1984 July 30

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

PHOTIOU BROS. CO. LTD., AND ANOTHER
Appellants-Plaintiffs.

v.

AUTOLIFTS AND ENGINEERING CO. LTD.,
Respondents-Defendants.

(*Civil Appeal No.* 5199).

Contract of agency—Agents acting as sole distributors of products of principals—Agents failing to pay for products supplied to them in accordance with the terms of contract of agency—They committed a breach of a fundamental term of the contract entitling principals to repudiate it—Section 11 *of the Sale of Goods Law, Cap.* 267 *not applicable—Agency validly terminated even if letter terminating it was written "without prejudice"—Because correspondence headed "without prejudice" serves to protect position of the writer if what he proposes is not accepted.*

By a written agreement dated 24th August, 1962, the respondent company, a manufacturer of hydraulic tipping gears in the United Kingdom, appointed the appellant company as its sole distributor in Cyprus of its products for a trial period of twelve months commencing on the 1st September, 1962, in order that both parties might decide whether it was mutually beneficial. These arrangements would then be automatically renewable annually subject to a three months' termination clause on either side. According to term 10 of the said agreement, payment of the products should be cash against documents. This term was in 1963 changed to a 90 days' draft credit facilities at the request of Mr. Photiou, the Managing Director of the appellant.

On the 21st March, 1967, the respondents addressed to the appellants a letter regarding an outstanding bill of exchange amounting to £1087.17s., which was due on the 19th December, 1966, and had not yet been settled.

On the 19th July, 1967 the respondents wrote a letter* "without prejudice" to the appellants regarding the above bill, wherein it was, inter alia, stated that "unless and until this bill is cleared there can be no question of anyone discussing anything further with you and if you have not cleared this bill within 14 days of this letter then I am afraid we must treat this further refusal as a material breach of contract terminating your appointment as distributor".

The appellants-plaintiffs failed to settle the aforesaid amount and the respondents instituted an action for its recovery.

In an action by the appellants-plaintiffs against the respondents for damages for breach of contract of agency the trial Court held that the non payment of the draft was so substantial as would go to the root of the whole contract and the defendants were at liberty after this breach by the plaintiffs to repudiate it. Hence this appeal by plaintiff 1.

Counsel for the appellant contended:

(a) That the non-payment of the bill by the appellants does not go to the root of the contract of agency, so as to entitle the respondents to terminate it**.

(b) That there was never a valid termination of the contract of agency by the respondents because the letter of the 19th July, 1967 by which the respondents gave notice to terminate the contract of agency, was written "without prejudice" and was, thus void.

Held, that the appellants by their refusal to pay, committed a breach of a fundamental term of the contract of agency, which entitled the respondents to repudiate it (*Decro* case, supra, clearly distinguishable because this case as well as section 11 of Cap. 267 are concerned with stipulations as to the time of payment of goods sold and delivered, whereas in this case we are concerned with the refusal of the appellants to pay for the value of the goods received by them for which they signed the relevant bill of exchange in accordance with the varied terms of the contract of agency); accordingly contention (a) must fail.

* The letter is quoted at pp. 426–427 post.

** Counsel relied in this connection on section 11 of the Sale of Goods Law, Cap. 267 and on the case of *Decro-Wall International S.A.* v. *Practioners in Marketing Ltd.* [1971] 2 All E.R. 216.

(2) That as a general rule, correspondence headed "without prejudice" serves to protect the position of the writer if what he proposes is not accepted; that if, however, what he proposes is accepted, a different situation is created; but that a notice "without prejudice" to annul a sale, failing acceptance of a given condition is certainly void; that in the case in hand, however, the letter of the respondents of the 19th July, 1967, contained no given condition which the appellants were asked to accept and the appellants were simply asked to discharge their obligation on a bill of exchange which was long overdue; accordingly contention (b) must also fail.

Appeal dismissed.

Cases referred to:

Decro-Well International S.A. v. Practioners in Marketing Ltd. [1971] 2 All E.R. 216;

In re Weston & Thomas Contract [1907] 1 Ch. 244.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Nicosia (Demetriades, P.D.C. and Papadopoulos, S.D.J.) dated the 31st May 1973 (Action No. 263/68) whereby the plaintiffs' claim for damages for breach of a contract of agency was dismissed.

