[TRIANTAFYLLIDES, P., STAVRINIDES, HADJIANASTASSIOU, JJ.]

SOLON CHARALAMBIDES,

Appellant-Plaintiff,

v

YIANGOS HJISOTERIOU & SON AND OTHERS,

Respondents-Defendants.

(Civil Appeal No. 4888).

Credibility of witnesses—Findings of trial Court as to credibility—Appeal turning on such findings—Approach of Court of Appeal—It will not interfere if it was reasonably open to a trial Court to make the finding which it has made as to credibility—It is up to the party challenging such a finding to satisfy Court of Appeal that the finding is indeed erroneous—Appellant failed to discharge the onus of satisfying the Court of Appeal that it was not reasonably open to the trial Court to disbelieve his version and to accept, instead, the version of the respondents as regards the agreed practice between them, concerning entries about excise duty in the invoices.

The claim of the appellant in this appeal arose out of an agreement by virtue of which he acted as agent of the respondents, as manufacturers of brandy in Limassol.

His claim was mainly based on his allegation that in the course of dealing with the respondents the latter used to debit him with a higher than the normal amount as excise duty.

The trial Court believed the respondents' version in this respect which was to the effect that there did exist an agreement between them and the appellant to follow the practice of stating in the invoices a higher than the normal amount as excise duty, in order to make allowance for losses through breakages, leakages and evaporation.

The main issue on which the outcome of the appeal depended being one of credibility, the Court of Appeal

after referring to the case-law concerning its approach on appeal to an issue of credibility of witnesses,

Held, 1. It is to be derived from such case-law that if it was reasonably open to a trial Court to make the finding which it has made as to credibility then this Court will not interfere with it.

2. A particular feature of the approach of this Court, on appeal, to an issue of credibility is that it is up to the party which challenges a finding of a trial Court, on such issue, to satisfy this Court that the finding is, indeed, erroneous (see, *inter alia*, *Sakellarides* v. *Papa Savva and Another* (1966) 1 C.L.R. 259 at pp. 261, 262; *Moumdjis* v. *Michaelidou and Others* (1974) 1 C.L.R. 226, at p. 237).

3. In the light of all relevant considerations we have reached the conclusion in this case that the appellant has failed to discharge the onus of satisfying us that it was not reasonably open to the trial Court to disbelieve his version and to accept, instead, the version of the respondents as regards the agreed practice between them, concerning the entries about excise duty in the invoices, and, therefore, this appeal fails and has to be dismissed accordingly.

Appeal dismissed.

Cases referred to:

Koumbaris v. *The Republic* (1967) 2 C.L.R. 1 at p. 9;

Pyrgas v. *Stavridou* (1969) 1 C.L.R. 332, at p. 342;

Ponou v. *Ibrahim* (1970) 1 C.L.R. 78 at p. 82;

Kyriacou v. *Aristotelous* (1970) 1 C.L.R. 172 at p. 176;

Karavallis v. *Economides* (1970) 1 C.L.R. 271 at pp. 284, 285;

Sakellarides v. *Papa Savva and Another* (1966) 1 C.L.R. 259, at pp. 261, 262;

Papaellina v. *Epco (Cyprus) Ltd. and Another*, (1967) 1 C.L.R. 338, at p. 370;

Imam v. *Papacostas* (1968) 1 C.L.R. 207 at p. 208;

Constantinou v. *Symeonides* (1969) 1 C.L.R. 412 at p. 415;

Christodoulou v. *Georghiades* (1973) 1 C.L.R. 155, at pp. 157 - 158;

Hjisolomou (No. 2) v. *Manolis* (1972) 1 C.L.R. 180, at pp. 181 - 182;

Moumdjis v. *Michaelidou and Others* (1974) 1 C.L.R. 226, at p. 237.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Ioannides and Kourris, D.JJ.) dated the 26th March, 1970, (Action No. 542/69) dismissing his claim for C£7,651 which allegedly he had been deprived of by the defendants under a mistake, or through fraud, and ordering him to pay to them the sum of £2,045.- by way of counterclaim.

L. Clerides, for the appellant.

P. Cacoyiannis, for the respondents.

Cur. adv. vult.

The judgment of the Court was delivered by :

TRIANTAFYLLIDES, P. : This is an appeal against the dismissal by the District Court of Nicosia of an action in which the appellant, as plaintiff, claimed from the respondents, as defendants, the sum—(as eventually reduced during the trial)—of C£7,651, on the ground that he had been deprived of this amount by the respondents under a mistake, or through fraud, or misrepresentation, or by way of unjust enrichment.

During the trial a claim of the appellant for damages for breach by the respondents of a contract of agency was abandoned.

Also, judgment was given against the appellant on a counterclaim by the respondents for the amount of C£2,045; and in this respect there has been no appeal by the appellant.

The salient facts of this case, as they appear from the record before us, are the following :-

The appellant, who had been an Assistant District Inspector posted in the Office of the Nicosia District Officer until 1946, and who, subsequently, after leaving the public service, was trading in brandy, became in December, 1949, by virtue of a written agreement entered into by him and the respondents, the agent of the respondents, as manufacturers of brandy in Limassol; the agency was for the Nicosia and Kyrenia Districts.

