1978 April 3

[STAVRINIDES, L. LOIZOU, A. LOIZOU, JJ.]

EPCO (CYPRUS) LTD.,

Appellants–Plaintiffs,

v.

LARTICO SYNTHETIC DETERGENTS CO., AND OTHERS,

Respondents–Defendants.

(*Civil Appeal No.* 5072)

Contract—Construction—Principles applicable—Contract giving exclusive rights of sale and distribution of respondents' products—Properly construed as referring to the products belonging to the respondents—And not to the products of another person manufactured by the respondents on that other person's behalf.

By virtue of a written agreement, entered into on the 4th March, 1968, the respondents–defendants appointed and made the appellants–plaintiffs, on a commission basis, exclusive agents and distributors, for the whole of the Island, for the "sale and distribution of their products" manufactured at the time or to be manufactured by them in the future, which consisted mainly of washing powder in boxes, various types of detergents and other similar products.

On the 4th November, 1969, the respondents by an agreement in writing with Detersa Ltd., of Nicosiá, which were authorised to use in Cyprus the trade mark DIXAN owned by a German Firm, undertook to manufacture the total requirements of DIXAN for Cyprus for the account of Detersa. The respondents were not the owners of DIXAN but they were merely manufacturing it for the account of Detersa.

The appellants sued the respondents and prayed for a declaration that the latter were bound to sell or deliver to plaintiffs for resale or distribution, on the basis of the agreement between them, dated 4.3.1968, all the products manufactured by the respondents under the name of DIXAN; and that the appellants were entitled at all material times to the agreed commission for the sale of DIXAN on the basis of the aforesaid agreement.

The trial Court dismissed the appellants' claim having come to the conclusion that the goods for which exclusive rights of

distribution were given to the appellants by the said agreement, were those belonging to the respondents and not the products of another person manufactured by the appellants on that other person's behalf. Hence the present appeal which turned on the construction of the agreement entered into on the 4th March, 1968.

Held, dismissing the appeal (1) the meaning of a document or of a particular part of it has to be sought in the document itself and that the intention of the parties must be discovered, if possible, from the expressions the parties have used. In that respect, clear and unabiguous words prevail over any intention, but if the words used are not clear and unambiguous then the intention will prevail. (See *Lloyd* v. *Lloyd* [1837] 2 My. & Cr. 192 at p. 202).

(2) Moreover, the deed has to be read as a whole so that the general intention is to be ascertained from the instrument as such, and be inferred from the general frame of the deed (see *N. E. Ry* v. *Hastings* (*Lord*) [1900] A.C. 260 at p. 267).

(3) Looking at the document as a whole in this case, one concludes that the intention of the parties as manifestly expressed therein and deduced from the duties and obligations undertaken by each of them, was that the exclusive rights of distribution cover only the goods of the respondents and not the goods manufactured by them on behalf of third parties over and above their own goods. Accordingly, the trial Court has not erred in its construction of the document in question, and there is no reason to interfere with its conclusions.

Appeal dismissed.

Cases referred to:

Lloyd v. *Lloyd* [1837] 2 My. & Cr. 192 at p. 202;

N. E. Ry v. *Hastings* (*Lord*) [1900] A.C. 260 at p. 267;

Chamber Colliery Co. v. *Twyerould* (1893) [1915] 1 Ch. 268 at p. 272.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Nicosia (Stavrinakis, Ag. P.D.C. and Evangelides, Ag. D.J.) dated the 18th March, 1972, (Action No. 2306/70) whereby their action for, *inter alia*, a declaration of the

Court that the defendants were bound at all material times to sell and/or deliver to them for resale or distribution, on the basis of a written agreement, all the products manufactured by defendants under the name of "DIXAN", was dismissed.

L. Demetriades with *D. Liveras*, for the appellants.

A. Hadjioannou with *X. Clerides*, for the respondents.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court.

STAVRINIDES J.: The judgment of the Court will be delivered by Mr. Justice A. Loizou.

