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

OMIROS TH. COURTIS AND ANOTHER (No. 2),
Appellants-Defendants,

v.

PANOS IASONIDES,
Respondent-Plaintiff.

(*Civil Appeal No.* 5033).

Contract—Contingent contract—For the payment of share of profits through securing agency of a foreign firm and purchase of shares upon such securing—Agency secured after execution of contract but rejected a short time later—Contingency coming about on securing agency—And, therefore, agreement became a fully operative one—And rejection of agency as aforesaid amounting to breach of said agreement—There being an implied term therein that the appellants would try to keep such agency as long as possible, or at least for a reasonable period of time—Such implied term to be derived from the nature of the agreement and its contents as a whole—See further immediately herebelow.

Contract—Breach—Specific performance—Party in breach rightly held liable to pay compensation for loss of profits and to purchase the shares as agreed—But an order should have been made directing the respondent (owner of such shares) to transfer them in the name of the purchaser—Basis of assessment of compensation reasonably open to the trial Court.

Company—Shareholder claiming earnings out of profits realised by the company—Whether the Court could make its own calculation on the basis of the audited accounts before it—And whether in estimating such earnings liability for income tax payable in respect thereof ought to be taken into consideration.

Company—In process of voluntary winding up—Involved in civil proceedings—No application to stay proceedings under section 220 *of the Companies Law, Cap.* 113*—Judgment rightly given against the company in the present proceedings as aforesaid.*

The facts sufficiently appear in the judgment of the Court, dismissing this appeal.

Appeal.

Appeal by defendants against the judgment of the District Court of Larnaca (Orphanides and Demetriou, D. JJ.)

dated the 22nd December, 1971, (Action No. 1833/67) whereby : (*a*) defendant No. 1 was ordered to pay to the plaintiff £1,914.175 mils as a balance due to him in respect of the value of his shares in defendant No. 2, (*b*) both defendants were ordered to pay to plaintiff £4,630 by way of damages for breach of a contract, and (*c*) both defendants were ordered to pay to plaintiff £2,157.106 mils as earnings due to him out of the profits of defendant No. 2.

L. Clerides with *E. Lemonaris*, for the appellants.

G. Cacoyiannis, for the respondent.

The judgment of the Court was delivered by :—

TRIANTAFYLLIDES, P. : Appellant No. 1 is the majority shareholder and managing director of appellant No. 2, which is a company.

Both appellants have appealed from a judgment of the District Court in Larnaca (in action 1833/67), by virtue of which (*a*) appellant No. 1 was ordered to pay to the respondent £1,914.175 mils, with interest thereon at 9% per annum from the 1st June, 1967, as a balance due to the respondent in respect of the value of his shares in appellant No. 2, (*b*) both appellants were ordered to pay to the respondent £4,630, by way of damages for breach of a contract entered into between the appellants and the respondent on the 5th May, 1967, and (*c*) both appellants were ordered to pay to the respondent £2,157.106 mils, as earnings due to the respondent, out of the profits of appellant No. 2, in respect of the year 1966 and of the period until the end of April, 1967.

The central issue of this case is the performance of the said agreement of the 5th May, 1967. By means of clause 1 thereof the respondent consented that appellant No. 1 and/or appellant No. 2 and/or any other company, partnership or person acting directly or indirectly on behalf of appellant No. 1 and/or appellant No. 2 would become the agent of the C.U.F. (Companhia Uniao Fabril) group of companies in Portugal ; the agent of C.U.F. had been appellant No. 2 until a few days before the 5th May, 1967, when the agency was terminated by C.U.F. due to discord between appellant No. 1 and respondent, who were shareholders of appellant No. 2. By means of clause 5 of the contract the appellants undertook to pay to the respondent, so long as they were the agents of C.U.F. as per clause 1, half of the net profits realized through being the agents of C.U.F. It was, further, provided by clause 2 that the

respondent would sell to appellant No. 1 all his shares in appellant No. 2 at a price of £4,000 (out of which there would be deducted £2,085.825 mils owed by the respondent to appellant No. 2). Also, by means of clause 3 the appellants undertook to pay to the respondent his share of the till then profits of appellant No. 2.