Clause 5 of the agreement provided expressly that the prices of the goods to be sent to the agent would be those prices as would be fixed, from time to time, by the respondents, as manufacturers.

The appellant had, also, to pay the transport expenses, from Limassol, in relation to any quantities of brandy supplied to him.

In actual practice the course of dealing between the parties was that when the appellant received a particular quantity of brandy from the respondents he would always be handed an invoice, prepared by the respondents, whereby he was debited with the value of the brandy, in which there was included, too, the excise duty; he would sell such quantity for his own account and he had to pay to the respondents the amount with which he had been debited by means of the invoice; sometimes he paid in cash straightway, sometimes by instalments, and sometimes by returning empty bottles in respect of which he was credited by the respondents. His commission was, initially, 15% on the value of the brandy, without taking, however, into account, in this connection, the relevant amount of excise duty; his rate of commission was later increased to 20%.

The value of each quantity of brandy was calculated on the basis of a price fixed by the respondents.

In December, 1968, the respondents started marketing their brandy in Nicosia through other retailers, and the appellant protested to them about this; as the respondents did not heed his protests, he wrote to them a letter, in January, 1969, through his advocate, whereby he confirmed an earlier oral notice of his that he would cease to act as the agent of the respondents in respect of the Nicosia and Kyrenia Districts as from January 1, 1969.

He, also, claimed damages for breach of the agency contract, as well as damages for having been wrongly debited, to his detriment, with incorrect amounts of excise duty, in the invoices sent to him during the whole period of his co-operation with the respondents, namely from December 1, 1949, until December 31, 1968; he, eventually, instituted against the respondents an action, and when it was dismissed he filed the present appeal.

The matter of wrong entries in the invoices, as regards excise duty, was apparently noticed, for the first time, about the middle of 1968, when a certain Ayiomamitis pointed out to the appellant that the excise duty which was stated in the respondents' invoices was higher than that which was prescribed by law; but, according to the evidence of the appellant, he did not, at that time, believe this to be so. When the same person mentioned the matter to him, again, about a fortnight later, the appellant felt—as he has testified—that his confidence was shaken; so, when a certain Vafeades, a Customs and Excise Officer, visited the appellant's shop in the summer of 1968, he asked him to enlighten him about the correct excise duty for the brandy sent to him by the respondents. As Vafeades could not give him completely definite information, the appellant obtained, eventually, in January 1969, such information from the Ministry of Commerce and Industry; in the meantime he had unofficially received, towards the end of 1968, similar information from other wines and spirits manufacturers in Limassol.

In his evidence the appellant admitted that he knew all along that the excise duty on brandy was fixed by law; and that as he knew the percentage of spirit contained in the particular brandy which he was selling on behalf of the respondents, he could find the exact amount of excise duty payable in respect thereof, if he had made the necessary inquiries; but he insisted that he never did so, because he had confidence in the respondents. He admitted, however, that even after he had been warned by Ayiomamitis—and while, as a result, he was in fact making inquiries—he was still placing orders with the respondents and he raised with them the matter of what was the exact excise duty payable only after December

31, 1968, when his co-operation with the respondents ceased.

In order to view in its proper context the appellant's rather belated complaint, that he had been overcharged by the respondents as regards excise duty, it is, we think, necessary to bear in mind, too, his own admission that about a year earlier the respondents had started pressing him to reduce his debit balance with them, and they were, also, complaining that the sales of their brandy, through the appellant, had dropped.

As it appears from the evidence on record the complaint of the appellant is that the excise duty was shown in the invoices to be 900 mils per carton of 12 bottles of brandy, instead of 675 mils as was prescribed by law.

The respondents called only one witness—one of the partners in the respondent partnership—who stated that it had been arranged between the parties that the commission was payable to the appellant on the basis of the value of the goods supplied to him, less excise duty, and that he himself had secured the agreement of the appellant that there would be entered in the invoices, as excise duty, an amount higher than the one which was actually payable under the relevant legislation, in order to provide for losses from breakages, leakages and evaporation, because the duty was levied on the quantity of stock inside the factory and the Customs Department accepted only a 5% difference in respect of losses from such causes, which was not sufficient in the circumstances. The respondent partner did, candidly, concede that by entering in the invoices a higher amount for excise duty the commission of the appellant was being reduced to a certain extent.

