1982 April 13

[HADJIANASTASSIOU, A. LOIZOU AND MALACHTOS, JJ.]

INVESTA FOREIGN TRADE CO. LTD.,
Appellants-Defendants,

v.

ONISIFOROS DEMETRIADES & CO.,
Respondents-Plaintiffs.

(*Civil Appeal No.* 5970).

Arbitration—Stay of proceedings—Arbitration clause—Section 8 *of the Arbitration Law, Cap.* 4*—Discretion of the Court—Principles applicable—Exclusive agency contract with arbitration clause in relation to disputes arising in respect of or in connection with contract—Action for damages for breach of said contract and for commission due thereunder—Claim not one where defendant agreed to pay the sum demanded and merely refused to pay—But a claim falling within the ambit of the arbitration clause —Proceedings stayed.*

On January 20, 1972, the respondents-plaintiffs, a trading company, entered into a written agency agreement* with the appellants-defendants, a firm of manufacturers and exporters from Czechoslovakia, by means of which they were appointed to be the exclusive selling agents in Cyprus of their knitting machines on payment of commission under the terms and conditions specified in the agreement. Clause 19** of this agreement ("the arbitration clause") provided that any dispute between the parties "in respect of, or in connection with this agreement" should be referred to Arbitration to the Arbitration Court of the Chamber of Commerce of Czechoslovakia.

Following an action*** by the respondents for, inter alia, "damages, for breach of written agency agreement dated 20.1.

* The details of the agreement appear at pp. 278-79 *post.*

** Clause 19 is quoted at p. 279 *post.*

*** Particulars of the claim appear at pp. 281-83 *post.*

1972 by the defendants" and for "C£18,000 by way of commission which is still due and payable by the defendants to the plaintiffs for goods sold by the defendants in Cyprus and Greece to customers introduced to the defendants by the plaintiffs", the appellants invoked the arbitration clause and applied for a stay of the proceedings. The trial Court dismissed the application on the ground that the appellants failed to show that there was a dispute within the arbitration clause or what the precise nature of the dispute was; and that, therefore, the burden was "never shifted in the plaintiffs to show cause why effect should not be given" to the arbitration clause.

Upon appeal by the defendants:

Held, that it is obvious from the claim as appearing in the endorsement to the writ and the statement of claim, as well as from the contents of the various affidavits filed, that this case is not one where the appellants as defendants had agreed to pay the sum demanded and merely refused to pay; that on the contrary, this case must be treated as one in which a difference has arisen within the ambit of the Arbitration Clause and which must, therefore, be determined by arbitration and not by action; that a dispute has so arisen between the parties to it, that is, in respect of and in connection with it and its provisions, there is no doubt whatsoever, particularly so in view of the provisions regarding the payment of commission and the mode by which the amount payable is reached, as set out in terms 9–12 of the Agreement; and that since the claims of the parties fall within the ambit of the Arbitration Clause 19 the proceedings have to be stayed to the extent of the claims relating to sales within the territory of Cyprus.

Appeal allowed.

Cases referred to:

Skaliotou v. *Pelekanos* (1976) 1 C.L.R. 251;

Hayman v. *Darwins Ltd.* [1942] 1 All E.R. 337;

Oliver v. *Hillier* [1959] 2 All E.R. 220;

London and North Western Railway Company v. *Jones* [1915] 2 K.B. 35;

London and North Western and Great Western Joint Ry. Co. v. *Billington* [1899] A.C. 79;

Frederick W. Harrison Ltd. v. *E. Philippou Ltd.* (1980) 1 C.L.R. 603.

Appeal.

Appeal by defendants against the ruling of the District Court of Limassol (Loris, P.D.C. and Chrysostomis, S.D.J.) dated the 18th June, 1979 (Action No. 2625/77) whereby their application to stay the proceedings instituted by the plaintiffs on the ground of an arbitration clause was dismissed.

St. McBride, for the appellants.

V. C. Tapakoudis, for the respondents.

Cur. adv. vult.

HADJIANASTASSIOU J.: The judgment of the Court will be delivered by H.H. A. Loizou.

A. LOIZOU J.: This is an appeal from the ruling of the Full Court of Limassol by which the application of the appellants-defendants to stay the proceedings instituted by the respondents -plaintiffs, on the ground of an arbitration clause and pursuant to section 8 of the Arbitration Law, Cap. 4, was dismissed with costs.