A. Triantafyllides with *X. Syllouris,* for the appellants.

A. Markides, for the respondents.

Cur. adv. vult.

L. LOIZOU J. The judgment of the Court will be delivered by Mr. Justice Malachtos.

MALACHTOS J. This is an appeal by plaintiff No.1 against the judgment of the Full District Court of Nicosia in Action No. 263/1968 by which its claim against the defendant company for damages for breach of a contract of agency was dismissed with costs.

The undisputed facts of the case, shortly put are the following:

By a written agreement dated 24th August, 1962, the respondent company, which is the manufacturer of hydraulic tipping gears in the United Kingdom, appointed the appellant company as its sole distributor in Cyprus of its products for a trial period of twelve months commencing on the 1st September, 1962, in order

that both parties might decide whether it was mutually beneficial. These arrangements would then be automatically renewable annually subject to a three months' termination clause on either side. According to term 10 of the said agreement, payment of the products should be cash against documents. This term was in 1963 changed to a 90 days' draft credit facilities at the request of Mr. Photiou, the Managing Director of the appellant. Further, the amount of the credit facilities would not exceed £1,200 - FOB terms on the understanding that any orders being placed over and above this amount, would be supplied "cash against documents" as in the past.

The parties continued their cooperation until the end of 1966, when the respondents by letter dated 23rd November, 1966, informed the appellants that their export sales executive would be visiting Cyprus in an endeavour to increase efficiency and sales overseas as they became members of Steel Barrel and Associate Engineers Group, incorporating Anthony Hoists Ltd., Autolifts and Engineering Co Ltd., and Carrimore Six Wheelers Ltd.

On the 19th December, 1966, Mr. John Dorey, the Export Sales Executive of the respondents in this appeal, arrived in Cyprus and had a discussion with Mr. Photiou about the representation of their products in Cyprus. He suggested to Mr. Photiou that there should be a joint franchise in Cyprus shared by the appellant company and a certain Costas Polydorou, who was the agent of Anthony Hoists Ltd., in Cyprus, but this suggestion was not accepted by Mr. Photiou.

Mr. Dorey then left the Island leaving Mr. Photiou and Mr. Polydorou to talk the matter over and see if they could reach an agreement.

The matter remained at that till the 23rd January, 1967 when the respondents received a letter from the appellant company enquiring as to what had happened with their representation in Cyprus.

By letter dated 13th March, 1967, the respondents informed the appellants that due to the fact that their export sales executive was away on overseas tours since the middle of January for a period of about two months, the position regarding the representation of their products in Cyprus was not settled and assured

them that an answer would be forthcoming to this question when the detailed report and suggestions for Cyprus of their export sales manager would be studied by their Board of Directors.

On the 21st March, 1967, another letter by the respondents was addressed to the appellants regarding an outstanding bill of exchange amounting to £1087.17s., which was due on the 19th December, 1966, and had not yet been settled.

It must be noted here that this draft was in respect of the last order of goods which arrived in Cyprus on the 20th September, 1966, and which was payable on the 19th December, 1966. The respondents in this very same letter also notified the appellants that as to their representation in Cyprus, the matter was referred to their Board of Directors and that their decision would be communicated to them in the near future.

As it appears from the record of proceedings at the trial some more letters were exchanged between the parties, which, however, were ruled as inadmissible in evidence due to the objection of counsel in the absence of giving the relevant notice to produce, and we finally come to the letter of the 19th July, 1967, addressed by the respondents to the appellants which reads as follows:

"Dear Mr. Photiou,

Thank you for your letter of the 21st June, 1967. As you say I have not so far personally acknowledged your letter of the 22nd May, written 'without prejudice' and I am now writing direct to you equally 'without prejudice'.

In the meantime Mr. Dorey has sought to persuade you to go through with the undertaking that you gave to me personally in the presence of both Mr. P.W. Wells and Mr. Dorey.

At that time you confirmed that you had sold this equipment and had indeed been paid for it and that irrespective of other considerations you would be fulfilling your delayed obligation by immediately meeting this overdue bill out of funds which could be made available for the purpose in London.