The trial court, having heard and seen the principal witnesses, namely the appellant and the said respondent partner, disbelieved the former and believed the latter; it stated, in this respect, the following in its judgment :-

> "... we found the defendant a truthful and reliable witness. The evidence of the plaintiff was in many respects unreliable, quite unnatural, self-contradicting and very improbable to be true and believed. It is hard to believe that for 20 years he did not make

a calculation to find out the excise duty payable and find whether he was overcharged or not. Again, when his faith in the defendants began to shake in early July 1968, he did not take any steps at all, when he very well knew that thousands of pounds were involved and he would have been profited by these sums, which is very unnatural. He never mentioned this to the defendants and when he inquired from P.W.3, Vafeades, he did not go to seek him out and learn about the excise duty payable, but when this witness visited plaintiff's shop to obtain some information, the plaintiff asked him about the excise duty casually. This is not the conduct of a person who is anxious to recover a number of thousands of pounds, if his story were to be true. When again he gets informed in October or November 1968 from the factories in Limassol about the excise duty payable, he still continues co-operating with the defendants, and for December 1968 he placed an order with them well exceeding £1,000. The plaintiff makes no claim against the defendants and the only claim comes when the co-operation with the defendants stopped as a result of the drop of sales and also as a result that the plaintiff did not manage to pay off the money with which he was debited as a result of the sales of liquor to him, and which is counterclaimed by the defendants. This counterclaim was admitted at the commencement of the trial of this action."

The basic issue on which the outcome of the appeal depends is one of credibility, because if the respondents' version that there did exist an agreement between them and the appellant to follow the practice of stating in the invoices a higher than the normal amount as excise duty, in order to make allowance for losses through breakages, leakages and evaporation is true—as found at the trial —then there is no question of the appellant being entitled to claim anything from the respondents on such grounds as mistake, misrepresentation, fraud or undue enrichment.

So we have given lengthy and careful consideration to the aspect of credibility in this case.

Counsel for the appellant has argued that the trial court erred in accepting the version of the respondents, because it was inconsistent with the statement of defence, in that the agreement regarding the special arrangement about entries in the invoices of increased amounts of excise duty was never pleaded; he contended, further, that such version was inconsistent with a letter written by the respondents to him, as advocate of the appellant, on January 15, 1969; and he submitted, too, that the respondent partner who gave evidence, had, in effect, admitted, in the course of his testimony, that the practice of stating a higher than the normal amount of excise duty in the invoices did in fact "cheat" the appellant of part of his commission.

We should say straightway that we cannot agree that there exists in the evidence on record any admission by the respondents of an intention to "cheat", that is to defraud, the appellant; when the relevant evidence of the respondent partner is read as a whole, and in its proper context, it becomes quite clear that it amounts to nothing more than an admission that the practice in question did in fact deprive the appellant of his full commission to a certain extent; but, this was done, as found by the trial court on having accepted the respondents' version, with the concurrence of the appellant.

As regards, next, the contention that the said agreed practice had not been pleaded by the respondents, we do not think that such contention is well-founded, because from the statement of defence (and in particular from paragraph 7 thereof) it is obvious that such agreement has, in effect, been relied on in the statement of defence in so far as all its essential features are concerned.

Concerning the other submission of counsel for the appellant, which has been based on the contents of the letter of the respondents dated January 15, 1969, it is correct that there was no express mention in such letter of the agreement in question between the parties (about stating in the invoices a higher than the normal amount in respect of excise duty), but there is to be found, in this letter, a clear reference to clause 5 of the contract of agency between the parties, which provided that the respondents were entitled to fix the "prices" at which

their products would be supplied to the appellant.

In a case such as the present one it might be useful to refer to some of our case-law concerning the approach on appeal to an issue of credibility of witnesses: Some of the relevant decisions are cited in *Koumbaris* v. *The Republic* (1967) 2 C.L.R. 1, 9, and the same principles have been applied in subsequent cases such as *Pyrgas* v. *Stavridou* (1969) 1 C.L.R. 332, 342, *Ponou* v. *Ibrahim* (1970) 1 C.L.R. 78, 82, *Kyriacou* v. *Aristotelous* (1970) 1 C.L.R. 172, 176 and *Karavallis* v. *Economides* (1970) 1 C.L.R. 271, 284, 285.

It is to be derived from the above case-law that if it was reasonably open to a trial court to make the finding which it has made as to credibility then this Court will not interfere with it.

A particular feature of the approach of this Court, on appeal, to an issue of credibility is that it is up to the party which challenges a finding of a trial court, on such issue, to satisfy this Court that the finding is, indeed, erroneous (see, *inter alia, Sakellarides* v. *Papa Savva and Another* (1966) 1 C.L.R. 259, 261, 262, *Papaellina* v. *EPCO (Cyprus) Ltd. and Another* (1967) 1 C.L.R. 338, 370, *Imam* v. *Papacostas* (1968) 1 C.L.R. 207, 208, *Constantinou* v. *Symeonides* (1969) 1 C.L.R. 412, 415, *Christodoulou* v. *Georghiades* (1973) 1 C.L.R. 155, 157, 158, *Hjisolomou (No. 2)* v. *Manolis* (1972) 1 C.L.R. 180, 181, 182, and *Moumdjis* v. *Michaelidou and Others*, (1974) 1 C.L.R. 226, at p. 237).

In the light of all relevant considerations we have reached the conclusion in this case that the appellant has failed to discharge the onus of satisfying us that it was not reasonably open to the trial court to disbelieve his version and to accept, instead, the version of the respondents as regards the agreed practice between them, concerning the entries about excise duty in the invoices, and, therefore, this appeal fails and has to be dismissed accordingly.

Taking, however, into account all relevant considerations we have decided not to make any order as to the costs of this appeal.

Appeal dismissed.
No order as to costs.