On the 20th January, 1972, the respondents, a trading Company, entered into a written agency agreement with the appellants, a firm of manufacturers and exporters from Czechoslovakia. They were appointed to be the exclusive selling agents in Cyprus of their Small Diameter Circular Knitting Machines, mark "UNIPLET". Under the said agreement the respondents as agents were to sell in the name of the appellants, as principals, and on their account, at prices and on terms and conditions communicated by the appellants to them and the latter were to receive commission under the terms and conditions specified in the contract. The appellants were to account to the respondents. The commission earned was to be paid within six weeks after receipt by the appellants of the approval of the statement of account by the respondents, who were obliged also to maintain a stock of spare parts to the value of two per cent of the turnover reached in the current year.

The agreement was to remain in force until the 31st December, 1972, and thereafter it was agreed to be renewed from year to year if no notice of termination was given by either side. Moreover, the respondents undertook to achieve a minimum yearly turnover, the appellants having the right to cancel the agreement

in case that minimum turnover was not reached. Also advertising and publicity as provided by Term 4 of the Agreement was undertaken to be covered to an extent of 50% of the proved advertising expenses by the appellants, the total expenses, however, paid by them not to exceed 2% of the net turnover.

The Agreement in question is a very detailed and elaborate one and it has been produced as an exhibit (exhibit 'A'). I need not, therefore, refer to its full text, I have merely tried to indicate certain aspects of it which give a general picture of its tenor. Reference, however, must be made to the Arbitration Clause contained in this agreement which is invoked by the appellants in their application for stay and which reads as follows:-

> "19. The legal relations arising out of or in connection with the present contract shall be governed by Czechoslovak Law.
>
> If any dispute shall arise between the parties hereto in respect of, or in connection with this agreement or any of the provisions herein contained or anything arising hereout the same shall be referred, unless a friendly settlement has been reached, to arbitration to the Arbitration Court of the Chamber of Commerce of Czechoslovakia in Prague by three arbitrators appointed in accordance with the Rules of the Arbitration Court of the Chamber of Commerce of Czechoslovakia. Both parties undertake that they shall abide by, and execute the terms of, the award rendered, without any delay".

The trial Court after dealing with the facts of the case and the arguments advanced referred to the Law on the subject as expounded in particular in the case of *Skaliotou* v. *Pelekanos* (1976) 1 C.L.R., p. 251, which turned on the interpretation of section 8 of the Law, Cap. 4, and the English cases of *Heyman* v. *Darwins Ltd.* [1942] 1 All E.R. 337; as well as *Oliver* v. *Hillier* [1959] 2 All E.R. 220.

From these authorities the following principles are discerned:

Once the party moving for a stay has shown that the dispute is within a valid and a subsisting arbitration clause, the burden of showing cause why effect should not be given to the agreement

to submit same to arbitration is upon the party opposing the application to stay, the obligation being not to persuade the Court that such a party has a right to continue but that he ought to be allowed to continue. Also that the matter of granting or not of a stay is one of discretion. The trial Court, concluded as follows:-

> "With the afore-mentioned principles in mind, we shall now proceed to answer the first question, that is, whether the proceedings are in respect of a dispute so agreed to be referred. No doubt the arbitration agreement is very broad and covers 'any dispute' that might arise between the parties 'in respect of' or 'in connection' with the agreement 'or any of the provisions herein contained' or 'anything arising hereout'. But, the question which poses for an answer is: What is the present dispute about? What is the precise nature of the dispute which has arisen?
>
> Having considered carefully the application to stay, the affidavits filed, the exhibits attached to one of the affidavits, the indorsement of the writ, the statement of claim, all other documents in the file and whatever has been argued and cited before us, and in particular the case of *Skaliotou* v. *Pelekanos* (supra), we have arrived at the conclusion that the defendants failed to show what the precise nature of the dispute is; in fact, they failed to show what the dispute is about. In the affidavit in support of the application, the only thing said by the affiant was that the defendants have a good defence to the claims raised in this action. The exact nature of the dispute is not disclosed on any of the causes of action in the present action.
>
> For these reasons and in the light of the authorities cited, we have arrived at the conclusion, in exercising our discretion, that we must refuse the application.
>
> Having arrived at this conclusion, we would like to add that as the defendants failed to show that there is a dispute within the arbitration clause, the burden was never shifted on the plaintiffs to show cause why effect should not be given to the agreement to submit".

It is obvious from the aforesaid passage that the ground upon which the application for a stay was refused was that the appel-

lants, as defendants failed to show what the precise nature of the dispute was and in fact they failed to show what the dispute was about and that there was a dispute within the arbitration clause, the burden having never been shifted on the respondents/plaintiffs to show cause why effect should not be given to the agreement to submit.