There can be no doubt that the contract of the 5th May, 1967 (which is *exhibit* 40 in these proceedings) should be construed as a whole and as containing promises of the parties given in consideration of each other.

It has been the main contention of counsel for the appellants that the contract, *exhibit* 40, is a contingent contract and that the contingency on which its coming into effect depended, namely the securing by the appellants of the agency of C.U.F., has not happened ; it was argued in this respect that the agency of C.U.F. was offered to appellant No. 2 on terms materially different from those in the past and that it was, therefore, justifiably not been accepted by appellant No. 1, who was conducting the affairs of appellant No. 2.

We are of the opinion that this contention of counsel is not a valid one : The agency of C.U.F. was secured by appellant No. 1, on behalf of appellant 2, when an agreement to that effect was reached in August, 1967, at a meeting in Lisbon between appellant No. 1 and representatives of C.U.F.; there exists in the record before us ample documentary and oral evidence warranting this conclusion. It is true that the agency of C.U.F. was granted to appellant No. 2 —as a result of the meeting in Lisbon—on terms which were different from those in the past, but in our opinion such terms were not so fundamentally different as to support appellants' contention that the contingency in this respect, in clause 1 of *exhibit* 40, did not substantially occur.

After the C.U.F. agency reverted to appellant No. 2, as aforesaid, appellant No. 1 behaved (as it appears from the relevant correspondence) in a most unjustifiable manner, amounting, in effect, to an implied rejection of the agency, and C.U.F., eventually, withdrew it on the 8th September, 1967 ; in our view this development did not render *exhibit* 40 void for non-occurrence of the contingency envisaged in clause 1 thereof, because when the C.U.F. agency was secured once again in August, 1967, by appellant No. 1, on behalf of appellant No. 2, such contingency did come about and so *exhibit* 40 became a fully operative agreement.

Proceeding, now, further, with the construction of *exhibit* 40, we are of the opinion that it was an implied term that

after securing the C.U.F. agency the appellants would try to keep it as long as possible, or at least for a reasonable period of time ; in our view such implied term is to be derived from the nature, and the contents as a whole, of *exhibit* 40, which was, in essence, an arrangement made between the parties to these proceedings (a few days after the C.U.F. agency had been withdrawn from appellant No.2 due to discord between appellant No. 1 and the respondent, who were shareholders of appellant No. 2) for the purpose of providing for the withdrawal from appellant No. 2 of the respondent, in exchange, *inter alia*, of receiving his share of the profits from the agency of C.U.F. which, with his consent, would be granted once again to appellants ; and that this arrangement for the sharing of the profits of the C.U.F. agency was contemplated to last for a long period of time is shown by the fact that by clause 9 of *exhibit* 40 it was provided that it would bind the successors and heirs of appellant No. 1 and the respondent.

So, when the C.U.F. agency was, in effect, rejected, unjustifiably—as stated above—by appellant No. 1, who was acting on behalf of appellant No. 2, there occurred a breach of *exhibit* 40 and as a result the respondent became entitled to be compensated in respect thereof.

We are of the view that as the C.U.F. agency was secured for appellant No. 2, by appellant No. 1, and was lost later on by appellant No. 2, through the conduct of appellant No. 1 while acting for appellant No.2, it would be only the latter appellant who would be liable to compensate the respondent, had it not been for clause 5 of *exhibit* 40, by means of which *both* appellants undertook to pay to the respondent his share of the profits from the enjoyment of the C.U.F. agency as long as appellant No. 1 and/or appellant No. 2 would be agents of C.U.F. ; in our opinion the effect of such clause is that appellant No. 1 guaranteed the payment of the share of the respondent out of the profits of appellant No. 2 as agent of C.U.F., and, thus, appellant No. 1 is jointly liable with appellant No. 2 to compensate the respondent in this respect.

