

[JOSEPHIDES, LOIZOU, HADJIANASTASSIOU, JJ.]

J. F. AHO ET FILS, TRADING UNDER
THE STYLE SOCIETE B.E.P.I.N.,
AND ANOTHER,

Appellants-Defendants,

v.

PHOTOS PHOTIADES & CO.,

Respondents-Plaintiffs,

(Civil Appeal No. 4704).

1968
Dec. 12, 13

J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER
v.
PHOTOS
PHOTIADES & Co.

*Agent—Commission or remuneration—Claim under alleged agree-
ment for remuneration for services rendered for the sale of
machinery—No such agreement proved—In any event, no
remuneration or commission is due, the sale having not been
effected through endeavours of agent—See, also, under Agency
herebelow.*

*Agency—Remuneration or commission payable to agents —
—Ordinary law of contract applicable—Establishment of
claim for commission or remuneration—Principles and tests
applicable—To establish a claim for commission the agent
must show that his act was the efficient or direct cause of the
transaction in respect of which the claim is made—Or, in
other words that such transaction was the direct result of
the agency—See, also, hereabove and herebelow.*

*Contract—Agency—Payment of commission or remuneration
to agents—Ordinary law of contract applicable—Test ap-
plicable—Agency must be the efficient or direct cause of the
transaction involved—Contract—Implied contract—Implied
term—When a term can be implied—Function of the Court
to interpret and apply the contract as proved—And not to
make the contract for the parties or reconstruct an agree-
ment on equitable principles.*

Commission—See above.

*Implied contract—Implied term—Function of the Court—See
above under Contract.*

*Practice—Documentary evidence—Observations by the Court
with regard to the procedure to be followed in producing bulky
correspondence or other documentary evidence, which is*

1968
Dec. 12, 13
—
J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER
v.
PHOTOS
PHOTIADES & CO.

not objected to—Duty of counsel—Duty of the Court—Documents to be filed before the hearing in bundle in chronological order, with extra copies for the use of judges—Proper stage at which action must be prepared for hearing is the “directions” stage.

Documentary evidence—Production of—Procedure to be followed—See above under Practice.

Correspondence—Production—See above under Practice.

This is an appeal by the second and third defendants against the judgment of the District Court of Nicosia awarding to the plaintiffs the sum of £6,500 as remuneration for services rendered by them. The claim against the first defendant was dismissed. The contract relied on by the respondents (plaintiffs) was that they were to render their services to the effect that the Hellenic Mining Company would be persuaded to purchase equipment and machinery for their proposed cement factory from the German firm “Polysius”, defendant 1.

The Supreme Court took the view that the following two questions were sufficient to determine this appeal: The first was whether there was a valid and binding agreement between the appellants and the respondents and whether the latter were entitled to any remuneration under the terms of that agreement; and the second question was, assuming the agreement proved, whether the Hellenic Mining Company was in fact persuaded by the respondents (as they pleaded) to purchase the equipment and machinery for its said cement factory from the firm “Polysius” (*supra*).

Allowing the appeal and setting aside the judgment of the District Court of Nicosia appealed from, the Supreme Court:-

Held, (1)(a) there are many decided cases on the question of the payment of commission or remuneration to agents but it is well settled that it is the ordinary law of contract which applies in this case and we propose, with respect, to adopt certain statements from the speeches of the learned judges in the leading case of *Luxor (Eastbourne) Ltd. v. Cooper* [1941] A.C. 108; at pp. 124 and 126 per Lord Russell and at pp. 130 and 137 per Lord Wright (quoted *post* in the judgment).

(b) To sum up, the position is this, that we have to look to this case as being governed by the ordinary law of contract and to interpret and apply the contract as alleged to have been made by the parties, if made at all, and not to make the contract for the parties or reconstruct an agreement on equitable principles.

(2) With regard to the payment of commission, this matter was considered by the Supreme Court of Cyprus in the case *Orphanides v. Michaelides* (1967) 1 C.L.R. 309, at p. 318. Reference was made there to several English cases and the principle adopted was that the act of the agent must be *the efficient cause* of the sale. In *Pollock and Mulla's Indian Contract and Specific Relief Acts*, 8th edition, where the English cases on the point are summarised, it is stated, at p. 679: "But in order to establish a claim for commission the agent must show that the transaction in respect of which the claim is made was a *direct* result of his agency. It is not sufficient to show that the transaction would not have been entered into but for his introduction. He must go further and show that his introduction was the *direct cause* of the transaction".

