1979 September 6

[TRIANTAFYLLIDES, P., A. LOIZOU, AND MALACHTOS, JJ.]

CHRISTOFOROS PELEKANOS LTD.,
Appellants-Plaintiffs,

v.

KERMIA LTD.,
Respondents-Defendants.

(*Civil Appeal No.* 5360).

Contract—Building contract—Architect's certificate—Final certificate—Conclusiveness.

Arbitration—Stay of proceedings—Arbitration clause—Time-limit clause therein is binding on the parties—Building contract—Architect's final certificate—No disagreement with it within the time stipulated in arbitration clause or at any time thereafter—Arbitration clause could not be involved in order to secure a stay of proceedings.

The appellant company entered into two building contracts with the respondents-defendants for the construction of certain buildings for them. Clause 13* of the contract provided that, "at the expiration of the period of responsibility for defects..... ..... the Architect will issue a certificate of delivery setting out therein the full settlement of accounts of the contractor and the definite value of the work executed by the contractor, such certificate, ... excepting all the defects and insufficiencies in the ..... work and materials which a reasonable examination at the time of the construction or at the time of the delivery would not reveal, will be a conclusive evidence with regard to the sufficiency of the said work, and materials and their value". Clause 14** of the contract provided that "in the case when any dispute would arise between the Employer ..... and the contractor either during the period

* Clause 13 is set out at p. 441 *post*.

** Clause 14 is set out at pp. 441-42 *post*.

of the work or after the completion .....then the Architect will resolve such disagreement or dispute by a written decision given to the Contractor and the Employer. The said decision will be binding and final for the contracting parties except if the Contractor or the Employer within 14 days from the taking of same, by a written notice to the Architect disagrees with it, in such a case ..... such disagreement may be referred ..... to arbitration by two arbitrators in accordance with the provisions of the Cyprus Law". The buildings in question were completed on or about October, 1972. A detailed final account was submitted to the respondents and to the supervising architect who, in the presence and with the co-operation of the then internal architect of the respondents, examined these accounts, checked them in detail and on the 28th July, 1973, issued a final certificate to the effect that the respondents should pay to the appellant company the amount of £4,255.610 mils. The appellant company immediately afterwards sent the said certificate to the respondents and asked for payment of the said amount. The respondents did not ask the supervising architect to re-examine the said final certificate nor did they ask the reference of any dispute to arbitration in accordance with term 14 of the contract.

The appellant company sued the respondents for the said amount and the trial Court ordered a stay of the proceedings upon an application by the respondents under sections 4, 5 and 8 of the Arbitration Law, Cap. 4.

Upon appeal by the contractors:

Held, allowing the appeal, that a time limit clause and a step to be taken within that time as preliminary to a reference to arbitration is binding on the parties and failure to observe same prevents one from invoking an arbitration clause, when proceedings are filed, in order to claim a stay of proceedings; that since the respondents have not, by a written notice to the architect, disagreed with his certificate, within 14 days from the taking of same or at any time thereafter, Clause 14 could not be invoked in order to secure a stay of proceedings as its conditions have not been complied with; and that, accordingly, the appeal must be allowed.

Appeal allowed.

Cases referred to:

East Ham Borough Council v. *Bernard Sunlay and Sons Ltd.* [1965] 1 All E.R. 210, [1965] 3 All E.R. 619 (H.L.);

Hookway & Co. Ltd. v. *Hooper Co.* [1950] 2 All E.R. 843;

Liberian Shipping Corporation v. *King & Sons* [1967] 1 All E R. 934;

Pinnock Bros. v. *Lewis & Peat Ltd.* [1923] 1 K.B. 690;

Ashington Piggeries v. *Hill* [1971] 1 All E.R. 847;

Tak Ming Co. v. *Yee Sang Metal Supplies* [1973] 1 All E.R. 569;

Parson v. *Uttley Ingham* [1978] 1 All E.R. 525;

Hardwich Game Farm v. *S A.P.P.A. Ltd.* [1964] 2 Lloyd's Rep. 227.

Appeal.

