



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

CASE OF MARKASS CAR HIRE LTD v. CYPRUS

(Application no. 51591/99)

JUDGMENT

STRASBOURG

2 July 2002

FINAL

06/11/2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Markass Car Hire Ltd v. Cyprus,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,

Mr A.B. BAKA,

Mr L. LOUCAIDES,

Mr C. BÎRSAN,

Mr K. JUNGWIERT,

Mrs W. THOMASSEN,

Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 23 October 2001 and 11 June 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 51591/99) against the Republic of Cyprus lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Markass Car Hire Ltd (“the applicant”), on 5 August 1999.

2. The applicant was represented by Mr C. Clerides, a lawyer practising in Nicosia. The Cypriot Government (“the Government”) were represented by their Agent, Mr A. Markides, Attorney-General of the Republic of Cyprus.

3. The applicant complained under Article 6 § 1 about the length of the proceedings to set aside an *ex parte* interim order issued by the Nicosia District Court.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

5. By a decision of 23 October 2001 the Court declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant company is the owner and hire purchaser of a fleet of vehicles registered in Cyprus and licensed as “Z” vehicles.

9. On 1st July 1996 the District Court of Nicosia delivered judgment in a civil action lodged by the applicant against another company, Diprose Ltd, also in the car hire business. The District Court held, *inter alia*, that the applicant having legally terminated an agreement with Diprose, permitting the use and exploitation by the latter of the “Z” fleet of cars, it was entitled to take possession thereof and to sell them in satisfaction of a debt of 667,776 Cypriot pounds owed to it by Diprose, by way of rental under the said agreement, and to pay the remaining amount in satisfaction of debts owed by the applicant to a number of banks which had financed the purchase of the fleet by the applicant. Furthermore, the District Court ordered Diprose to deliver the cars to the applicant. Diprose obtained a stay of execution of the judgment on condition that it regularly paid certain instalments to the applicant for the use of the vehicles which the applicant had given to it in the past for rental to third parties.

10. Diprose failed to keep up the instalments and, as a result, on 8 January 1998, the District Court of Nicosia allowed the applicant to collect the vehicles. In the meantime, Diprose had been wound up and, by letter of 11 February 1998, the liquidator declared that he was willing to return the vehicles, which apparently had been wrongfully given to another company, Kemtours Ltd, belonging to the same group as Diprose, without the consent of the applicant.

11. In the meantime, Kemtours had instituted proceedings (action 3315/98) seeking damages from the applicant for breach of the agreement which they had allegedly concluded on 3 February 1997. Kemtours contended that, under that agreement, 127 vehicles had been rented to it by the applicant but a number of them was still in the applicant's possession. Kemtours further sought to obtain a decision preventing the applicant company from interfering with Kemtours' activities under the agreement and ordering it to hand over to Kemtours a number of the vehicles which were still in the applicant's possession.

12. Whilst the applicant was in the process of collecting the vehicles, Kemtours obtained in fresh proceedings before the District Court of Nicosia, and on an *ex parte* basis, an interim decision which ordered the applicant to deliver the said vehicles to Kemtours. This order was issued on 31 March 1998 and served on the same date on the applicant.

13. The order was to be enforced on 13 April 1998. On that date, the applicant's lawyer appeared before the court and requested time to appeal

against the order. The court fixed the case for directions on 5 May 1998 and then again on 7, 20 and 25 May in order to afford time to the parties to settle their dispute. The court invited the lawyer to file an appeal at least four days before 5 May 1998.

14. However, the applicant filed its appeal on 5 May 1998. The applicant maintained that the court had been misled by Kemtours, which had failed to disclose the real facts of the case and the previous judgment and decision of the District Court. The applicant invited the District Court to hold a hearing as soon as possible in view of the fact that the fleet of “Z” cars was worth more than 500,000 Cypriot pounds. Furthermore, the applicant alleged that the unauthorised use of the vehicles under the interim decision would entail a reduction of their value and would prevent the applicant from presenting them to the competent authorities in order to have their licenses renewed. Finally, the applicant affirmed that it had never entered into such an agreement with Kemtours.

15. As the parties had reached no settlement of the case by 27 May 1998, the District Court fixed the hearing for 8 July 1998. On this date, the judge stopped the hearing at midday, because of the “lateness of the hour”, and adjourned it until 17 July 1998, during the summer recess. However, the judge pointed out that he would be working during this period.

16. The hearing started on 17 July 1998. Evidence given by Kemtours was completed on the same day.

17. According to the applicant, the hearing should have been completed in the same month or at the beginning of August 1998. However, it was repeatedly adjourned due to the illness of either the advocate for the plaintiff or the judge dealing with the case, as well as to the latter's transfer to other pending court proceedings.