(3) Looking at the documentary evidence we find nothing to support the agreement as alleged by the respondents (plaintiffs) in their statement of claim and we hold that no such agreement has been proved by the evidence.

(4) But assuming the agreement to have been proved, that is to say that the appellants (defendants 2 and 3) instructed the respondents to render their services to the effect that the Hellenic Mining Company would be persuaded to purchase equipment and machinery for their cement factory from "Polysius" (defendants 1) and that the appellants undertook to pay a reasonable remuneration or commission on the evidence of P. and L. (the Chairman and the Technical Director of the Hellenic Mining Company respectively) we have no doubt whatsoever that the said Mining Company was not persuaded to purchase machinery from "Polysius" as a result of the endeavours of the respondents (plaintiffs). On the contrary the Hellenic Mining Company had considered the matter and made a survey of prospective suppliers of machinery, including "Polysius", long before they were approached by the respondents (plaintiffs) and they had arranged to send their

1968
Dec. 12, 13

J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER
v.

PHOTOS
PHOTIADES & Co.

1968
Dec. 12, 13
—
J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER
v.
PHOTOS
PHOTIADES & CO.

technical director L. to visit the "Polysius" factory in Germany before they were approached by the respondents (plaintiffs).

(5) For the above reasons the plaintiffs' claim must fail, the appeal is allowed with costs here and in the Court below and the judgment of the District Court of Nicosia is set aside and the plaintiffs' claim dismissed.

Appeal allowed with costs.

Practice: Observations by the Court with regard to the procedure to be followed in producing bulky documentary evidence:

In the present case there were more than thirty lengthy letters and they were produced by the parties in the course of their evidence in a haphazard way, and *not* in chronological order. This made the task of this Court very difficult. It has been pointed out more than once that the proper stage at which the action must be prepared for hearing is the "directions" stage. It is the duty of counsel, no less than that of the Court, that directions should be given that correspondence or other documentary evidence, which is not objected to, should be prepared and filed by the advocates of the parties, before the hearing, in a bundle in chronological order and numbered consecutively, accompanied by a detailed list of contents. Extra copies should be supplied to the Court for the use of the judges, so that no time may be wasted over these matters in the course of the hearing.

Cases referred to:

Luxor (Eastbourne) Ltd. v. Cooper [1941] A.C. 108, at pp. 124, 126, per Lord Russell; at pp. 130, 137, per Lord Wright, *adopted*;

Orphanides v. Michaelides (1967) 1 C.L.R. 309 at p. 318.

Appeal.

Appeal by the second and third defendants against the judgment of the District Court of Nicosia (Mavrommatis and Stylianides D.J.J.) given on the 24th February, 1968, in Action No. 961/65, whereby the plaintiffs were awarded the sum of £6,500 as remuneration for services rendered by them.

N. Hji Gavriel for the appellants.

Chr. Mitsides for the respondents.

Cur. adv. vult.

1968
Dec. 12, 13

J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER

v.
PHOTOS
PHOTIADES & Co.

The judgment of the Court was delivered by:-

JOSEPHIDES, J.: This is an appeal by the second and third defendants against the judgment of the District Court of Nicosia awarding to the plaintiffs, the sum of £6,500 (six thousand and five hundred pounds) as remuneration for services rendered by them. The claim against the first defendant was dismissed.

By their action the respondents (plaintiffs) claimed the sum of £10,000 (ten thousand pounds) in the endorsement to the writ, and the sum of £30,000 (thirty thousand pounds) in the prayer in the statement of claim, for expenses and services rendered and/or for commission and/or under an agreement or an implied agreement.

The respondents are a general partnership, carrying on various lines of business in Nicosia. The first defendant is a German firm of industrialists. The third defendants (appellants) were for all intents and purposes identified and treated as one with the second defendants (appellants) in the District Court: They are the agents of the German firm, and they are carrying on business in Beirut as commission agents. In the present judgment we shall refer to the respondents (plaintiffs) as "Photiades", to the appellants, who are the second and third defendants, as "Aho", and to the first defendant as "Polysius".

