inconsistency between his evidence and that of Araouzos. It was evidently left at the interview that a document should be prepared and submitted not merely embodying what had been agreed as to the rate and other shippers but recast so as to be applicable to shipments from Limassol and any other matters that might be acceptable to both. The document which was sent, some of its contents having been the subject of discussion between Araouzos and Williamson as the reports by the former to his head office showed, did in fact differ in several respects from the earlier contract. In arriving at this conclusion their Lordships have not overlooked the two letters both probably written by Araouzos and at any rate emanating from the respondents' office dated 19th April and 9th September, 1939. These were strongly relied on by the appellants as showing that the respondents recognised that there was an existing contract between the parties. The first of these in their Lordships' opinion is really no more than a report on the rates of freights which the various shippers were willing to pay. That of 9th September, which was the letter relied on as a repudiation, does appear to recognise in terms that a contract existed. The explanation given is that it was in fact a circular letter sent to all the fruit shippers and was sent to cancel all contracts. Thus it was sent to the appellants with whom a rate had been arranged and who the appellants no doubt expected would be shipping in due course, and this appears to be a reasonable and sufficient explanation.

In view of the opinion their Lordships have formed on the first question, which is enough to dispose of this appeal, they do not find it necessary to say anything on the question as to whether the respondents had proved that, assuming a contract, its performance by them had been rendered impossible owing to the war.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

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In the Privy Council

THE CYPRUS PALESTINE PLANTATIONS COMPANY LIMITED

v.

OLIVIER & COMPANY (CYPRUS) LIMITED

DELIVERED BY LORD GODDARD

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