[JACKSON, C.J., AND MELISSAS, J.]

(March 18, April 13 and 29, 1949)

THE BIENVENIDO STEAMSHIP CO. LTD.,

Appellants,

v.

GEORGHIOS CHR. GEORGHIOU AND ANOTHER,

Respondents.

(*Civil Appeal No.* 3821.)

Arbitration—Stay of legal proceedings—Arbitration Law, 1944, section 8.

The respondents chartered a ship from the appellants who were shipowners in the Republic of Panama acting through their agents in Egypt. The agreement contained an arbitration clause in these terms: "All disputes which may arise under this agreement and cannot be settled by both parties will be referred to arbitration in London." A dispute arose between the parties, and the respondents instituted proceedings in the District Court of Famagusta for breach of the agreement. The appellants claimed that the action should be stayed pursuant to the Arbitration Law, 1944, section 8, in order that the matters in dispute might be referred under the arbitration clause. The respondents contended that the appellants were not ready and willing to do all things necessary to the proper conduct of the arbitration and that questions of law arose for decision which it would be more convenient that a court should decide.

Held: (i) that the dispute between the parties was a dispute within the arbitration clause and the respondents' action ought to be stayed.

(ii) When a court was asked to stay legal proceedings in order that a dispute might be referred to arbitration in accordance with an agreement between the parties, the power of the court to stay the proceedings was discretionary.

(iii) Under a general submission, the arbitrator was appointed to decide issues both of fact and law, and it would require some substantial reason to induce the court to deny its due effect to the agreement of the parties to submit the whole dispute, whether it included both fact and law or was limited to either fact or law.

Appeal allowed and proceedings in the District Court stayed.

Appeal by defendants from an order of the District Court of Famagusta (in Action No. 325/46) refusing an application for a stay of proceedings under section 8 of the Arbitration Law, 1944.

G. N. Chryssafinis, K.C., and *M. Triantafyllides* for the appellants.

F. Markides for the respondents.

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The facts of the case are fully set forth in the judgment of the Court which was delivered by:

JACKSON, C.J.: The appellants, who are shipowners in the Republic of Panama, acting through their agents in Alexandria, Egypt, are the defendants in an action brought against them by the respondents for breach of an agreement for the charter of a ship. The agreement provided for the reference of disputes arising under it to arbitration in London if they could not be settled by the parties themselves. Accordingly when the respondents, as plaintiffs, had instituted proceedings for breach of the agreement in the District Court of Famagusta, the appellants, as defendants, applied to the Court to stay those proceedings under section 8 of the Arbitration Law, 1944. The District Court refused to do so and this is an appeal against that decision.

The cause of the dispute between the parties was as follows: The agreement between them was made in Alexandria on the 17th July, 1946. It provided for the charter by the appellants, as owners, to the respondents of a ship called *Anatoli* which was described in the agreement as a passenger ship "of 565 tons gross and 291.75 tons net, carrying about 130 passengers." The ship was chartered for a voyage from Famagusta to Marseilles, "to carry up to 130 passengers" for the lump sum freight of 8,200 Egyptian pounds. Of that sum, 2,500 Egyptian pounds was to be paid on the signing of the charter and a further 1,500 Egyptian pounds before the 25th July, 1946. The balance of 4,200 Egyptian pounds was to be paid by the charterers when they had been informed that the ship had left Alexandria. The fifth clause of the agreement provided that, in default of any of the payments as specified, the owners would have the right to withdraw the ship and all deposits made to them would be forfeited. The first two instalments of freight were paid in accordance with the agreement but the charterers withheld the third instalment, 4,200 Egyptian pounds, because of the dispute that arose.