A. LOIZOU J.: This appeal turns on the construction of a written agreement entered into on the 4th March, 1968, between the appellants, a Trading Company, and the respondents, manufacturers of detergents and soap, for a period of three years, commencing on the 11th February, 1968, to be automatically renewed for another three-year period only, provided both sides honoured their obligations and responsibilities thereunder. By clause 1 thereof, the respondents appointed and made the appellants exclusive agents and distributors for the whole of the island for the sale and distribution of their products manufacturered at the time or to be manufactured by them in the future, which consisted, mainly, of washing powder in boxes, various types of detergents and other similar products.

It is an elaborate agreement consisting of 12 clauses covering such items as credit facilities, mode of payment, quantities of yearly production, advertising, mode of delivery, the right of the respondents to fix the prices of the products in question, a reservation of the right to manufacture and dispose direct to Turkish packers detergent in bulk, of a special quality, without commission to the appellants, as well as the manufacture of a similar product for Greek packers through the appellants but on a commission to be agreed in such a case between them, the minimum quantities to be delivered to and distributed by the appellants, the setting up of offices and the organisation of a machinery of distribution throughout the island, including the minimum number of vans for transportation of the goods in question and their obligation not to carry out any business or deal with similar products either as employees of or agents of other firms. Further, the commission to be paid by the respondents to the appellants on the sales of their products was

set out in detail, making a differentiation between the various categories, and the amount of commission to be paid by the appellants to Co-operative Societies and wholesale dealers supplied by them.

On the 4th November, 1969, the respondents by an agreement in writing with Detersa Ltd., of Nicosia, authorised to use in Cyprus the trade mark DIXAN and all patents, formulae and technical information pertaining thereto, owned by the German Firm Henkel, undertook to manufacture the total requirements of DIXAN for Cyprus for the account of Detersa. This agreement was produced at the trial as *Exhibit* No. 4 for the purpose of showing that the respondents were not the owners of DIXAN, but merely manufacturing it for the account of Detersa, as stated therein and that the disclosure of the patents and formulae and the know-how to the respondents would not give them any rights thereon and that they would be using same only on behalf of Detersa.

The trial Court dealt with the several legal and factual issues raised before it at the trial in its elaborate judgment. Two of these were the true construction of the said agreement and the doctrine of restraint of trade to the extent that it could be applicable to this case, and it is against the conclusions and approach of the trial Court on these two issues that this appeal has been filed and argued before us. The grounds of appeal as they appear in the notice, are the following:

" (1) (a) The trial Court wrongly interpreted the contract between the parties (dated 4.3.1968), in that it failed to give effect to the intention of the parties as expressed in the document and/or in that the Court failed to construe the contract as a whole in order to ascertain its true meaning and/or in that the Court in construing the said contract wrongly directed their minds to the probability of such contract being void as offending the doctrine of restraint of trade.

(b) On its true construction the said contract placed on the defendants an obligation to sell the goods manufactured by them to the plaintiffs for resale by the latter, and it deprived the defendants of the right to manufacture and/or sell goods themselves, except to the plaintiffs, so long as the contract was operative.

(2) The trial Court wrongly construed the provisions of section 27 of the Contract Law, Cap. 149, and it wrongly applied the law to contract between the parties and the facts of the case. The contract in question was not an agreement in restraint of trade within the meaning of section 27 of the Contract Law, Cap. 149 when properly construed".

The trial Court came to the conclusion that the goods for which exclusive rights of distribution were given to the appellants by the said agreement, were those belonging to the respondents and not the products of another person manufactured by the appellants on that other person's behalf.

In support of this conclusion, it referred to a number of terms of the contract in question, their wording and in particular, to clause 4, whereby the respondents undertook to make regular advertisements which were required and were necessary for the advertisement of their goods. Particular stress was laid on clause 4 which requires the respondents to undertake to carry out the advertising which was necessary for the promotion of "their" goods. Emphasis was given to the significance of the word "their", as supporting the proposition that no such undertaking could be given for the advertisement of goods which were not theirs and from the promotion of the sales in which they would have no financial interest.