Appeal by plaintiffs against the order of the District Court of Nicosia (Stavrinakis, P.D.C.) dated the 11th November, 1974 (Action No. 4200/74) whereby it was ordered that the proceedings in an action for the amount of £4,255.610 mils, balance due to the plaintiffs in respect of work done under two building contracts, be stayed on condition that the defendants would take the necessary steps for the reference of the dispute to arbitration within fifteen days.

K. Michaelides, for the appellants.

K. Chrysostomides, for the espondents.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice A. Loizou.

A. LOIZOU.: The appellant company instituted on the 11th June, 1974, in the District Court of Nicosia, an action by a specially endorsed writ against the respondent company, claiming the amount of £4,255.610 mils, balance due to them in respect of work done under two building contracts both dated the 15th January, 1971.

After appearance but before any other step in the action was taken, the respondent company filed on the 18th September, 1974, an application based on sections 4, 5 and 8 of the Arbitration Law, Cap. 4, praying for an order of the Court that all further proceedings in the action be stayed.

In the affidavit filed in support thereof, it is stated:

"3. Both building contracts contain, in Article 14 of the

terms of the contract (ὅροι τοῦ Συμβολαίου) which are expressly made integral parts of the said contracts, an arbitration clause. Copy of the said Article 14 is annexed hereto, marked 'A'.

4. Certain disputes have arisen between the parties under the aforesaid building contracts and the applicants-defendants have been in the past and are still ready and willing to refer such disputes to Arbitration. At the time when this action was commenced the applicants-defendants, were and still remain, ready and willing to do and concur in all things necessary for causing the matters in dispute to be decided by Arbitration under the said agreement and for the proper conduct of such arbitration .....".

An additional affidavit of the same date setting out the version of the respondent company regarding the disputed amounts was filed.

In a third affidavit filed on the 17th October, 1974, it is stated:

"2. After receipt of certification of the amounts dated 20th July, 1973, prepared by the architect Dr. Dikeos, it was agreed between Chr. Pelekanos and our Company that the whole matter should be discussed at a common meeting which took place end of October 1973, in our premises.

3. Plaintiffs-respondents, although in agreement that they would re-examine their claims and would come back for discussion of the subject, later refused to do so".

The version of the appellant company as appearing in the affidavit of Christoforos Pelekanos dated the 7th October, 1974, is that the said buildings in respect of which the dispute arose were completed on or about October, 1972. A detailed final account was submitted to the respondent company and to the supervising architect Mr. Charilaos Dikeos. Mr. Charilaos Dikeos in the presence and with the cooperation of the then internal architect of the respondent company, examined these accounts, checked them in detail and on the 28th July, 1973, issued a final certificate (attached to the affidavit), according

to which the respondent company should pay to the appellant company the amount claimed.

The appellant company immediately afterwards sent the said certificate to the respondent company and asked for payment of the said sum. The respondent company did not ask the supervising architect to re-examine the said final certificate nor did they ask the reference of any dispute to arbitration in accordance with term 14 of the contract, to the terms of which reference will shortly be made.

It is useful at this stage to refer, first, to paragraph (2) of term 13, of the contract, entitled "Taking of Delivery" which, translated into English, reads:

> "At the expiration of the period of responsibility for defects, which is referred to in the Appendix or if a period is specified then within six months and after the completion of the repairs of the defects, in accordance with term 3(i) of the present agreement, whichever is the latter, the Architect will issue a certificate of delivery setting out therein the full settlement of accounts of the Contractor and the definite value of the work executed by the Contractor, such certificate, excepting the case of fraud, non honest or deceitful concealment regarding the work, or the materials or with any other matter to which the certificate refers, and excepting all the defects and insufficiencies in the work and materials which a reasonable examination at the time of the construction or at the time of the delivery would not reveal, will be a conclusive evidence (μία άποδεικτική μαρτυρία) with regard to the sufficiency of the said work, and materials and their value".

Term 14 entitled "Arbitration", in so far as relevant, translated into English, reads:

> "*Instances of Arbitration*:
>
> (a) In the case when any dispute would arise between the Employer or the Architect acting on his instructions and the Contractor either during the period of the work or after the completion or after the annulment, breach or abandonment of the contract or in so far as it

refers to the interpretation of the contract or in so far as it refers to any matter or thing arising therefrom, or in so far as it refers to the withholding by the Architect of any certificate for which the Contractor may have a claim that he is entitled to, then the Architect will resolve such disagreement or dispute by a written decision given to the Contractor and the Employer. The said decision will be binding and final for the contracting parties except if the Contractor or the Employer, within 14 days from the taking of same, by a written notice to the Architect disagree with it, in such case, or in the case when the Architect for 14 days after a written application to him by the Employer or the Contractor, neglects to give a decision as hereinabove stated, then such disagreement may be referred and is already hereby referred to arbitration by two arbitrators in accordance with the provisions of the Cyprus Law.

