1986 January 30

[TRIANTAFYLLIDES, P., DEMETRIADES, PIKIS, JJ.]

NICOSIA RACE CLUB AND ANOTHER,

Appellants-Plaintiffs,

v.

1. COSTAS VAFEADES,
2. CYBARCO LIMITED,

Respondents-Defendants.

(Civil Appeal 6649).

Arbitration clause—The Arbitration Law, Cap. 4, Section 8—Building Contract—The standard building contract approved by the Association of Architects and Civil Engineers of Cyprus and the Association of Building Contractors, Term 14A—Action for damages against both the Architect and the Building Contractors—Application by the Building Contractors for stay of proceedings—Risk of inconsistent findings of fact on the same disputed matters, if stay were granted—But no allegation of any injustice to the plaintiffs if such a stay were granted—Trial Court ordered stay of proceedings as against the Building Contractors—An Appellate Court will not interfere with the discretion of a trial Court within its jurisdiction, unless clearly satisfied that the discretion has been wrongly exercised—In this case the result arrived at was warranted by the facts.

In May 1981 the appellants, who are the owners of the Nicosia Race Track, employed defendant 1 an architect, to re-design their track, prepare specifications for its re-construction and invite tenders for the work to be executed. The appellants, (plaintiffs in the action) alleged in their statement of claim that defendant 1 agreed to advise them for the award of the relevant contract and to supervise the carrying out of the work.

The contract for the said reconstruction was awarded to the respondents (defendants 2 in the action) and as a

result a standard contract approved by the Association of the Civil Engineers and Architects of Cyprus and the Association of the Building Contractors was signed by the appellants and the respondents.

Term 14(a) of the said contract provided that in case of a dispute between the employer (the appellants in this case) and the contractor (the respondents in this case) same shall be in first instance resolved by an architect employed but, if his decision is not accepted by the contractor, the matter shall be referred to arbitration in accordance with the provisions of the Laws of Cyprus.

As the appellants were not satisfied either with the work carried out by the respondents or with the supervision carried out by the architect they filed action number 344/82 in the D. C. Nicosia claiming damages against both of them.

After the appointment of arbitrators for the dispute by the appellants and the respondents and after an agreement between the arbitrators as to the appointment of an umpire, the respondents filed an application claiming inter alia an order staying the proceedings in the said action pursuant to s. 8 of the Arbitration Law, Cap. 4 as against both defendants or alternatively as against them.

The trial Court accepted that (a) Either the dispute between the appellants and the respondents will be tried by the same civil Court which will try the dispute between the appellants and defendant 1 or appellants' dispute with the respondents will be tried by an arbitrator but their claim against the architect (defendant 1) by the civil Court, and (b) That the question of respondents' negligence is interwoven with the question of negligence of defendant 1 and that the determination of both questions involves the examination of substantially the same facts.

The only reason or argument of the appellants before the trial Court against the stay of proceedings was the risk of having inconsistent findings of fact on the same disputed matters if a stay were granted.

It should be noted that there was no allegation before

the trial Court that a stay of proceedings will result to any injustice to the appellants.

The trial Court reached the conclusion that the appellants have not shown sufficient reason within the language of s. 8 of Cap. 4 why their claim should not be referred to arbitration and ordered that all proceedings be stayed as against the respondents (defendants 2). The plaintiffs appealed.

Held, dismissing the appeal (1) The result arrived at by the trial Court was warranted by the facts before it. (2) This Court will not interfere with the discretion of a trial Court acting within its jurisdiction, unless clearly satisfied that the discretion has been wrongly exercised.

Appeal dismissed.

Cases referred to:

Bienvenito Steamship Co. Ltd. v. *Georghiou and another,* 18 C.L.R. 215;

G. Galatoriotis and Sons Ltd. v. *Scandinavian and Mediterranean Shipping Corporation of Monrovia* (1968) 1 C.L.R. 385;

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

W. Bruce Ltd. v. *Strong and others* [1951] 1 All E. R. 1021;

Taunton-Collings v. *Cromie and another* [1964] 2 All E. R. 332;

Halifax Overseas Freighters Ltd. v. *Rasmo Export,* [1958] 2 Lloyds Rep. 146;

Hellenic Bank Ltd. v. *Kosma and Another* (1984) 1 C.L.R. 53.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Nicosia (Boyadjis, P. D. C.) dated the 8th December, 1983 (Action No. 344/82) whereby the proceedings in

the above action against defendant 2 were stayed.

G. Trantafyllides, for the appellants.

St. McBride, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice Demetriades.