Photiades and Aho had been in close consultation since 1961 in connection with the floating of certain companies and investment in certain projects, including the securing of a permit from the Government of the Republic of Cyprus for the establishment of a cement factory or, failing that, the investment of capital in such factory. The turning point in their relations is to be found in a letter written by Photiades to Aho on the 9th May, 1963, in which he announced the decision of the Government of Cyprus to grant the permit for the establishment of the cement factory to the Hellenic Mining Company.

The basis of Photiades's claim is to be found in paragraph 3 of the statement of claim in which it is alleged that "defend-

1968
Dec. 12, 13

J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER
v.
PHOTOS
PHOTIADES & Co.

ants 2 and 3 or either of them acting in their aforesaid capacity requested and/or instructed and/or expressly or impliedly requested and/or instructed the plaintiffs to render their services to the effect that the Hellenic Mining Company Ltd. be persuaded to purchase equipment and machinery and accessories for the proposed cement factory for which the Hellenic Mining Company had obtained a special permit from the Government of Cyprus, from defendant 1, and undertook expressly or impliedly to pay the plaintiffs a reasonable remuneration or commission for their services in respect thereof". It will thus be observed that the contract alleged by Photiades is that he was to render his services to the effect that the Hellenic Mining Company would be persuaded to purchase equipment, machinery and accessories from Polysius. In paragraph 5 of the statement of claim Photiades claimed that he was entitled to a commission of 5% on £600,000, which commission amounts to £30,000, and that this amount "is a fair and reasonable commission and/or remuneration for services rendered as above on a quantum meruit basis and/or reasonable remuneration and/or in accordance with the custom of the trade". Polysius and Aho by their defence denied such agreement.

The Full District Court of Nicosia, after hearing nine witnesses, called on behalf of Photiades—the main of whom was Photiades, the senior partner—and the evidence of Aho (the third defendant), delivered a careful and elaborate judgment. This is their conclusion with regard to the evidence of Photiades himself:

"We have given due consideration to the evidence of Mr. Photiades and we think that there are many allegations therein and especially the one about agreed remuneration in respect of which we consider his evidence as unsatisfactory.

"A number of *exhibits* were produced in this case which we consider of great significance in view of the fact that the defendants No. 1 have not given evidence and that the defendant 3, whilst giving evidence also did not impress us as a good witness either. What we propose to do in due course is to compare the evidence of both P.W.1 and defendant No.3 with the *exhibits* produced and rely more on the *exhibits* than on their oral evidence. The same applies also with equal force

(with certain exceptions), as shall be stated hereinbelow, to the evidence of most of the witnesses called by plaintiffs”.

With regard to the evidence of Paschalis Paschalides, the Chairman of the Board of Directors of the Hellenic Mining Company, who was called to give evidence on behalf of Photiades, the trial Court were of the view that he was a “most important and reliable witness”. We shall revert to his evidence later.

Having dealt with the witnesses, the trial Court recorded their findings of fact stating that such findings were based *mainly* on the *documentary evidence*, and the evidence of those of the witnesses whom they found to be reliable and “to a lesser extent on that part of the evidence” of Photiades which they considered “as more or less reliable and which extends mainly to evidence having nothing to do with the defendants No. 1 and to agreed commission”.

Pausing there, and having regard to the documentary evidence and the way in which Photiades gave his evidence, we have no doubt, whatsoever, that it was very unsafe for the trial court to have relied at all on his evidence.

The trial court further stated in their judgment that “From the documentary evidence we have no doubt whatsoever that the plaintiffs were to be paid for rendering services to the defendants No. 2 and 3 (*Exhibits* No. 18 and 19)”. *Exhibit* 18 is dated the 7th March, 1963, and *exhibit* 19 is dated 25th September, 1962. We shall revert to these letters at a later stage.

Further on the trial court said:

“As stated, it was the intention of both parties to pay the plaintiffs (who were to be the watchdogs in Cyprus for the defendants 2 and 3) for the services which they were to render in their common interest. We do not think there was any specific agreement for the payment of any commission but in the light of the evidence of Mr. Maheriotis and from all the evidence before us, including documentary evidence (*Exhibits* No. 2, 18 and 21(b)), we are of the view that they were to share the commission to be paid by the suppliers had they been successful. This, we would rather prefer to call remuneration for services rendered rather than commission”.