Such reference, except for the question of the certificates or a change of the Architect, will not be raised except after the alleged completion of the work unless there is a written consent by the Architect and the Contractor".

In the case of *East Ham Borough Council* v. *Bernard Sunley and Sons Ltd.* [1965] 1 All E.R., p. 210, reversed in part and affirmed in part H.L. [1965] 3 All E.R., p. 619, the corresponding English term to clause 13(th) which is clause 24(f) is one of the terms of the R.I.B.A. Standard Form of Contract No. 6, (1950 ed.) and it reads as follows:

"(f) Upon expiration of the defects liability period stated in the appendix to these conditions or upon completion of making good defects under cl.12 of these conditions, whichever is the later, the architect shall issue a final certificate of the value of the works executed by the (contractors) and such final certificate, save in cases of fraud, dishonesty or fraudulent concealment relating to the works or materials or to any matter dealt with in the certificate and save as regards all defects and insufficiencies in the works or materials which a reasonable examination would not have disclosed, shall be

conclusive evidence as to the sufficiency of the said works and materials".

There is, however, paragraph (g) which also reads as follows:

"(g) Save as aforesaid no certificate of the Architect shall of itself be conclusive evidence that any works or materials to which it relates are in accordance with this contract".

The corresponding clause in the aforesaid Standard Form of Contract to English clause 14 in the present case is clause 27 which reads as follows:

" Provided always that in case any dispute or difference shall arise between the (Council) or the architect on (their) behalf and the (contractors), either during the progress or after the completion or abandonment of the works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this contract to the discretion of the architect or the withholding by the architect of any certificate to which the (contractors) may claim to be entitled to the measurement and valuation mentioned in cl.9 of these conditions or the rights and liabilities of the parties under cl.19, cl.20 or cl.25 of these conditions, then either party shall forthwith give to the other notice in writing of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of (blank) (the name is not filled in) or, in the event of his death or unwillingness or inability to act, of a person to be appointed on the request of either party by the president or a vice-president for the time being of the Royal Institute of British Architects, and the award of such arbitrator shall be final and binding on the parties. Such reference, except on art. 3 or art. 4 of the foregoing articles of agreement, or on the questions whether or not a certificate has been improperly withheld or is not in accordance with cl. 24 of these conditions, or on any dispute or difference under cl. 25 of these conditions, shall not be opened until after the completion or alleged completion or abandonment of the works, unless with the written consent of the (Council) or the architect on (their) behalf and the (contractors). Without prejudice to the

generality of his powers the arbitrator shall have power to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given".

Before proceeding any further it may be pointed out that under Clause 14 hereinabove set out, any dispute must first be referred to the Supervising Engineer, who must resolve such disagreement or dispute by a written decision which will be binding and final for the contracting parties except if the contractor or the employer within 14 days from taking the same by written notice to the architect disagrees with it, in which case the matter is referred to arbitration or is taken to be automatically referred to arbitrators. It may also be taken as referred to arbitration where the architect neglects to give a decision as already stated. Whereas under the English Clause 27, in case where any dispute or difference arises, in the circumstances described therein, either party shall forthwith give to the other notice in writing of such dispute or difference and such dispute or difference shall be and is thereby referred to the arbitration.

It was the case for the appellants that in view of the conclusiveness of the final certificate of the Supervising Architect, there was no dispute falling within the ambit of Clause 14; once they had this certificate, it was claimed that it was a question of collecting money and nothing else. In support of this proposition reference was made to the *East Ham B.C.* v. *Bernard Sunley* [1965] 3 All E.R. 619, as ultimately decided in the House of Lords and also to Hudson's Building and Engineering Contracts, 10th Ed., pp. 833 and 834. Moreover, it was claimed that this was not in fact a dispute within Clause 14 as it was not a dispute between the parties to the agreement but between the respondents and their agent, the architect.

