[STAVRINIDES, HADJIANASTASSIOU, MALACHTOS, JJ.]

YIOLA A. SKALIOTOU,
Appellant-Defendant,

v.

CHRISTOFOROS PELEKANOS,
Respondent-Plaintiff.

(*Civil Appeal No.* 5396).

Arbitration—Stay of proceedings—Arbitration clause—Section 8 of the Arbitration Law, Cap. 4—Power of Court discretionary—Onus of satisfying Court against stay, on the opposing party—Claim arising under building contract—Failure of applicants to show what was the precise nature of the dispute or difference between the parties—Application refused.

Court of Appeal—Discretion of trial Judge—Reviewing exercise of discretion—Principles governing intervention by Appellate Court.

Discretion—Discretion of trial Judge—Review of, by Court of Appeal.

By an action filed on the 14th February, 1973, the plaintiff claimed the amount of £12,404.250 mils being balance (including extras) due to him under a building contract. The action was filed after the execution and completion of the building operations and after the defendant had been given a final account with full details for all the claims appearing in the statement of claim.

Five months after the filing of the statement of claim the defendant filed an application, under s. 8 of the Arbitration Law, Cap. 4* for the stay of the action and the reference of the dispute to arbitration as provided by clause 14 of the Contract**.

The trial Judge dismissed the application having held that there was no specific disagreement or dispute between the litigants relating to any fact or matter which arose out of the contract. In exercising his discretion against stay the trial Judge took into consideration all the facts and circumstances of the case including the unreasonable delay in applying for such stay.

*. Quoted at pp. 257-258 of the judgment *post*.

** Quoted at p. 264 of the judgment *post*.

Counsel for the appellant in arguing the appeal contended:

(a) That the finding of the trial Judge that there was no dispute was wrong in law.

(b) That the trial Judge wrongly exercised his discretion in declining to grant a stay. He (counsel) was not in a position, however, to state clearly before the Court of Appeal what was the disagreement between the parties or what was the precise nature of the dispute which had arisen between them that was to be referred to arbitration in accordance with the arbitration clause of the contract.

Held, (1) a mere reference to arbitration is not sufficient; it was up to the applicant to point out clearly what was actually the precise nature of the dispute in order to obtain stay of the proceedings (see *Monro* v. *Bognor U.D.C.* [1915] 3 K.B. 167 at p. 171).

(2) Having regard to the language of the arbitration clause and once the appellant has failed to show what was the dispute or difference in fact which has arisen between them and as to whether there has been a breach by one side or the other we would dismiss the contention of counsel that there was a dispute between the parties arising out of the contract and that such dispute was within the arbitration clause.

(3) The appellate Court will only set aside the discretionary order of a trial Judge if satisfied that the Judge was wrong. But conversely it will interfere if it can see that a Judge has been influenced by other considerations which ought not to have weighed with him; or not weighed so much with him (see, *inter alia, Evans* v. *Bartlam* [1937] A.C. 473; *Oscnton & Co.* v. *Johnston* [1941] 2 All E.R. 245; *Hennel* v. *Ranaboldo* [1963] 1 W.L.R. 1391).

(4) Having regard to the judgment of the trial Judge and the reasons put forward by him, we are not disposed to interfere with the discretion of the Judge. We would affirm his decision because we are of the opinion that he rightly exercised his discretion in rejecting the stay of the action.

Appeal dismissed with costs.

Cases referred to:

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

Heyman and Another v. *Darwins Ltd.*, [1942] 1 All E.R. 337;

Union of India v. *Aaby's Rederi A/S* [1974] 2 All E.R. 874;

Monro v. *Bognor U.D.C.* [1915] 3 K.B. 167 at p. 171;

Ford v. *Clarksons Holidays Ltd.* [1971] 3 All E.R. 454;

Bloemen v. *Council of City of Gold Coast* [1972] 3 All E.R. 357;

Evans v. *Bartlam* [1937] A.C. 473;

Osenton and Co. v. *Johnston* [1941] 2 All E.R. 245;

Hennell v. *Ranaboldo* [1963] 1 W.L.R. 1391;

Grimshaw v. *Dunbar* [1935] 1 All E.R. 350;

In Re F. (*an infant*) reported in "The Times" newspaper of November 18, 1975;

Re O. (*infants*) [1971] 2 All E.R. 744;

Hadjiathanassiou v. *Parperides and Others* (1975) 1 C.L.R. 401;

Ward v. *James* [1965] 1 All E.R. 563;

Instrumatic Ltd. v. *Supabrase Ltd.*, [1969] 2 All E.R. 131;

Re F. (*a minor*) [1976] 1 All E.R. 417;

Appeal.