1968
Dec. 12, 13

J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER
v.
PHOTOS
PHOTIADES & Co.

We shall refer to *exhibits 2 and 21(b)* later, in the sequence of events.

With regard to Polysius (the first defendant), the trial court came to the conclusion that no legal relations had been created between Photiades and Polysius who dealt directly with Aho, and Photiades's claim against Polysius was accordingly dismissed.

Aho was eventually paid the sum of about £14,500 commission by Polysius for the supply of the machinery to the Hellenic Mining Co., or, to be precise, the Vassiliko Cement Works Ltd., which is a subsidiary of the Hellenic Mining Company. This figure is equivalent to 2.66% of the total value of the machinery and equipment supplied by Polysius. It has been Aho's case throughout that he received this remuneration or commission as the accredited agent of Polysius in the Near East, having been such an agent for the past 20 years.

Aho's case was argued before us on the following grounds:

- (a) that no authority was given by Aho to Photiades;
- (b) if such authority were given, it was revoked or withdrawn by the letter dated the 16th August, 1963;
- (c) that Photiades's act was not the *causa causans* or the efficient cause of the sale;
- (d) that there was no binding contract between the suppliers and the purchasers;
- (e) that the Court wrongly found the agreement proved on the evidence adduced; and
- (f) that the amount awarded was excessive, assuming that it was on a *quantum meruit* basis.

Photiades's case, with regard to the alleged contract, was based on three letters as follows: Letter dated the 25th September, 1962 (*Exhibit 19*), letter dated 7th March, 1963 (*Exhibit 18*), and letter dated the 16th May, 1963 (*Exhibit 2*).

The letter dated the 25th September, 1962 (*Exhibit 19*), is addressed by Aho to Photiades and it reads as follows:

"With reference to your letter dated 18th September, 1962, kindly note the following:

"*Tender for road machinery for P.W.D.*

"We enclose herewith copy of our letter reference CYP/DIV-1946 of today's date, addressed to your Sister Company, The Cyprus Marketing Co. Ltd., P.O.B. 264, Nicosia, and are pleased to confirm to you that we have included in our quotations a 5% commission for you.

"Cement factory.

"We will write to you on this subject in the few coming days".

Pausing there, it will be seen that there is nothing expressly embodied in the letter with regard to the cement factory. The only reference to 5% commission is to a tender for road machinery for the Public Works Department.

The letter of the 7th March, 1963, (*Exhibit 18*), which is addressed by Aho to the Cyprus Marketing Co. (see previous letter), reads as follows:

"Subject: *Tenders for Plant.*

"We wish to acknowledge receipt of your letter dated March 2, 1963 attaching documents pertaining to the Cyprus Government various tenders for machinery.

"Accordingly we have communicated same to our various suppliers with the request that they send us their offers separately for each type of tender. In view of the magnitude of these tenders and in order to render our offers competitive we have requested our suppliers to show their prices cif Cyprus Port inclusive of five per cent commission only which we will share with you on equal basis.

"Considering that the closing date for these tenders is on Saturday March 23, 1963 at 10 a.m. we have urged our suppliers to communicate to us their offers not later than the 18th inst. which will give us time to mail them to you before the closing date.

"May we request you for the future to communicate to us such elaborate tenders early in advance, so as to have the necessary material time to meet any adverse contingencies in case they arise and still be able to meet the tender before its ultimate expiry date".

There we would observe that the subject is "tenders for plant" pertaining to the Cyprus Government, and that it is

1968
Dec. 12, 13
—
J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER
v
PHOTOS
PHOTIADES & Co.

1968
Dec. 12, 13

J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER
v.
PHOTOS
PHOTIADES & CO.

stated in the letter that "in view of the magnitude of these tenders and in order to render our offers competitive we have requested our suppliers to show their prices cif Cyprus port inclusive of five per cent commission only which we will share with you on equal basis". Then the letter goes on to refer to the closing date of those tenders, and in its final paragraph Photiades is requested that in future he should communicate to Aho "such elaborate tenders early in advance". There again, this is a specific agreement for tenders to the Cyprus Government, the closing date of which was the 23rd March, 1963. There is nothing in that letter about the supply of machinery by Polysius for the cement factory. In passing it should be stated that nothing materialized out of the above letter and that no commission was ever paid by Aho to Photiades.