DEMETRIADES J.: This is an appeal from a judgment of a trial Court by means of which proceedings in Action No. 344/82, in the District Court of Nicosia, against respondents No. 2 in this appeal—defendants No. 2 in the action —were stayed.

In May 1981 the appellants, who are the owners of the Nicosia Race Track, employed defendant No. 1, an architect—who is not a party to this appeal—to re-design their track, prepare specifications for its reconstruction and invite tenders for the work to be executed. The appellants in their Statement of Claim further alleged that defendant No. 1 had agreed to advise them for the award of the contract for the reconstruction of the track and to supervise the carrying out of the work.

The contract for the reconstruction of the track was awarded to the respondents and on the 2nd July, 1981, a standard contract approved by the Association of the Civil Engineers and Architects of Cyprus and the Association of the Building Contractors of Cyprus was signed between the appellants and the respondents, term 14(a) of which provides that in case of a dispute between the employer (the appellants in this case) and the contractor (the respondents in this case) same shall be in the first instance resolved by an architect employed but, if his decision is not accepted by the contractor, the matter shall be referred to arbitration in accordance with the provisions of the Laws of Cyprus.

As the appellants were not satisfied either with the work executed by the respondents or with the supervision carried out by defendant No. 1, their architect, they, on the 15th January, 1982, filed in the District Court of Nicosia Action

No. 344/82, by which they claim damages against both of them.

As it appears from the record of this appeal the respondents, after they and the appellants had appointed arbitrators for the dispute that arose between them and the arbitrators so appointed by them agreed to the appointment of an umpire, filed in the action an application by which they prayed for -

"(a) an order that all further proceedings in this action against the defendants 1 and 2 or alternatively against the defendant 2 be stayed pursuant to Section 8 of the Arbitration Law Cap. 4;

(b) in the event that no order be made under (a) above then for an order that the hearing of the causes of action be confined to those alleged against the defendant 1 and/or that the causes of action alleged against the defendant 2 be excluded."

Their application is based on section 8 of the Arbitration Law, Cap. 4, which reads as follows:-

"8. If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the arbitration agreement or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

The meaning and effect of this provision of the Law is not the subject of this appeal.

Before the hearing of the application of the respondents the architect, defendant No. 1, through his counsel, stated that he had no objection to the application of the respondents and that he did not intend to take part in the proceedings.

The trial Court after referring to a number of English and Cyprus authorities relevant to the issues that called for decision by it, namely *Bienvenito Steamship Co. Ltd.* v. *Georghios Chr. Georghiou and Another,* 18 C.L.R. 215; *George S. Galatariotis & Sons Ltd. v. Scandinavian Baltic and Mediterranean Shipping Corporation of Monrovia,* (1968) 1 C.L.R. 385; *Yiola Skaliotou* v. *Christoforos Pelekanos,* (1976) 1 C.L.R. 251; *W. Bruce, Ltd.* v. *Strong and Others,* [1951] 1 All E.R. 1021; *Taunton-Collings* v. *Cromie and another,* [1964] 2 All E.R. 332; and *Halifax Overseas Freighters Ltd,* v. *Rasno Export,* [1958] 2 Lloyd's Rep. 146, made its findings which, for the purposes of this jugdment, I shall quote extensively:

> "In the light of the above judicial pronouncements, this application turns on the question whether the plaintiffs, who try to oppose the contractors' claim for stay, have shown sufficient reason to deprive the arbitration clause of its binding efficacy.
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> The plaintiffs content that the true situation is this: either their dispute with the contractors will be tried by the same Civil Court which will try their dispute with the architect, or their dispute with the contractors will be tried by an arbitrator and their claim against the architect by the Civil Court. There is no other alternative, they say, inasmuch as the Court cannot possibly stay their action against the architect for the simple reason that the architect is not a party to the agreement embodying the arbitration clause. This is truly the situation and I agree with the contention of the plaintiffs on this matter.
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> The plaintiffs further say that the question of the negligence of the contractors is interwoven with the question of negligence of the architect and that the determination of both questions involves the examina-

tion of substantially the same set of facts, mainly the plaintiffs' allegation that the contract work was executed negligently and not in accordance with the agreed specifications. Although the learned counsel for the contractors tried to explain why he considers the two claims as distinct, alleging in this respect that the plaintiffs' cause of action against the contractors is in fact the alleged breach of their agreement whereas the cause of action against the architect is the tort of negligence, yet, if one approaches the matter in a realistic manner and if he also takes into account another consideration, admitted by the learned counsel for the contractors, i.e. the overlapping of the damage, if any, he will have to agree with the plaintiffs' contention in this respect.