18. At the end of the hearing on 17 July 1998, the applicant's lawyer had indicated five dates in July on which he could make himself available for the continuation of the hearing, but the advocate for the plaintiff declared that he would be unavailable due to other court commitments.

19. Adjournments were thus ordered until 7 and 9 September 1998 (because the advocate for the plaintiff had to undergo an operation), 5 November 1998, 12 November 1998, 17 December 1998 (due to the court's lack of time and the illness of the advocate for the plaintiff), 7 January 1999, 14 January 1999, 25 February 1999 (on which date the case was heard by another judge because the judge dealing with the case was ill), 18 March 1999, 22 April 1999, 13 May 1999, 2 June 1999, 17 June 1999, 1 July 1999, 6 July 1999, and 9 and 10 September 1999.

20. On 27 April 1999 and as a result of the repeated adjournments, the applicant filed an application for *certiorari* and prohibition with the Supreme Court. It sought the annulment of the interim order because of the excessive delay in the proceedings before the District Court. The applicant also alleged that the court had exceeded its jurisdiction on a matter of

construction involving section 9 of the Civil Procedure Law. On 27 May 1999 the Supreme Court refused the application. On the same date the applicant appealed against that decision and, by way of a letter to the President of the Supreme Court, invited him to expedite the proceedings.

21. Following a letter from the applicant's lawyer, who complained about the delay in the proceedings, the President of the District Court assigned the case to a new judge on 10 June 1999.

22. In the meantime, on 21 April 1999, Kemtours had applied for an order of imprisonment of the applicant's managers for contempt of the interim order of 31 March 1998. Initially fixed for 2 June 1999, the hearing was adjourned until 17 June and then until 6 July 1999, because of the direct relevance of these proceedings to those concerning the interim order. Due to the summer recess both sets of proceedings were fixed for hearing on 9 and 10 September 1999.

23. On 9 September 1999 the District Court decided that the hearing relating to the interim order should precede the contempt hearing. The hearing commenced on 10 September and was adjourned until 30 September, and then until 8 October because the plaintiff's advocate had failed to summon a witness whom he wished to call to give evidence. The hearing continued on 8 and 20 October, but on 27 October it was adjourned until 9 November 1999 at the request of the plaintiff's advocate. The court rejected the objection by the applicant's lawyer's on the ground that the adjournment was granted in order to permit the other party to prepare a document which would expedite the proceedings. The hearing continued on 9, 12 and 18 November 1999 and the court heard six witnesses.

24. On 3 December 1999, when the hearing was to be resumed, the advocate for the plaintiff requested an adjournment because his bad state of health necessitated an operation abroad. The continuation of the hearing was fixed for 22 December 1999.

25. On 9 December 1999, the date on which the hearing in the contempt proceedings ought to have taken place, the District Court again ordered an adjournment until 14 January 2000 and then until 24 January because the plaintiff's advocate was hospitalised abroad. However, following a protest by the applicant's lawyer, the court affirmed that no further request for an adjournment would be granted.

26. On 21 January 2000 the District Court again adjourned the hearing until 28 February 2000 in order to give time to the newly appointed lawyer for the plaintiff to familiarise himself with the case. The applicant's lawyer did not object because he stated that he had other court commitments.

27. The hearing resumed on 28 February 2000 with the testimonies of two witnesses, thus bringing to eight the total number of witnesses heard. On 17 March 2000, the parties made their final addresses.

28. By judgment of 11 May 2000, the District Court held that the interim order was no longer in force. It declared it null and void because the

plaintiff had failed to prove its allegations; it also held, at page 16 of the judgment, that the failure of Kemtour to file the Statement of Claim over a two-year period could not be attributed to the illness of the lawyer.

II. RELEVANT DOMESTIC LAW AND PRACTICE

29. Section 4 of Cap. 6 (Civil Procedure) reads as follows:

“The court may at any time during a pending action make an order for the ...preservation, custody, sale, detention or inspection of any property being the subject of the action, or an order for preventing any loss, damage or prejudice which but for the making of the order might be occasioned to any person or property, pending a final judgment on some question affecting such person or property or pending the execution of the judgment.”

30. Section 9 of Cap. 6 (Civil Procedure) reads as follows:

“(1) Any order which the court has power to make may, upon proof of urgency or other special circumstances, be made on the application of any party to the action without notice to the other party.

(2) Before making any such order without notice the court shall require the person applying for it to enter into a recognisance, with or without a surety or sureties as the court thinks fit, as a security for his being answerable in damages to the person against whom the order is sought.