Finally, we come to the last letter, dated *16th May, 1963* (*Exhibit 2*). The following is the material extract:

"Cement factory: We note with certain regrets that the Council of Ministers has decided to allow the granting of one permit only and it has been issued in favour of the Hellenic Mining Co. of Nicosia. It appears, however, that the HMC are not in a position to raise the required capital to cover the construction and equipment of the entire project. Whatever the outcome of this situation we can still consider the possibility of negotiating with the prospective Company for the supply of necessary equipment and even contract for the delivery of a complete Cement Co. 'Key on the door'. We request you, therefore, to keep a close watch on the development of this project and advise us in due time in order that we may jointly take the necessary action in this respect".

Photiades lays particular emphasis on the statement in this letter that whatever the outcome of the situation Aho would still consider the possibility of negotiating with the prospective company for the supply of the necessary equipment and even contract for the delivery of a complete cement factory; and, most important of all, according to Photiades's counsel, was Aho's request to Photiades "to keep a close watch on the development of this project and advise us in due time in order that we may jointly take the necessary action in this respect".

As already stated, the trial court in their judgment stated that, in reaching their conclusion, they also relied on a letter dated the 20th May, 1963 (*Exhibit 21 (b)*), from Aho to Polysius, but we are of the view that this does not carry the matter any further.

We shall consider the argument presented on behalf of Photiades after we shall have stated the full facts. The other material dates in this case are the following: Aho terminated or revoked his authority to Photiades by a letter dated the 16th August, 1963. The tender of Polysius regarding the supply of machinery reached the Hellenic Mining Company on the 2nd September, 1963. The Vassiliko Cement Works Ltd., which is a subsidiary of the Hellenic Mining Company, to carry on the operation of the cement factory, was registered on the 30th December, 1963, and finally, the order for the machinery was placed with Polysius on the 10th August, 1964.

As already stated, the trial court relied mainly on the documentary evidence and the other reliable evidence as described by them. We regard the evidence of Paschalis Paschalides, coupled with the documentary evidence to which we shall refer, as the touchstone on which the case turns. Considering that the case turns mainly on documentary evidence, apart from the evidence of Paschalides, we, sitting as a court of appeal, are in as good a position as the trial court to draw our own conclusions and decide the question.

Referring to the documentary evidence, the first material letter is that dated the 9th May, 1963, written by Photiades to Aho. In that letter he informed Aho of his "deepest regret" that, in spite of his (Photiades's) endeavours and contacts, the Council of Ministers decided at their last meeting to allow the granting of one permit only for a cement factory, and that to the Hellenic Mining Company. After expressing certain views, Photiades goes on to say -

"Whilst we doubt very much the correctness of this statement we can readily inform you that even with the permit already issued in their name unless the H.M.C. reconsiders considerably their attitude about the value of the above assets we doubt it very much whether they will eventually be able to achieve the realisation of this project.

"We are, however, following the matter very closely

1968
Dec. 12, 13
—
J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER
v.
PHOTOS
PHOTIADES & CO.

1968
Dec. 12, 13

J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER
v.
PHOTOS
PHOTIADES & Co.

and we shall keep you informed of any new develop-
ments”.

Meantime, Polysius is rather disturbed that neither Aho nor Photiades are doing anything with regard to the supply of machinery and on the 16th May, 1963, he writes a letter to Aho about it, threatening that unless they did something about it he would stop any future business relations with them. Following that letter Aho comes to Cyprus on or about the 24th May, 1963, and together with Photiades they call on Paschalis Paschalides, the Chairman of the Hellenic Company and the technical director of the cement factory, Loizides, in connection with the supply of machinery for the cement factory by Polysius. As a result of that meeting, Photiades on the 24th May, 1963, writes a long letter to Polysius in which, after alleging that he had several meetings and discussions with the officials of the company, including a meeting with no less a personality than the President of the Republic and meetings with several Ministers, he states:

“Now on the occasion of the visit of Mr. J. Aho we discussed with the management of the Hellenic Company the question of supplying Polysius equipment to them and we can tell you that we have managed to make them really interested in your equipment. Their interest was to such an extent as to agree to send their Chief Engineer and Technical Director Mr. N. D. Loizides, Dipl. Ing., M.A.I.E.E. A.M.I. MECH.E. in order to see your production and confirm by his personal conviction that what we promised about the quality of your machinery is the reality.