You have not yet met that bill and you are therefore in direct breach of the undertaking given to me personally. If

you will refer to your signed copy of the agreement governing your original appointment as an Autolifts Distributors you will see that under Item 10 the terms of payment are 'Cash Against Documents'. You would therefore perhaps agree that you are also in direct breach of your legal obligation to pay.

Unless and until this bill is cleared there can be no question of anyone discussing anything further with you and if you have not cleared this bill within 14 days of this letter then I am afraid we must treat this further refusal as a material breach of contract terminating your appointment as distributor.

So far as the other items now raised in your letter of the 22nd May are concerned these are entirely rebutted and should you not wish to pay over the £1,087.17s.0d. which in item 5 page 2 of that letter you yourself admit to be due then we must seek sterner action elsewhere in order to recover what is due.

I hope you will not allow matters to come to this pass and I look forward to our Bankers early confirmation that this bill has been settled. In your earlier letter you make mention of the British High Commissioner for Trade in Nicosia and I am therefore endorsing a copy of this letter also to Mr. Worsnop, First Secretary (Commercial) at the British High Commission in Nicosia."

As the appellants failed to settle the aforesaid amount the respondents instituted before the District Court of Nicosia Action No. 735/1968, for its recovery.

As it appears from the record of proceedings the appellants, prior to the institution of the above action, on the 18th January, 1968, filed Action No. 263/1968, the subject matter of this appeal, claiming damages against the respondents for breach of contract of agency, the alleged breach consisting in the supply of their products in March and April, 1967 to other persons in Cyprus.

The respondents in their defence denied the allegations of the appellants and further stated that the breach of the contract of agency was committed by the appellants by their refusal to pay

the amount of £1087.850 mils which fell due on the 19th December, 1966.

In the meantime, the parties appeared before the Court in Action No. 735/68 and the present appellants submitted to judgment in the sum of £1087.850 mils on condition that execution should stay till the final determination of Action No.263/68.

The trial Court, after hearing the evidence of Mr. Photiou, the Managing Director of the appellants, who was the only witness called by them, and the evidence of the Export Sales Executive of the respondents, Mr. Dorey, who was also the only witness called on their behalf, dismissed the claim of the appellants with costs. The relevant part of their judgment appears on page 44 of the record and reads as follows:-

> "From the evidence before us we are satisfied that there was an agreement between the parties for the sole agency of the products of the defendants in Cyprus by the plaintiffs which agreement would be renewable annually on a three months' termination clause and payment would be 'cash against documents'. It is also clear that the last order placed by the plaintiffs with the defendants for their products was that of June, 1966, for which the draft was accepted by the plaintiffs and payable on the 19th December 1966. We are also satisfied that the defendants terminated their agency agreement with the plaintiffs on the 19th July, 1967, by their letter dated 19th July, 1967, and that the defendants appointed a new representative in Cyprus, Mr. Costas Polydorou, as from the 5th November, 1968. We are not satisfied from the evidence adduced that the defendants supplied any one with their products prior to this date. Mr. Photiou insisted that he had seen products of the defendants circulating in Cyprus some time in March and April, 1967. We cannot say, however, that these goods were supplied by the defendants themselves as these products, like any other product, might be supplied through another sub agent in England or another agent in another country or they might be second hand."

And, further down at page 45 of the record, they continue:-

> "From the above findings of fact we are satisfied that the

breach of the agreement was committed by the plaintiffs No. 1 who did not comply with clause No. 10 of the contract dated 24th August, 1962. Their breach, in our opinion, was from refusal to pay the draft for £1087.850 mils which fell due on the 19th December, 1966. We think that the non payment of the draft is so substantial as would go to the root of the whole contract and the defendants were at liberty after this breach by the plaintiffs to repudiate it. We have not been convinced that there was any legal justification for the non payment of the bill."