The next provision referred to was the one in clause 5, to the effect that the respondents, being the manufacturers of the goods, were entitled thereunder to fix in writing the sale price of the goods to the appellants, and clause 8 (b), which deals with undertakings on the part of the appellants not to carry out any work or to have interest in any other business either as principals, agents or as servants dealing with the buying or sale of goods similar to those manufactured by the defendants, and the trial Court said—"Had there been a restrictive covenant on the part of the defendants, then the question would have arisen as to whether this would imply a prohibition not to manufacture goods for others, but as we said before, there is no such restriction and the restriction applies only to the plaintiffs" and went on and said:-

" Considering the words and expressions used and the document as a whole, the intention of the parties appears

quite clear and in conformity with the text. There is no doubt that the parties did not intend to extend the contract to cover the manufacture of goods for other persons, nor was such a thing within their contemplation at the time. If that was their intention, we would have expected to find elaborate stipulations necessary to give effect to such a contract. In the first place, we would have expected a stipulation regarding the advertisement of the goods. A person can advertise his own goods and he can regulate the manner and nature of such advertisement, whereas it would be quite a different thing to advertise the goods of a third person. We would also have expected to find a stipulation regarding the mode and ascertainment of prices and the payment of commission, about which there is none. The defendant according to the terms of the agreement can fix the price of his goods and upon such prices the commission of the plaintiffs is calculated. This mode of ascertaining the commission cannot possibly be applied in the case of goods, not the products of the defendants manufactured for third persons, the manufacturer having no control or say in such prices which are at the absolute discretion of the owner. In the absence of such vital stipulations the agreement as it stands cannot effectively be put in operation, if it is to be interpreted in such a way as to cover the manufacture of goods on behalf of third parties, unless it can be implied from its text that the defendant Company is restricted from manufacturing goods for third persons. If this is so, and labouring on this assumption, we shall consider the case within the framework of the doctrine of restraint of trade."

It is well settled that the meaning of a document or of a particular part of it has to be sought in the document itself and that, the intention of the parties must be discovered, if possible, from the expressions the parties have used. In that respect, clear and unambiguous words prevail over any intention, but if the words used are not clear and unambiguous, then the intention will prevail. In this case, looking at the document as a whole, one concludes that the intention of the parties as manifestly expressed therein and deduced from the duties and obligations undertaken by each of them, was that the exclusive rights of distribution given to the appellants cover only the

goods of the respondents and not the goods manufactured by them on behalf of third parties over and above their own goods. As stated in the case of *Lloyd* v. *Lloyd* [1837] 2 My. & Cr. 192 at page 202 by Lord Cottenham,

> " If the provisions are clearly expressed and there is nothing to enable the court to put upon them a construction different from what the words import, no doubt the words must prevail: but if the provisions and expressions be contradictory and if there be grounds appearing from the face of the instrument affording proof of the real intention of the parties, then that intention will prevail against the obvious and ordinary meaning of the words. If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention".

With regard to the principle that a deed has to be construed as a whole so that the general intention is to be ascertained from the instrument as such, and infer same from the general frame of the deed, reference may be made to the case of *N.E.Ry.* v. *Hastings* (*Lord*) [1900] A.C. 260, where at p. 267, Lord Davey quoting from Lord Watson in *Chamber Colliery Co.* v. *Twyerould* (1893) reported in [1915] 1 Ch. 268, at p. 272, said,

> " The deed must be read as a whole in order to ascertain the true meaning of its several clauses and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible".

In our case, the provisions of the contract on the issue are clearly expressed and having not been persuaded, in view of the above, that the trial Court erred in its construction of the document in question, we find no reason to interfere with its conclusion, therefore, we think it unnecessary to examine the doctrine of restraint of trade, as the trial Court did, and counsel asked us to do, because that issue, does not arise in this appeal. It was only dealt with on an assumption and anything we might have said would be obiter, which a Court, particularly an appellate one, should avoid as far as possible.

For all the above reasons this appeal is dismissed with costs.

Appeal dismissed with costs.