(3) No such order made without notice shall remain in force for a longer period than is necessary for service of notice of it on all persons affected by it and enabling them to appear before the court and object to it; and every such order shall at the end of that period cease to be in force, unless the court, upon hearing the parties or any of them, shall otherwise direct; and every such order shall be dealt with in the action as the court thinks just.

(4) Nothing in this section shall be construed to affect or apply to the powers of the court to issue writs of execution.”

31. In some recent judgments the Supreme Court has ruled that the procedure for deciding an interim order which is issued on an *ex parte* basis is an exceptional one and must therefore be dealt with and treated as a matter of urgency. In two cases, the Supreme Court decided that such an order must be served within two to four days and be brought before the judge for trial within seven days (judgments of 25 June 1999 and 10 September 1999). The Supreme Court found that periods of 17 and 21 days to serve the order, and give the other party an opportunity to oppose it, were excessive. In the case of SPE Agias Fylas v. Christoforou (judgment of 4 October 1999), the Supreme Court ruled that, if a court issued an *ex parte* order which is not urgent, it will be set aside for excess of jurisdiction.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

32. The applicant complains about the length of the proceedings to set aside the *ex parte* interim order issued on 31 March 1998 by the Nicosia District Court. He alleges a violation of Article 6 § 1 of the Convention, which insofar as relevant, reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal...”

33. The Government state that they do not purport to disagree with the applicant that proceedings concerning interim orders must be concluded as soon as possible. However, they submit that the present case raised complex factual and legal questions and required the examination of eight witnesses and of extensive documentary evidence, including 127 Government files. Most of the delays in the proceedings were caused by the bad state of health of the plaintiff's advocates. The latter's requests for adjournment of the hearing were granted with the consent of the applicant's lawyer. A delay of four months during the period from 25 February 1999 to 1 July 1999 could have been avoided had the applicant's lawyer informed the President of the District Court earlier of the problem raised by the delay in the examination of the interim order. On 1 July 1999, it was impossible to fix a hearing before September 1999 due to the summer recess. From 1 July 1999 to 17 March 2000, when the case was taken over by another judge, adjournments were not very long and were mostly due to the state of health of the plaintiff's advocate. On three occasions, the adjournments were justified by the need to summon a witness (an eight-day adjournment), the need to prepare a written account of facts disclosed by the exhibits submitted during the proceedings (a one-month adjournment) and the need to afford time to the newly appointed lawyer for the plaintiff to familiarise himself with the case (a one-month adjournment).

34. The applicant submits that the record of the proceedings presented by the Government is incomplete. In effect, certain days are missing, including 5 May 1998 and 7 January 1999, when the judge failed to attend the hearing without giving reasons. The applicant claims that the adjournment until 8 July 1998 was unacceptable, and that granted on the same date unjustified.

35. The applicant further claims that, despite the urgent character of the proceedings, several adjournments were granted on account of the illness of Kemtour's lawyer or on the District Court's own motion. The court allowed urgent proceedings to be dealt with in a very idle manner and allowed the plaintiff's lawyer to dictate its time-table.

36. The applicant stresses that the appeal of 5 May 1998 was filed in time, that is two days before the date on which the case was fixed for mention and not for hearing. On 17 July 1998 no complex factual or legal issues had arisen and, at that stage of the proceedings, the District Court could not examine the merits of the case. On that date, Kemtours had already submitted its evidence and only two or three further hearings were required to complete the proceedings. Kemtour's lawyer had expressly indicated that he needed three more days to cross-examine defence witnesses. Finally, the District Court declared null and void the interim order because the plaintiff had failed to prove its allegations; it also held, at page 16 of the judgment, that the failure of Kemtour to file the Statement of Claim over a two-year period could not be attributed to the illness of the lawyer.

37. As regards the period to be taken into consideration, the Court notes that it began on 5 May 1998, when the applicant appealed to the District Court against the *ex parte* interim order. The proceedings ended on 11 May 2000, with the judgment of the District Court. They thus lasted approximately two years.

38. The Court recalls that the reasonableness of the length of the proceedings must be assessed in the light of the particular circumstances of the case and with the help of the following criteria: the complexity of the case, the conduct of the parties, the conduct of the authorities dealing with the case and what was at stake for the applicant (see *Laino v. Italy* [GC], no. 33158/96, § 18, ECHR 1999-I).