Counsel for the appellants argued this appeal on two grounds:

The first ground is that the non payment of the bill by the appellants does not go to the root of the contract of agency, as found by the trial Court, so as to entitle the respondents to terminate it. He submitted that only in cases of insolvency non payment goes to the root of the contract and is treated as a breach of a fundamental term thereof. In support of his above proposition he relied on the wording of section 11 of our Sale of Goods Law, Cap. 267, which corresponds to section 10 of the English Sale of Goods Act of 1893 and referred us to the case of *Decro-Well International S.A. v. Practioners in Marketing Ltd.* [1971] 2 All E.R. 216 which case, as he put it, is based on the above section.

Section 11 of Cap. 267 reads as follows:

"Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not, depends on the terms of the contract."

In the *Decro* case, (supra),

"by an oral agreement made in March 1967 the plaintiffs, a French manufacturing company, undertook (i) not to sell their goods in the United Kingdom to anyone other that the defendants, (ii) to ship goods with reasonable despatch on receipt of the defendants' orders and (iii) to supply the defendants on demand with certain advertising material: the defendants undertook (i) not to sell goods competing with the plaintiffs' goods, (ii) to pay for the goods which

they bought by bills of exchange due 90 days from the date of the invoice and (iii) to use their best endeavours to create a market for the plaintiffs' goods in the United Kingdom and to develop it to its maximum potentiality. The agreement was terminable by reasonable notice on either side.

The defendants incurred heavy expenses in promoting the plaintiffs' products in the United Kingdom, but as a result of their efforts the sales of those products increased very substantially each year and by April, 1970 accounted for 83 per cent of the defendants' business. The defendants were however consistently late in meeting the bills of exchange. They were, as the plaintiffs knew before entering into the contract, short of working capital and they had to rely on money received from customers to meet the bills. The delays in payment varied from two to 20 days. The plaintiffs never doubted that the bills would be paid albeit late. On occasions the time for payment had been extended with their consent. The financial detriment to the plaintiffs of the delay in payment was in the area of £20 on each bill (being the interest on loans from their bank). This loss could have been but was not debited to the defendants. At the beginning of April 1970, without a word to the defendants, the plaintiffs arranged for another company to be appointed their sole concessionaires in the United Kingdom. On 9th April the plaintiffs wrote to the defendants in effect alleging that the defendants had wrongfully repudiated the agreement by failing to pay the bills on time and purporting to accept the repudiation and bring the agreement to an end. In an action by the plaintiffs claiming the amount of the bills accepted and unpaid, sums for goods sold and delivered and a declaration that the defendants had ceased to be from 10th April 1970 their sole concessionaires in the UK, the trial judge gave judgment for the plaintiffs in respect of the dishonoured bills and the goods sold and delivered, and for the defendants on their counterclaim for a declaration that they remained the plaintiffs' sole concessionaires in the United Kingdom. He further held that the agreement was only terminable by 12 months' notice by either party and ordered the plaintiffs to pay the defendants damages for their own breach of contract. The plaintiffs undertook (a) to continue supplying the defendants with their products

until the expiry of 12 months' notice to terminate the agreement, (b) not to appoint any other persons as concessionaires for their products in the United Kingdom until that date and (c) not themselves to sell or distribute such products in the United Kingdom until that date. They subsequently served a notice to determine the agreement on the defendants.

Held. (1) The failure to pay the bills of exchange promptly and the likelihood of similar delays in the future did not constitute a repudiation of the agreement by the defendants; such a breach could only amount to a repudiation which the plaintiffs would be entitled to accept as a cancellation of the contract if the breach went to the root of the contract or (per Buckley LJ) if the effect of the breach was such as to deprive the plaintiffs as the injured party of the enjoyment of so important a part of the benefits to which they were entitled under the contract as to make it unfair to relegate them to the recovery of damages for each breach as it occurred; since nothing expressed or implied in the agreement suggested that the terms relating to time of payment were of the essence of the contract, the inference drawn from the practical consequences of the defendants' conduct was that the breaches did not go to the root of the contract."

It is clear from the above that our section 11 of Cap. 267 and the *Decro* case, supra, are concerned with stipulations as to the time of payment of goods sold and delivered, whereas in the case in hand we are concerned with the refusal of the appellants to pay for the value of the goods received by them for which they signed the relevant bill of exchange in accordance with the varied terms of the contract of agency.