It was claimed that there has been no application for extension

of time to go to arbitration and we have been referred to the case of *Hookway & Co. Ltd.* v. *Hooper Co.* [1950] 2 All E.R., p. 843, which was applied in the *Liberian Shipping Corporation* v. *King & Sons* [1967] 1 All E.R., 934. The question, however, for extension of time and the considerations that have to be born in mind as to whether same will be granted or not, does not have to be decided for the purpose of disposing of the present appeal, and so we need not deal with this aspect of the case.

In our view the issue on the basis of which we should determine this appeal is whether Clause 14 has been complied with or not.

The claim for payment by the contractor in this instance and the deliberations that took place in the presence and with the cooperation of the then internal architect of the respondent company, was in fact a dispute or disagreement which was resolved by the architect and who, on the 28th July, 1973, issued a final certificate according to which the respondent company should pay to the appellant company the amount claimed. The appellant company immediately afterwards sent the said certificate to the respondent company and asked for payment of the sum adjudged therein. The respondent company had, within 14 days from the taking of same, by a written notice to the architect, to disagree with it. This has not been done by the respondent company within the period of 14 days or as far as the evidence placed before the Court goes, at any time thereafter. Therefore, in our view, Clause 14 could not be invoked in order to secure a stay of proceedings in the present case as its conditions were not complied with.

In support of this approach reference may be made to Russel on Arbitration, 18th Ed., p. 56, where it is stated that "the parties to an arbitration agreement can in general insert into it such lawful terms as they please. Their freedom of contract is limited by the rule that the jurisdiction of the Court to entertain disputes cannot be ousted by agreement". It is obvious from the aforesaid passage that an arbitration agreement is governed by the law of contract and the procedure laid down therein being a matter of agreement between the parties has to be observed if anyone of the parties wants to take advantage of such agreement.

In the same text-book at p. 58, in dealing with the insertion

of provisions limiting the time for arbitration reference is made to the case of *Pinnock Bros.* v. *Lewis & Peat Ltd.* [1923] 1 K.B., 690, where an arbitration clause provided that notice of arbitration should be given within 14 days of the arrival of the ship. A dispute arose after that period had expired and the injured party attempted to refer it to arbitration but the arbitrator held that the time having expired he had no jurisdiction. In an action relating to the matter in dispute the defendant pleaded the arbitration clause held that the clause was not so phrased as to constitute a bar to claims not referred to the arbitration within the period.

This case has been distinguished in *Ashington Piggeries* v. *Hill* [1971] 1 All E.R., 847, and applied in *Tak Ming Co.* v. *Yee Sang Metal Supplies* [1973] 1 All E.R., 569. The *Ashington* case (*supra*) was also applied in *Parson* v. *Uttley Ingham* [1978] 1 All E.R., 525.

Though these cases referred to the effect of a time limit clause, yet they can equally be relied upon in support of the proposition that a time limit clause and a step to be taken within that time as preliminary to a reference to arbitration is binding on the parties and failure to observe same prevents one from invoking an arbitration clause when proceedings are filed in order to claim a stay of proceedings.

In the case of *Hardwick Game Farm* v. *S.A.P.P.A. Ltd.* [1964] 2 Lloyd's Rep. 227, it is stated:

> "An arbitration clause provided 'Notice of arbitration shall be given and arbitrator appointed ..... not later than twenty-one working days after final discharge of vessel declared against the contract'. Held, there was no express condition that if the notice was not given or arbitrator appointed within the stipulated time the claim should be deemed to be waived and absolutely barred. Moreover, if there was a case where the claim could not be raised within the stipulated period (as is in the instant case) it was difficult to see how the rule could apply. The clause was not a time barring clause at all, it merely deprived a party guilty of laches from arbitrating".

It is significant that in this case it was held that the clause was not a time barring clause at all, but—and we stress this—it

merely deprived a party guilty of laches from arbitrating, which means that in our case the party guilty of laches, i.e. of not complying with Clause 14, is deprived from arbitrating.

For all the above reasons the appeal should be allowed with costs and the order of the trial Court be set aside.

Order accordingly.

Appeal allowed with costs.