“This gentleman being the technical person who will chose the right equipment, should be given as great importance as possible, during his visit and look after him in a way that will please him to such an extent as to be influenced as much as possible.

“We are doing ourselves the necessary from this end in this connection, but we thought that it would be to our mutual benefit if you try to please him yourselves as well”.

And the letter concludes:

“We enclose, herewith in the meantime, a questionnaire which has been given to us by the Director of the

Hellenic Company which we request that you study carefully and prepare all the information and details immediately, so that they be ready when Mr. Loizides visits you around the second June next”.

Pausing there, we should compare the statements made by Photiades in this letter with what actually happened. Fortunately, we have the reliable evidence of Paschalides. This is what he said in his evidence which has been accepted in toto by the trial court:

“Q. Who suggested this German Firm to you?

“A. Well, before obtaining the permit for this factory the technical service of our group of companies had made the necessary efforts and had in mind a number of reputable firms which could supply the machinery to us. One of these firms was Defendant 1, Polysius”.

Further down:

“With Mr. Photiades I had three meetings in May, 1964. During the first two of these meetings Mr. Syrimis, the accountant, was present and the purpose of those meetings was for them to participate in the formation of the new company by supplying part of the capital. I have noted the dates of these two meetings in my diary. During the third meeting the date of which is not down in my diary, Mr. Photos Photiades visited me with Mr. Aho. During that meeting both of them told me that the Polysius firm was prepared to submit a tender for the supply of machinery for the factory. As my usual practice was, I referred both these gentlemen to Mr. Loizides, the technical adviser of our Company. Finally the Company purchased from Polysius the necessary machinery”.

And further down in Cross-Examination:

“As stated, I knew about Polysius well before approached by Mr. Photos Photiades, so did our technical staff. As stated, we had in mind five or six or ten factories which our technical staff intended to visit personally before finally deciding on the firm which we were going to use for the purpose of the supply of the machinery. One of them was Polysius.

“Q. Therefore, it was not the visit of Photiades that

1968
Dec. 12, 13
—
J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER
v.
PHOTOS
PHOTIADES & Co.

1968
Dec. 12, 13

J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER
V.
PHOTOS
PHOTIADES & CO

induced you to do it?

“A. As stated, we had already decided before his visit to approach these people ourselves amongst the others and as a matter of fact we did so”.

And, finally, in answer to the Court, Paschalides stated:

“Q. Mr. Paschalides, as far as we understand it from your evidence, it appears that the original idea for contacting Polysius, the visit there and the negotiations which led to the final deal were done on your own initiative and not through the good services of anybody else?

“A. Yes, this is true. In the interest of the Company we had made the necessary studies well beforehand and we proceeded accordingly”.

Nearchos Loizides, the technical director of the Vassiliko Cement Factory, who was called on behalf of Aho, stated in evidence as follows:

“As we told Mr. Photiades and Mr. Aho during the visit we knew well before their visit about Polysius”.

And further down:

“Long before Mr. Photiades approached us we made a list of the appropriate factories and we decided to approach these factories ourselves and we also decided not to ask for offers by publishing an invitation to this effect in the newspapers. We also decided not even to examine offers apart from those of the factories' offers which we have decided beforehand”.

Having quoted extensively from the evidence of Paschalides and Loizides, no further comments are necessary to give the lie to the statement of Photiades in his letter to Polysius of the 24th May, 1963. In short, Photiades was trying to convert the converted when he visited Paschalides and Loizides; but to Polysius he presented a picture that due to his extraordinary endeavours he had persuaded them to arrange a special visit to the Polysius factory in Germany.