The *Decro* case, supra, is, therefore, clearly distinguishable and so we are in full agreement with the findings of the trial Court, that the appellants by their refusal to pay, committed a breach of a fundamental term of the contract of agency, which entitled the respondents to repudiate it.

The second ground of appeal is that there was never a valid termination of the contract of agency by the respondents Counsel for the appellants submitted that since the letter of the

19th July, 1967, by which the respondents gave notice to terminate the contract of agency, was written "without prejudice", is void. He relied on the case of *In Re Weston & Thomas's Contract* [1907] 1 Ch. 244. In that case a freehold ground rent, secured by a lease expiring in 1938, was sold by auction. The 12th condition provided that "if any purchaser shall make and insist on any objection or requisition either as to the title, conveyance, or any matter appearing on the particulars, conditions, or abstract, or otherwise, which the vendors shall be unable to, or on the ground of difficulty, delay, or expense, or on any other reasonable ground unwilling, to remove or comply with, the vendors shall, notwithstanding any previous negotiation or litigation, be at liberty, on giving to the purchaser not less than ten days notice in writing, to annul the sale, in which case, unless the objection or requisition shall have been in the meantime withdrawn, the sale shall at the expiration of the notice be annulled, the purchaser being in that event entitled to a return of the deposit but without interest, costs or compensation. The fee was vested in two vendors, as to two undivided thirds beneficially, and as to the remaining third in trust for their brother. Succession duty on the death of a tenant for life of the entirety had been paid on the ground rent only. The purchaser insisted that the vendors should commute and pay the further duty, amounting to a few shillings, which would be payable if any of the three brothers (who in 1938 would all be over 90 years of age) should be alive on the determination of the lease. The vendors refused but by a letter expressed to be 'without prejudice' they offered an indemnity and gave notice in case of non acceptance to annul the sale."

At page 247 of the report Swinfen Eady J., after stating the facts and expressing his regret that a vendor and purchaser summons should have been issued where the amount in dispute was so small, continued:-

> "Although in my opinion the purchaser would have run no substantial risk if she had accepted the vendors' indemnity for this small amount of contingent duty, I cannot say that in point of law she was bound to accept an indemnity. The vendors were bound to clear the property, and had no legal

right to say they would not discharge the incumbrance, b would only give an indemnity. They were bound to di charge the incumbrance. Instead of doing so, their solic tors wrote offering an indemnity and saying: 'Failin your acceptance of this, we hereby give you notice und the 12th condition to annul the sale... We write of cour entirely without prejudice.' In my opinion a letter writte 'without prejudice' was not a valid notice to annul the sa within the 12th condition.

I am further of opinion that the vendors were not an are not entitled to rescind merely because the purchas asked them to clear off this small charge, and they did n see their way to do so. The requisition is not a requisitio which the vendors are unable, 'or on the ground of difficult delay, or expense, or on any other reasonable ground un willing' to comply with within the 12th condition. There i no evidence that there would be any 'difficulty, delay, o expense' in assessing and commuting the duty, and th vendors have shown no 'other reasonable ground' for re fusing to do so. There is really 'no reasonable groun why they should not ascertain and pay this small amoun The purchaser is therefore right in her contention that th duty must be borne by the vendors, and that under th circumstances they were not and are not entitled to rescind.

It is abundantly clear that the ratio decidenti in the abov case was not that the notice to annul the sale was written "with out prejudice", but that the vendors were bound to clear th property, and had no legal right to say that they would no discharge the encumbrance, but would only give an indemnity Their position in law would have been the same even if the notic had not been written "without prejudice".

As a general rule, correspondence headed "without prejudice" serves to protect the position of the writer if what he proposes i not accepted. If, however, what he proposes is accepted, a different situation is created. But a notice "without prejudice" to annul a sale, failing acceptance of a given condition, as in th case of *Re Weston,* supra, is certainly void.

In the case in hand, however, the letter of the respondents o

the 19th July, 1967, contained no given condition which the appellants were asked to accept. The appellants were simply asked to discharge their obligation on a bill of exchange which was long overdue.

For the reasons stated above, we dismiss the appeal with costs. 5

Appeal dismissed with costs.