The amount of compensation due to the respondent was assessed by the trial Court at £4,630, on the basis of an expectation of profitable enjoyment of the agency for five years ; and in arriving at the said amount the trial Court relied on the earnings of appellant No. 2 as agent of C.U.F. during the period of the preceding ten years. We have carefully listened to lengthy arguments in relation to the correctness of the assessment of the compensation at

the trial. We have not been persuaded that it was not reasonably open to the Court below to proceed as it has done, and we are of the view that its decision on this point is warranted by the material before it ; it has not been established to our satisfaction that there has been made any error of a material nature which would prevent the assessment of compensation, as made at the trial, from being treated by us as substantially correct.

Coming, next, to the respondent's claim regarding the value of his chares in appellant No. 2, we cannot agree with the submission of appellants' counsel that the relevant clause of *exhibit* 40 (clause 2) contained merely an undertaking on the part of respondent to sell his shares to appellant No. 1, without any reciprocal obligation on his part to buy them ; bearing in mind the nature of the arrangement between the parties, which was embodied in *exhibit* 40, we are of the view that once the contingency in clause 1 thereof did happen, namely the C.U.F. agency was secured again by appellant No. 2, with the consent of appellant No. 1 and on the basis of the reciprocal promises contained in *exhibit* 40, appellant No. 1 became liable to purchase the said shares of the respondent in the manner stated in clause 2. We would add, however, that the decision of the trial Court on this issue, in favour of the respondent, should have been coupled with an order compelling the respondent to transfer his shares in appellant No. 2 to appellant No. 1, in accordance with the said clause 2, and we, therefore, do make such an order in this appeal.

The last matter with which we have to deal is that of the amount due to the respondent as his earnings, out of the amount of the profits of appellant No. 2 during 1966 and the earlier part of 1967. We find that the trial Court rightly based itself in this respect on audited accounts of appellant No. 2 and we do not agree with the contention that the calculations which it sets out in its judgment amount, in effect, to embarking on the course of doing its own accounting, in substitution of that of the accountants of appellant No. 2 ; in our view the trial Court merely made certain necessary calculations, on the basis of audited accounts before it—as it was bound to do—in order to ascertain the amount due to the respondent as aforesaid.

In relation to this claim of the respondent, counsel for the appellants has submitted that there ought to be taken into consideration the liability for income tax payable in respect of the earnings in question of the respondent and that the amount due to him by the appellants has to be reduced accordingly. We do not agree that such a course would

be correct in a situation such as the present one ; no allowance or deduction for income tax ought to be made, especially as there is no evidence on record on which it could be calculated ; but, of course, if either of the appellants, and particularly appellant No. 2 as company, were in future to be obliged to pay any income tax which should have burdened the respondent in respect of his said earnings then it will be open to either appellant No. 1 or appellant No. 2 or both, as the case may be, to seek to recover it from the respondent.

It is quite clear from clause 3 of *exhibit* 40 that in respect of the claim of the respondent for his earnings in 1966 and 1967 the appellants undertook a joint liability and, therefore, judgment against both of them was rightly given by the Court below.

Before concluding this judgment we must observe that we have considered the contention of counsel for the appellants that judgment could not be given against appellant No. 2 as it was, at the time, a company in the process of voluntary winding-up. We have found no substance in this contention because, notwithstanding the relevant provisions of the Companies Law, Cap. 113, and particularly of section 220 thereof, no application had been made for the proceedings before the trial Court to be stayed on the ground in question, and, moreover, by means of clause 4 of *exhibit* 40 it was agreed between the parties thereto, who are the same as the parties to these proceedings and two of whom (appellant No. 1 and the respondent) were the shareholders of appellant No. 2, that the voluntary winding-up, in respect of which no Court order had been made, would not take place.

For all the foregoing reasons this appeal fails and it is dismissed accordingly, subject to the judgment of the Court below being varied so as to include an order for the transfer by the respondent to appellant No. 1 of his shares in appellant No. 2.

In the light of all relevant considerations we have decided not to make any order as to the costs of the appeal.

As it has been agreed that a pending civil action between the parties, No. 2201/67 in the District Court of Famagusta, shall follow the result of the present proceedings we make, with the consent of both counsel, an order that such action should stand dismissed ; and, apart from such costs as have already been paid, we make no order as to its costs.

Appeal dismissed. No order as to costs.