Although Photiades based his case on the three letters dated 25th September, 1962, 7th March, 1963 and 16th May, 1963, on which the court found the contract proved, nevertheless, if that were so it is surprising to find Photiades

stating in his evidence the following:

“On the 24th or 25th of May (1963), when Mr. Aho was leaving Cyprus and by which time it was clear that we could not proceed with the original project (meaning the establishment of the Cement Factory by themselves), I asked Mr. Aho what the new state of affairs would be and his reply was that I was to get my one half of the commission to be earned from the supply of machinery to the new Cement Company, which commission was to be 10%. He promised to send to me a confirmation in writing of the fact that I was one of the appointed sub-agents of Polysius but he did not do it but instead of that he started acting on his own. He was also to confirm in writing the commission and the amount thereof, namely 10%”.

In fact, there was never a written confirmation and the trial court disbelieved Photiades that Aho ever promised to pay him 10 per cent commission. It should also be observed that this statement of Photiades, of a conversation which is stated to have taken place on the 24th or 25th May, 1963, after the conclusion of the alleged agreement with Aho (16th May, 1963), tends to show that no such agreement was ever concluded.

We shall refer briefly to the other correspondence in this case in order to give the background against which the case should be viewed. When Polysius received Photiades's letter of the 24th May, 1963, they noticed on the printed letter-head of his correspondence paper that he was the agent of "Allis Chalmers". This disturbed Polysius considerably and they wrote about it to Aho saying that they did not have confidence in Photiades, who was the agent of a competitor firm, to represent them as well. Polysius further wrote a letter to Aho on the 27th May, 1963, complaining about his inactivity with regard to the supply of the machinery. In reply to that letter, Aho wrote a very long letter on the 28th May, 1963, explaining fully the position and referring to visits he paid to the Chairman and Directors of the Hellenic Mining Company.

On the 27th June, 1963, Photiades writes a letter to Polysius referring to his previous letter in which he was informing Polysius about the impending visit of Loizides and stating "We have now seen the above gentleman after his return to

1968
Dec. 12, 13

J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER

PHOTOS
PHOTIADES & CO.

1968
Dec. 12, 13

J.F. AHO ET FILS,
TRADING UNDER
THE STYLE SOCI-
ETE B.E.P.I.N.,
AND ANOTHER
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PHOTOS
PHOTIADES & Co.

Cyprus who has informed us of his visit to you. He spoke with enthusiasm and great admiration with regard to the welcome and courtesy he had been favoured during his stay at your end and he requested us to thank you on his behalf”.

On the 9th July, 1963, Polysius writes a letter to Aho, being very disturbed about the representation of “Allis Chalmers” (Polysius’s competitor) by Photiades. He concludes his letter by saying that “In no case we shall continue addressing copies of our correspondence or tenders to Photiades”. On the 15th July, 1963, Aho replied to Polysius stating that he agrees with the writer’s information on the “lack of ethical business behaviour” on the part of Photiades and that on his (Aho’s) part he had taken the decision to interrupt business relations with Photiades. Finally, on the 16th August, 1963, Aho sends a letter revoking his authority to Photiades and interrupting all business relations.

This is the evidence as appearing from the correspondence between the parties.

We now have to consider two questions, which we think will be sufficient to determine this appeal. The first is whether there was a valid and binding agreement between Photiades and Aho and whether Photiades was entitled to any remuneration under the terms of that agreement; and the second question is, assuming the agreement proved, whether the Hellenic Mining Company was persuaded by Photiades to purchase the equipment, machinery and accessories for their cement factory from Polysius; because it should be borne in mind that that is the case pleaded by Photiades and he cannot be allowed to change front without amendment of his pleading.

There are many decided cases on the question of the payment of commission or remuneration to agents but it is well settled that it is the ordinary law of contract which applies in this case and we propose, with respect, to adopt certain statements from the speeches of the learned judges in the leading case of *Luxor (Eastbourne) Ltd. v. Cooper* [1941] A.C. 108. As Lord Russell says (at page 124), “(1) Commission contracts are subject to no peculiar rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of agency. (2) No general rule can be laid down by which the rights of the agent or the liability of the principal under commission contracts

are to be determined. In each case these must depend upon the exact terms of the contract in question, and upon the true construction of those terms”.