The *Anatoli* arrived at Famagusta on the 29th July, 1946. She carried a certificate which was described as a "Provisional Safety Certificate for a short international voyage, issued under the provisions of the International Convention for the Safety of Life at Sea, 1929." This certificate had been issued on the 23rd July, 1946, by the Ports and Lighthouses Administration of the Egyptian Government. The certificate stated that the *Anatoli* was 565 tons, gross tonnage, and that she had been shown by survey to comply with the International Convention above

mentioned in specified particulars, including "boats, life rafts and life-saving appliances which provided for a total number (crew and passengers) of 170 persons." The appellants state that the crew of the ship totalled 30.

After the arrival of the *Anatoli* at Famagusta to take on board 130 passengers, who are said to have been waiting at the port to embark for Marseilles, the Port Authorities refused to allow her to take more than 30. The ground for their refusal was that 30 passengers was the maximum number which the ship could be permitted to carry by the Shipping (Life Saving Appliances) Regulations, 1926, made under the Shipping (Regulations as to Safety) Law No. 19 of that year. By section 4 of those regulations the number of passengers that could be carried in a ship clearing from a port in Cyprus for any other port, whether in Cyprus or elsewhere, may not exceed one passenger for every ten tons of the ship's registered tonnage. The registered net tonnage of the *Anatoli* is, as already stated, 291.75 tons. By section 6 of the Law quoted a penalty was imposed on the master of a ship carrying more passengers than the number allowed by the regulations. Those regulations exempted the ships of certain countries but Panama is not among them.

After the occurrence of this difficulty correspondence passed between the charterers in Cyprus and the owners' agents and on the 4th August, 1946, the owners' agents wrote to the charterers stating that, relying on clause 5 of the agreement between the parties, they had withdrawn the ship from the charterers' service and had retained the two payments, amounting to 4,000 Egyptian pounds already made to them.

Such was the dispute between the parties and on the 5th August the charterers instituted an action in the District Court of Famagusta, claiming from the owners and their agents in Alexandria £2,000 damages for breach of the charter agreement of 17th July, 1946, and the return of the payments which the charterers had already made.

On the 28th November, 1946, the owners, through their agents, having previously entered an appearance to the writ of summons, applied for a stay of proceedings under section 8 of the Arbitration Law, 1944, and early in January, 1947, the District Court refused their application. The owners and their agents now appeal from that decision.

Section 8 of the Law quoted empowers a Court to stay proceedings commenced by one party to an arbitration agreement against another party "in respect of any matter agreed to be referred" if the Court is satisfied: (*a*) that

there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and (*b*) that the applicant for a stay of proceedings was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration.

The first question before the District Court was whether the action instituted by the charterers was " in respect of any matter agreed to be referred to arbitration." The arbitration clause in the agreement between the parties covered " all disputes which may arise under this agreement " and the District Court held that the dispute between the parties fell within that clause and consequently that the action which had been instituted by the charterers was one which could be stayed if the other requirements of section 8 of the Arbitration Law were fulfilled.

Neither party contests that finding but we thought it desirable to invite argument on a point which, as far as we could judge from the record, did not appear to have been fully argued in the District Court and, at any rate, is not considered in their judgment. If, according to the true construction of the agreement between the parties, it was one for the conveyance of as many as 130 passengers from Cyprus to Marseilles in the ship *Anatoli*, the agreement was for the performance of an act which, at the time when the agreement was made, was forbidden by the law of the country in which an essential part of that act was to be performed. In drawing the attention of counsel to that consideration we had in mind a dictum of Viscount Simon, L.C., in the case of *Heyman* v. *Darwins Ltd.* (All England Reports, 1942, Vol. 1, page 337). In the course of his judgment in that case the Lord Chancellor said (at p. 343) " if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is void." There was also a dictum by Lord MacMillan in the same case to the same effect (at p. 345). On the other hand, in the case of *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (1920, 2 K.B.287) a dispute had arisen out of a charter-party part of the performance of which was forbidden by the law of the country in which that part was to be performed; yet the dispute had gone to arbitration. Accordingly, in the absence of a fuller record of the argument in the District Court, we wished to ascertain whether the charterers in the case before us maintained that the agreement was illegal and that the arbitration clause could not be enforced.