We shall be faced, therefore, with a situation, which the learned counsel for the plaintiffs says, is most undesirable, because there is a risk or possibility of the arbitrator who shall try the plaintiffs' claim against the contractors, if a stay is granted, reaching to a completely different conclusion on the same disputed facts than that of the Civil Court which will try the plaintiffs' claim against the architect. It is really this eventuality that the plaintiffs invoke in their endeavour to discharge their duty under section 8 by showing sufficient reason against the stay to which the contractors would have otherwise been entitled.

I have not been persuaded that the plaintiffs, in joining the two defendants in the same action, were motivated by any of the motives attributed to them by the learned counsel for the contractors. Reading the Statement of Claim one concludes that, if the averments made therein are proved, the plaintiffs' claim against the architect is, to say the least, arguable and not any less genuine than that against the contractors. I am not, however, expressing any opinion regarding the merits of the plaintiffs' claim against either defendant. Nevertheless, I wish to stress, that, in the absence of any other relevant circumstances, I cannot reasonably reach any conclusion whatsoever regarding which

of the two defendants the plaintiffs were primarily interested in suing, from the mere fact that, unlike the plaintiff in the *Cromie Case* (supra), the plaintiffs in this case chose to join both defendants in the present action right from the beginning.

The contractor's contention that there is no allegation in the present case that a stay of the litigation against them will result to any injuctice to the plaintiffs, is correct. It is also worth noting that the only reason or argument which the plaintiffs put forward against the stay is, as I have already said, the risk of having inconsistent findings of fact on the same disputed matters, if a stay were granted. It is because of the aforesaid two matters, i.e. the absence of any injustice and the reliance of the plaintiffs merely on the aforementioned risk, that I was led to the conclution, not without some difficulty, I must confess, that the present case is distinguishable from the *Cromie Case* (supra). The learned counsel for the plaintiffs did not refer to the *Trans-Asiatic Case* (supra). The fact remains, however, that it was therein held that the Court should give full weight to the prima-facie desirability of holding the parties to their agreement and that a mere balance of convenience is not enough reason for the refusal of the stay. Regarding moreover, the countervailing principle which was the main basis of the decision in the *Cromie Case* (supra) that multiplicity of proceedings is undesirable, and the dichotomy or dilemma brought about by the conflict of the aforesaid two principles, it was held that the latter principle should not prevail over the former merely on grounds of convenience and without other reasons of sufficient weight which are liable to subject the defendants to a miscarriage of justice. I should add in this juncture that I do not see how it can be said, in the present circumstances, that the risk of different conclusions being reached by the two tribunals, if a stay is ordered, is in itself a potential source of injustice to the plaintiffs.

For all the above reasons which I have endeavoured to state hereinabove, I have come to the conclusion that the plaintiffs have not shown sufficient reason within the language of sec. 8 of the Arbitration Law, why their claim against the contractors should not be referred to arbitration in accordance with their agreement. In the exercise of my discretion in the matter, I accordingly order that all further proceedings be stayed against the defendants No. 2....."

Counsel for the appellants submitted that the trial Judge exercised his discretion wrongly in that the proceedings initiated by the action ought not to have been stayed; that the gist of the judgment of the trial Court is that the stay was ordered because the Judge was not satisfied that the risk of different conclusions which may be reached is not in itself a potential source of injustice to the plaintiffs; that the possibility of inconsisting findings of facts carries in itself the possibility of injustice to the plaintiffs and that the question of the negligence of the architect and of the contractor is interrelated and must be decided in one set of proceedings only.

After citing the authorities to which the trial Court refers in its judgment, counsel suggested that in the present case it is clear that for the cause of action against the architect vis a vis negligence and breach of statutory duties, as well as for the claim against the contractors for negligence and breach of their contract, the same set of facts is involved and necessarily there would be a dublication of investigation if these two claims are tried separately.

Counsel for the respondent contractors submitted that when one reads the statement of claim it is apparent that there are two distinct causes of action and that the appellants signed a contract with the respondent contractors in which the clause invoking and requiring the parties to go into arbitration in the event of a dispute was included and that appellants must abide by it.

In the recent case *Hellenic Bank Ltd.* v. *Kosma and Another*, (1984) 1 C.L.R. 53, the Supreme Court, in its

appellate jurisdiction, after reviewing Cyprus and English authorities, had this to say (at p. 68):-

> "It is clear from the above authorities that a Court of appeal should not interfere with the discretion of the Judge acting within his jurisdiction unless the Court is clearly satisfied that the discretion has been wrongly exercised."

In the present case, going through the judgment of the trial Court and its findings, we are of the view that the result arrived at was warranted by the facts before it and for this reason the appeal fails.

Appeal dismissed.