And further on (at page 126):

“I do not favour the view that an agent who has not earned his commission according to the express terms of the contract is entitled to damages for breach of some term to be implied. I see no necessity which compels the implication”.

Lord Wright, at page 130, says: “However that may be what is in question in all these cases is the interpretation, of a particular contract. I deprecate in general the attempt to enunciate decisions on the construction of agreements as if they embodied rules of law. To some extent decisions on one contract may help by way of analogy and illustration in the decision of another contract. But however similar the contracts may appear, the decision as to each must depend on the consideration of the language of the particular contract, read in the light of the material circumstances of the parties in view of which the contract is made”.

And at page 137 he says:

“There have been several general statements by high authorities on the power of the Court to imply particular terms in contracts. It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. But it is well recognized that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that ‘it goes without saying’, some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the Court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties.

“These general observations do little more than warn judges that they have no right to make contracts for the parties. Their province is to interpret contracts. But

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language is imperfect and there may be, as it were, obvious interstices in what is expressed which have to be filled up. Is there then any reason in the present case for thinking that there is some defect in expression or something omitted because it seemed too obvious to express? I cannot find any such reason".

To sum up, the position is this, that we have to look to this case as being governed by the ordinary law of contract and to interpret and apply the contract as alleged to have been made by the parties, if made at all, and not to make the contract for the parties or reconstruct an agreement on equitable principles.

With regard to the payment of commission, this matter was considered by the Supreme Court of Cyprus in the case of *Orphanides v. Michaelides* (1967) 1 C.L.R. 309, at page 318. Reference was made there to several English cases and the principle adopted was that the act of the agent must be the efficient cause of the sale. In Pollock and Mulla's Indian Contract and Specific Relief Acts, 8th edition, where the English cases on the point are summarised, it is stated, at page 679: "But in order to establish a claim for commission the agent must show that the transaction in respect of which the claim is made was a direct result of his agency. It is not sufficient to show that the transaction would not have been entered into but for his introduction. He must go further, and show that his introduction was the direct cause of the transaction".

Looking at the three letters, dated the 25th September, 1962, 7th March, 1963, and 16th May, 1963, we find nothing to support the agreement as alleged by the plaintiff in his statement of claim and we hold that no such agreement has been proved by the evidence. Two of these letters refer to other projects, and there is no general agreement; and the third one simply refers to transactions or joint action to be taken in future which, in fact, was never agreed upon.

But, assuming the agreement to have been proved, that is to say, that Aho instructed Photiades to render their services to the effect that the Hellenic Mining Company would be persuaded to purchase equipment and machinery for their cement factory from Polysius and that Aho undertook to pay a reasonable remuneration or commission, on the evidence of Paschalides and Loizides we have no doubt what-

soever that the Hellenic Mining Company was not persuaded to purchase machinery from Polysius as a result of the endeavours of Photiades. On the contrary, the management of such company, being efficient and reliable, had considered the matter and made a survey of prospective suppliers of machinery, including Polysius, long before they were approached by Photiades; and they had arranged to send their technical director, Loizides, to visit the Polysius factory in Germany before they were approached by Photiades. This is uncontradicted evidence and, in the face of such evidence, can it be said that the Hellenic Mining Company was persuaded by Photiades to purchase their equipment and machinery from Polysius? The answer is unhesitatingly in the negative.

For these reasons the plaintiffs' claim must fail.

Before concluding, however, this judgment we would take the opportunity of making certain observations with regard to the procedure followed in producing the documentary evidence in this case. There were more than thirty lengthy letters and they were produced by the parties in the course of their evidence in a haphazard way, and *not* in a chronological order. This made the task of this court very difficult. It has been pointed out more than once that the proper stage at which the action must be prepared for hearing is the "directions" stage. It is the duty of counsel, no less than that of the Court, that directions should be given that correspondence or other documentary evidence, which is not objected to, should be prepared and filed by the advocates of the parties, before the hearing, in a bundle in chronological order and numbered consecutively, accompanied by a detailed list of contents. Extra copies should be supplied to the Court for the use of the Judges, so that no time may be wasted over these matters in the course of the hearing.

In the result, the appeal is allowed with costs here and in the court below. The judgment of the District Court is set aside and the plaintiffs' claim dismissed.

Appeal allowed with costs.

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