It appears from subsequent argument that the charterers do not object to arbitration on that ground. On the contrary, while the appellants still ask that the dispute should go to arbitration under the agreement, the respondents ask to be allowed to proceed with their action which, in its present form, is founded on the agreement.

In these circumstances, and having regard to the particular questions raised in this appeal, we did not feel compelled to form any conclusion of our own on the question whether or not the agreement between the parties, including the arbitration clause, was void. Both parties rely on the agreement and we shall accordingly deal only with the reasons for which the District Court refused to stay the action which the charterers had instituted.

Section 8 of the Arbitration Law, 1944, empowers a court to stay proceedings if, among other conditions, the court is satisfied that the applicant for a stay " was, at the time when proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration." The District Court stated that they were not satisfied that the appellants, the shipowners, fulfilled that condition.

It is well established by English authorities dealing with the corresponding provisions of the English Arbitration Act, 1889, section 4, that when a court is asked to stay legal proceedings in order that a dispute may be referred to arbitration in accordance with an agreement between the parties, the power of the court to stay the proceedings is discretionary. In considering this appeal we have therefore tried to bear constantly in mind the principles upon which a superior court should act in an appeal from the exercise of a discretion given to a lower court. (See the case of *Osenton* v. *Johnston*, A.E.R., 1941, Vol. 2, p. 245). Those principles have a special application when the exercise of the discretion given to the lower court rests partly on the Court's view on a question of fact. Nevertheless we feel compelled to examine the grounds upon which the District Court came to the conclusion that they were not satisfied that the shipowners were willing to go to the arbitration at the commencement of the action by the charterers.

The District Court said that they came to that conclusion from a perusal of the documents filed in the application for a stay of proceedings. The Court was evidently referring to a series of telegrams and letters which passed between the parties, beginning after the discovery of the refusal of the port authorities at Famagusta to allow the embarkation of 130 passengers on or about the 29th July, 1946, and continuing until the 5th August, when the charterers

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instituted their action. The District Court referred in particular to two documents. One was a letter of the 4th August, 1946, in which the appellants, without mentioning arbitration, claim to retain the payments already made to them as forfeited under the agreement. The other document was a letter of the 5th August from the respondents notifying the appellants that they intended to take legal proceedings and the Court observed that even then the appellants did nothing to claim arbitration. The fact that in their letter of the 4th August, the appellants claimed rights under the agreement affords, in our view, no ground whatever for a conclusion that they were unwilling to proceed to arbitration if the parties could not settle the dispute between themselves. They were still relying on the agreement and were putting their own interpretation on it. We think, further, that the delay of the appellants in responding to the letter of the 5th August is satisfactorily explained by the fact that it was addressed to the Cyprus representatives of the shipowners' agents in Egypt. It introduced an entirely new situation, outside the agreement, and the Cyprus agents had to consult their principals. The first action they took, after entering appearance, was to apply on the 28th November, 1946, for a stay of the proceedings which had been instituted on the 5th August. There was certainly no delay on the part of the charterers in abandoning the arbitration clause and in having recourse to an action at law.

In the face of the appellant's affidavit that they were, and always had been, ready to proceed to arbitration, we can find no sufficient reason, in the correspondence to which the District Court referred, for a refusal to stay proceedings on that particular ground.

We must, therefore, consider whether the refusal of the District Court to stay proceedings should be supported on the other ground on which it was based.