It has been argued before us that this was a wrong approach and that the trial Court was wrong to hold that there was no dispute for arbitration and or that the matters in dispute had not been pinpointed and that in consequence the onus never shifted to the respondents/plaintiffs to show cause why the action should not be stayed. The question, therefore, that poses for determination by us is whether on the material before the Court the appellants who took out this application to stay proceedings on the ground that the question raised therein ought to be referred to arbitration,had as a first step established that the question or questions, raised in the proceedings, are as such within the scope of the submission and that is the real question for decision.

The endorsement on the writ of summons issued by the respondents reads as follows:-

"(a) Damages for breach of written Agency agreement dated 20.1.1972 by the defendants and/or damages which the plaintiffs suffered because of the wrongful and/or unjustified termination of the said agreement by the defendants and/or money spent by the plaintiffs and/or otherwise.

(b) C£18,000.— by way of commission which is still due and payable by the defendants to the plaintiffs for goods sold by the defendants in Cyprus and Greece to customers introduced to the defendants by the plaintiffs, or

(c) An order directing that accounts be taken of the goods sold by the defendants in Cyprus and Greece to sustomers introduced to the defendants by the plaintiffs and of the amount of commission due to the plaintiffs in respect thereof.

(d) Payment of the amount found due by the defendants to the plaintiffs on the taking of such accounts.

(e) C£6,000.— compensation for the value of the stock of goods of the defendants which the plaintiffs will no longer be able to offer for sale.

(f) Further and/or other relief which the Court will consider just.

(g) Interest and costs".

In the statement of claim filed by the respondents after an appearance was entered by the appellants, and we may say here that that was the only step taken before the filing of the application for stay, allege, inter alia, the following:

"3. The plaintiffs and the defendants have been cooperating since 1960 and their terms of cooperation were set out in an Exclusive Agency Contract dated 20.1.1972 which was renewed automatically from year to year.

4. Under the said contract the plaintiffs were appointed exclusive agents of the defendants for Cyprus.

5. The said agreement or its extended validity could only be terminated by giving the other party at least three months notice before expiration or if there was failure to reach the minimum agreed turnover provided the economic situation prevailing in the contractual territory shall be taken into consideration. Since 1974 no minimum turnover was agreed between the parties due to the bad economic situation prevailing in Cyprus in consequence of the Turkish invasion.

6. Under the said agreement and prior to it under several oral agreements, the defendants agreed to pay to the plaintiffs 10% commission on the amounts of the defendants' products delivered in Cyprus.

7. Relying on the said oral and written agreements the plaintiffs were involved in considerable expenses and had to train personnel at their own expenses for a better service of the customers of the defendants.

8. Furthermore under oral agreement between the plaintiffs and the defendants and/or at the request of the defendants the plaintiffs opened a market in Greece for the goods of the defendants for which they were also involved

in considerable expenses. The defendants agreed to pay to the plaintiffs for sales in Greece a similar commission to that paid for sales in Cyprus.

9. For the better performance of their obligations the plaintiffs kept and still keep stock of the defendants' goods the value of which is C£2,710.— Particulars of the said stock can be given to the defendants on their request at any time.

10. The plaintiffs and the defendants have not, as yet, had a final account for the commission still due and payable by the defendants to the plaintiffs for sales by the plaintiffs of the goods of the defendants in Cyprus and in Greece.

11. Or or about March 1976 the defendants wrongly and in breach of the agreement dated 20.1.1972 terminated the said agreement and since then the plaintiffs were unable to carry out any sales of the defendants' goods.

12. Under the said agreement the defendants agreed to pay to the plaintiffs similar commission for sales made directly by the defendants to Cypriot customers".

That there existed several oral agreements between the parties prior to the written one, reference may be made to Term 16 of the said agreement which explicitly provides that:

"Upon conclusion of the present contract, all preceding agreements as well as all understandings concerning your agency, or the exclusive sales, shall become null and void".

And it is clear that all the previous agreements and understandings between the parties were embodied in the said written agreement.

In the affidavit filed in support of the present application the written agreement in invoked and produced as an attachment thereto and maintained that all matters in the statement of claim arose solely out of the contractual relationship between the parties as embodied in the said agreement, and went on to say:-

"3. The said Agreement at paragraph 19 contains a provision that if any dispute shall arise between the parties in respect of or in connection with the said agreement or

any of the provisions therein contained or anything arising thereout the same shall be referred to the arbitration Court of the Chamber of Commerce of Czechoslovakia in Prague by three arbitrators appointed in accordance with the Rules of the Arbitration Court of the Chamber of Commerce of Czechoslovakia and that both parties undertake to abide by and execute the terms of the award involved without any delay.