Appeal by defendant against the order of the District Court of Nicosia (Pierides, Ag. D.J.) dated the 14th January, 1975 (Action No. 1085/73) dismissing her application for the stay of plaintiff's action, for £12,404.250 mils being balance due under a building contract.

C.J. Myrianthis, for the appellant.

K. Michaelides, for the respondent.

Cur. adv. vult.

STAVRINIDES, J.: The judgment of the Court will be delivered by:

HADJIANASTASSIOU, J.: This is an appeal by the defendant Yiola A. Skaliotou against the order of a Judge of the District Court of Nicosia dated January 14, 1975, whereby he dismissed an application for the stay of the action of the plaintiff on the ground that the defendant failed to show that there was any dispute arising out of the building contracts to be referred to arbitration.

The facts are these:–

The plaintiff, Christoforos Pelekanos, a building contractor,

agreed with the defendant to erect a basement and a four storey building in Nicosia on the building site of the defendant situated at Kyriacos Matsis Avenue in accordance with the designs prepared by her architects for the sum of £85,000. The said agreement was embodied in three contracts dated June 7, 1966, May 24, 1968 and May 28, 1969, respectively. There was a further contract containing the terms and conditions of the works undertaken to be completed by the building contractor, and *exhibit* 4 contains clause 14(1)(a) which provides for an agreement for arbitration proceedings if and when a dispute would arise between the parties.

It appears that before the works were executed and completed, the building contractor was paid various amounts, and when finally the building operations were executed and completed the plaintiff informed the defendant that an amount of £12,404.250 mils was still owing to him out of the agreed amount including extras, and called upon the latter to pay it. When there was no payment, the plaintiff brought an action against the defendant on February 14, 1973, claiming that amount.

Although the statement of claim was filed on April 14, 1973, yet no defence was filed by the defendant disputing in any way the amount claimed by the plaintiff, but after a period of nearly 5 months, *i.e.* on September 7, 1973, the defendant filed an application for the stay of the action of the plaintiff relying on the provisions of s. 8 of the Arbitration Law, Cap. 4. In an affidavit filed by the husband of the defendant in support of the said application, the affiant alleged that the claims in the action of the plaintiff arose exclusively from the building contracts (referred to earlier) which adopted and included terms and conditions which are recognized by both the Association of Engineers and Architects and by the Association of Building Contractors of Cyprus. Furthermore, the affiant pointed out that under clause 14(1)(a), all differences between the litigants which would arise or were connected with the aforesaid agreements should be referred to for arbitration in accordance with the provisions of the law; and that the defendant was at all material times and is now ready and willing to do all things necessary to the proper conduct of the arbitration in accordance with the terms and conditions of the said agreements. Finally, the affiant said that the disputes raised in the litigation are matters entirely of a technical nature and can be decided only by an architect or a civil engineer.

On October 18, 1973, the plaintiff gave notice opposing the application for a stay of the proceedings relying on the provisions of s. 8 of Cap. 4, and on the Civil Procedure Rules Order 48 rule 2. The plaintiff in a sworn statement alleged in his affidavit that the Court, in the exercise of its discretionary power, should dismiss the application for the stay of the action. Moreover, he alleged that the amounts claimed under paragraphs 10 and 11 of the statement of claim do not fall within the terms and conditions of building contract recognized by both the Association of Engineers and Architects, and the Association of Building Contractors; and that the said action brought against the defendant should proceed to be heard by the Court, because there was no alleged dispute to be referred to arbitration. With regard to the rest of the claims appearing in the statement of claim, the plaintiff deposed that on certain dates accounts with full particulars had been given to the defendant; and that on March 27, 1972, a final account was given both to the defendant and their architect with full details for all the claims which appear in the statement of claim. Then the affiant posed the query that if the defendant had any doubt, she ought to have checked the work carried out within a period of 3 months from the date of its completion. But he added that, until that time, and until the filing of the said application, the defendant had never made a statement that there was any disagreement or dispute to anything done or as regard to any of the amounts claimed by him; and that she had never referred any matter or thing to her architect to resolve it if there was any dispute which arose out of the said accounts.

Finally, the affiant alleged that in the light of his allegations, the amounts claimed by him from the defendant cannot be considered as any disputes or differences arising under the contracts, and that the provisions of clause 14(1)(a) are not applicable.