This was the ground that questions of law arose for decision which it would be more convenient that a court should decide. The questions of law which the District Court had in mind were two, the question of the effect on the agreement of the rules made under the Shipping (Regulations as to Safety) Law, No. 19 of 1926, and the construction of clause 1 of the agreement between the parties. This was the clause providing for the hire of the ship *Anatoli* to the charterers "to carry up to 130 passengers" from Cyprus to Marseilles, and the District Court quoted a dictum by Lord Parker in the case of *Bristol Corporation* v. *Aird* (1913 A.C. 241). "Everybody knows", said Lord Parker, "that with regard to the construction of a contract it is absolutely useless to stay the

action, because it will come back to the Court on a case stated." That dictum was the subject of comment in the case of *Heyman* v. *Darwins* (*v. sup.*) both by Lord Chancellor Simon and by Lord Wright, the latter remarking that it would not be safe to tear it from its context and give it a general application. Lord Wright went on to observe that it had often been said that, under a general submission, the arbitrator is appointed to decide issues both of fact and law, and that it will require some substantial reason to induce the court to deny its due effect to the agreement of the parties to submit the whole dispute, whether it includes both fact and law or is limited to either fact or law.

There is a further consideration to which attention was drawn by counsel for the appellants and, though it could not be regarded as a deciding factor, it is one which common sense forbids us to ignore. The arbitration clause in this case provides for arbitration, not in Cyprus, but in London. The capacity and experience of London arbitrators have often been recognised by the English Courts. Arbitrators in England are men of high standing, thoroughly familiar with the customs and practices of the businesses in which the disputes referred to them arise and with the questions which they are asked to determine. On the other hand, no court in Cyprus has had the opportunity to become familiar with the particular kind of questions that arise in this case. Such cases can only very rarely have arisen here, if indeed there has ever been even one. As we have said, that consideration could not be a determining factor in this appeal but, in our view, it would hardly be sensible to take no account of it.

Under section 8 of the Arbitration Law, 1944, if a court is to stay proceedings, it must be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement. Bearing in mind all the considerations we have mentioned, can it be said that there is any reason why the construction of clause 1 of the agreement—the clause providing for the hiring of the ship *Anatoli* to carry "up to" 130 passengers from Cyprus to Marseilles—should not be referred to a competent arbitrator in London thoroughly familiar with the interpretation of charter-parties? We can see no reason at all why that particular question should not be referred, nor any reason to expect that, if it is referred, the arbitrator's decision will necessarily have to be reviewed by a court of law.

There was a second question of law which the District Court thought should be determined by a court of law rather than by an arbitrator. This was the effect upon the agreement between the parties of the Cyprus law which

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prohibited the performance of that part of the contract which was to be performed in Cyprus. At the beginning of this judgment we referred to a case in which a similar question had been referred to arbitration, apparently without objection by either side. This was the case of *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (1920 1 K.B. 614). It is true that, in that case, there was a later reference to a court of law on a case stated, but the questions that arose in that case were very much more complicated than those in the case before us. There are also other authorities giving guidance upon questions of the conflict of laws as affecting the performance of charter-parties and it can be assumed that a London arbitrator will be familiar with them.

Nor is that question the only one that must be decided before the rights of the parties in this case can be determined. There are several other questions also, but there has been no suggestion that any of these form grounds for refusing to give effect to the agreement between the parties and to allow their dispute to be determined by arbitration.

The District Court referred briefly to the question of the relative cost of arbitration in London and proceedings before a Cyprus court and they appear to have thought that cost of arbitration would be far greater. There was no precise evidence of the cost of arbitration and the cost of legal proceedings in Cyprus would, of course, depend on whether they stopped in Cyprus or were pursued elsewhere. In any event, the District Court remarked that arbitration in London was part of the agreement between the parties and the Court stated that they would not have refused to stay proceedings on that ground alone. In our opinion also relative expense forms no sufficient ground for refusing a stay of proceedings in this case.

It will now be clear, from what we have said, that we do not consider that the reasons given by the District Court for the exercise of their discretion are sufficient to support it. For one of their reasons, a refusal to believe that the appellants were willing to go to arbitration, there seems to us to be no ground at all. With regard to the others, we refer again to the words that we have already quoted from the judgment of Lord Wright in *Heyman* v. *Darwins*, and we can see no substantial reason which could reasonably induce a court to refuse to give effect to the agreement between the parties.

We think, therefore, that this appeal must be allowed with costs here and in the Court below and that the proceedings in that Court must be stayed.

Appeal allowed with costs.