39. The Court first notes that, according to the Supreme Court, the procedure for deciding an interim order which is issued on an *ex parte* basis is an exceptional one and must therefore be treated as a matter of urgency. In the present case, what was at stake for the applicant's company was its financial survival, since the interim order provided that a great number of its vehicles had to be handed over to another car hire company.

40. Secondly, the Court notes that the applicant's behaviour did not cause any delay in the proceedings. On the contrary, he often objected to the successive adjournments and even applied to the Supreme Court seeking the annulment of the interim order because of the excessive delay. The Court cannot accept the Government's argument that the applicant consented to a certain number of the adjournments. These adjournments were practically imposed on the applicant, because they were decided either on the court's own motion or because the plaintiff's lawyer was frequently unwell.

41. Thirdly, the conduct of the judicial authorities, and in particular that of the judge of the District Court who first dealt with the case, is subject to criticism: despite the urgent character of the proceedings and the imminence of the summer recess, the first hearing took place on 8 July 1998. Although the judge affirmed that he would be working during the summer recess, he held only one hearing, on 17 July 1998, during which the plaintiff

completed the presentation of its evidence. However, the hearing was repeatedly adjourned until June 1999, when the case was assigned to another judge, following the applicant's protest to the President of the District Court. Despite the time which had already elapsed since the commencement of the proceedings, the second judge generously granted the requests for adjournment presented by the plaintiff's lawyer: twelve days to enable him to prepare a report, more than one month and a half because he was unwell or hospitalised abroad, and more than one month to allow the newly appointed lawyer to familiarise himself with the case.

42. The Court considers that both judges of the District Court failed to ensure the speedy conduct of the proceedings which by law, and having regard to what was at stake for the applicant, ought to have been concluded in a summary and expeditious manner.

43. Accordingly, the Court concludes that there has been a violation of Article 6 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

45. For pecuniary damage the applicant claims CYP 456,672 or CYP 415,833. The applicant relies on a valuation report prepared on its instructions by a chartered accountant. The first figure represents the valuation of the loss on a net assets basis. The applicant alleges that, had the vehicles been sold back in August 1998, their value in the open market would have been CYP 414,525, support for which is found in a report by Automobile Assessors attached to the accountant's report. Furthermore, the licences of 93 of the vehicles were sold separately from the vehicles, some of them before the judgment of May 2001, some of them afterwards, for a total amount of CYP 198,499.54. The open market value of those licences in August 1998 would have reached CYP 305,250, but by February 2001 the value had dropped. The second figure mentioned above represents the assessment of the loss of earnings. Had it not been for the interim order remaining in force from August 1998 to May 2000, the applicant would have hired these vehicles.

46. The applicant also claims CYP 10,000 for non-pecuniary damage.

47. The Government submit that the Automobile Assessors' report cannot be considered to be reliable evidence as to the actual value of the vehicles in 1998 without any inspection of the vehicles concerned. The price fixed by the report on the market value of licences is not supported by pertinent evidence and cannot be relied upon for calculating the applicant's loss with any certainty. As regards the calculation of the damage based on the loss of earnings, the Government note that, prior to the issue of the interim order, Diprose had already defaulted in their monthly instalments to the applicant and that its default had already rendered immediately payable all amounts due to the applicant and immediately enforceable the latter's right to have the vehicles delivered to it, to have them sold by public auction, and to use the proceeds of the sale for the payment of its own debts. The interim order had postponed the exercise of the right to take delivery of the vehicles and sell them in execution of the judgment, but had not necessitated the selling of the vehicles or prevented the applicant from receiving earnings by hiring them.

48. As regards non-pecuniary damage, the Government submit that the finding of a violation would constitute sufficient just satisfaction.

49. The Court cannot speculate on the price at which the cars would have been sold or on the earnings of the applicant had the domestic courts decided within a reasonable time. Therefore, the Court does not award the applicant any compensation for pecuniary damage.

50. However, the Court accepts that the applicant suffered damage of a non-pecuniary nature as well as a loss of opportunities as a result of the length of the proceedings. Making its assessment on an equitable basis, the Court awards the applicant EUR 15,000 as compensation for non-pecuniary damage.

B. Costs and expenses

51. The applicant claims CYP 8,470 for costs and expenses.

52. The Government submit that an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum.

53. The Court considers that the duration of the domestic proceedings has to some extent increased the applicant's legal expenses in these proceedings. Making its assessment on an equitable basis, the Court awards the applicant 4,000 EUR under this head.

C. Default interest

54. According to the information available to the Court, the statutory rate of interest applicable in Cyprus at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 4,000 (four thousand euros) in respect of costs and expenses;
 - (iii) any tax that may be chargeable on the above amounts;
 - (b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;
3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 2 July 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President