4. I also have read and perused the contents of the file in question and I can say the defendants have a good defence to the claims raised in this action and that appearance only has been entered to the writ in this action.

5. Furthermore it is a fact that a different dispute under the said contract acted 20.1.1972 had also arisen prior to the commencement of the present action and the same was referred to arbitration by the parties in accordance with the provisions of the said contract acted 20.1.1972.

6. The present plaintiffs duly defended the claims made against them and counterclaimed for the self-same matters in that arbitration as are now claimed in this action and I attach hereto a photocopy of the defence and counterclaim so made in the arbitration marked 'B'.

7. From that documents marked 'B' it can be seen at a glance that:

Statement of Claim in Action 2625/77	Equates	Defence and Counterclaim in Arbitration 31/76
(a) Paragraph 3		Paragraph 7
(b) Paragraph 5		Paragraph 8
(c) Paragraphs 7 and 8		Paragraph 9
(d) Paragraphs 7 and 8		Paragraph 10
(e) Paragraph 9		Paragraph 11
(f) Paragraph 10		Paragraph 12
(g) Paragraph 11		Paragraph 13
(h) Paragraph 16(a)		Paragraph 14(a)
(i) Paragraph 16(c)		Paragraph 14(b)
(j) Paragraph 16(d)		Paragraph 14(c)
(k) Paragraph 16(e)		Paragraph 14(d)

(l) Paragraph 16(f) Paragraph 14(e)
(m) Paragraph 16(g) Paragraph 14(f)

At the hearing of the said Arbitration 31/76, the present plaintiffs did not particularise their claim to the same extent as in the present action but it is clear from the present statement of claim no new matters have been introduced. The plaintiffs did not pursue their counterclaim in the said arbitration proceedings.

9. Furthermore at the hearing of Arbitration 31/76 the counterclaim was withdrawn but with an express remark that it was not intended to put forth the claim in the form of a counterclaim and that they reserved their right to lodge their claim in a separate way. The counterclaim was not tried".

They further allege that they have all along been ready and willing to do all things necessary for the proper conduct of the arbitration in accordance with the provisions of the said arbitration clause.

In the case of *London and North Western Railway Company* v. *Jones* [1915] 2 K.B., 35 it was held by reference to a section which might be considered as equivalent to the arbitration clause that the only case in which an action can be brought to recover charges for detention of trucks under an enactment in the terms of such enactment is where the defendant has agreed to pay the sum demanded but has failed to do so, if there is a refusal to pay and no agreement to pay can be proved, the case must be treated as one in which a difference has arisen within the appropriate section of the Law which must, therefore, be determined by an arbitrator and not by an action.

Support for the aforesaid proposition was drawn also from the case of *London and North Western and Great Western Joint Ry. Cos.* v. *Billington* [1899] A.C. 79, where it was held that it does not follow that the Courts cannot be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which the trader merely persists in not paying.

It is obvious from the claim as appearing in the endorsement to the writ and the statement of claim, as well as from the contents of the various affidavits filed, that the case before

us is not one where the appellants as defendants had agreed to pay the sum demanded and merely refused to pay; on the contrary, this case must be treated as one in which a difference has arisen within the ambit of Clause 19 of the Agreement and which must, therefore, be determined by arbitration and not by action. That a dispute has so arisen between the parties to it, that is, in respect of and in connection with it and its provisions, there is no doubt whatsoever, particularly so in view of the provisions regarding the payment of commission and the mode by which the amount payable is reached, as set out in terms 9–12 of the Agreement and which need not be reproduced here in full.

Before concluding reference may be made to the judgment of the Court in the case of *Frederick W. Harrison Ltd.* v. *E. Philippou Ltd.*, (1980) 1 C.L.R., 603, where, however, the question was resolved by assuming that a dispute within the ambit of the arbitration clause in that case existed but that it was not a proper case in which the Court in the exercise of its discretionary powers ought to have made an order staying the proceedings. In view of this approach, however, it cannot be of assistance to us in the present case.

Having come to the conclusion that the claims of the parties fall within the ambit of the arbitration Clause 19, the proceedings have to be stayed but only in so far as they relate to claims for sales in Cyprus which in the territory of its application as per the addendum to the agreement, but not with regard to claims that took place in Greece in respect of which the agreement containing the arbitration clause does not extend.

For all the above reasons the appeal is allowed and a stay is ordered to the extent of the claims relating to sales within the territory of Cyprus. Costs in favour of the appellant.

Appeal allowed with costs.