Now the question posed was that once the claim was made and not rebutted or denied, whether a dispute would arise between the employer and the contractor; and whether such dispute fell within the terms of the arbitration clause 14. We think we can state at the outset that the law permits the parties to a contract to include in it as one of its terms an agreement to refer to arbitration disputes which may arise in connection with it. Where, therefore, proceedings are instituted by one of the parties to a contract, containing an arbitration clause and the other party, founding on the clause, applies for a stay,

the first thing to be ascertained is the precise nature of the dispute which has arisen; and the next question is whether the dispute is one which falls within the terms of the arbitration clause. No question arises here whether the arbitration clause is still effective or whether something has happened to render it no longer operative. With this in mind, and once the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause, there remains for the Court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration.

The learned trial Judge, having heard the submissions of both counsel, and having properly addressed his mind to arbitration clause 14 and to the law, delivered his reserved ruling on January 14, 1975, and said at pp. 30–31:–

> " Having considered carefully the evidence before the Court *viz.*, the contents of the two affidavits, as well as the documents contained in the file, that is to say, the writ of summons, the statement of claim, the application of the plaintiff for giving judgment in his favour, the present application to stay the proceedings, and the minutes taken during the hearing of the application for a stay, I was unable to determine that at any stage of the proceedings a point was raised that there was a specific disagreement or dispute between the litigants, having regard to any fact or matter which arose out of the three agreements, *exhibits* '(*A*)', '(*B*)' and '(*C*)'. Furthermore, neither of the advocates has referred me during the hearing of the application to any difference or dispute nor did they put forward any allegation that there was any disagreement or dispute besides the allegation of counsel for the defendant that her refusal to pay when the plaintiff sent to her the final account of March 27, 1972, could be treated that there was a dispute or disagreement. But (the Judge goes on) that refusal by itself, without disclosing reasons, it cannot be understood conclusively that there existed a dispute or difference relating to any matter which arose out of the three agreements because that (refusal) might be arising from various reasons, as for example, due to lack of money or an intention for an indefinite postponement of the payment, or indeed due to a caprice not to pay etc., and not due to the existence of any dispute or difference. But even if such refusal for payment by the defendant could be considered as being understood that

there was a dispute or a difference of someone, again this cannot be sufficient once in accordance with what has been said the nature of the dispute or disagreement should be disclosed in order to be decided as to whether it falls within the terms of the agreement relating to arbitration."

Finally, the trial Judge, exercising his discretionary powers and having addressed his mind: (a) that the defendant, in order to obtain a stay of the proceedings there must be a dispute in fact, that is to say, that there must be some issue joined between the parties which the arbitrator will have to try; and that the effect of there being no dispute within the arbitration agreement is that the Court has no power to stay an action; and (b) to all the facts and circumstances of the case, including the unreasonable delay of 6 months (as he put it) to file an application for a stay, refused to stay the proceedings because he was of the view that there was no dispute in fact, and dismissed the application of the defendant with £40 costs.

The defendant, feeling aggrieved, appealed against that ruling and the notice of appeal raised in effect three grounds of law:-

(1) That the trial Court was wrong in law and in fact, that there was a delay in filing the application for a stay of proceedings in view of the provisions of s. 8 of Cap. 4;

(2) that the finding of the Court was wrong that there was no dispute for arbitration, once in the affidavit of the applicant there was a reference to the arbitration agreement; and

(3) that the discretion of the Court was not exercised judicially.

There is no doubt that the learned trial Judge has power to stay proceedings where there is an arbitration agreement, because section 8 of Cap. 4 says:-

"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."

Before dealing with the submissions of counsel, we think it is necessary to point out that our section 8 is almost identical to s.4 of the English Arbitration Act, 1950, and that of the older Act of 1889. Our section was interpreted by the then Supreme Court of Cyprus in the *Bienvenito Steamship Co. Ltd.* v. *Georghios Chr. Georghiou and Another*, 18 C.L.R. 215, where the Court in allowing the appeal, held:-

"(1) that the dispute between the parties was a dispute within the arbitration clause and the respondents' action ought to be stayed.

(2) When a Court was asked to stay legal proceedings in order that a dispute might be referred to arbitration in accordance with an agreement between the parties, the power of the Court to stay the proceedings was discretionary.

(3) Under a general submission, the arbitrator was appointed to decide issues both of fact and law, and it would require some substantial reason to induce the Court to deny its due effect to the agreement of the parties to submit the whole dispute, whether it included both fact and law or was limited to either fact or law."

In that case, the first question before the District Court was whether the action instituted by the charterers was "in respect of any matter agreed to be referred to arbitration". The arbitration clause in the agreement between the parties covered "all disputes which may arise under this agreement" and the District Court held that the dispute between the parties fell within that clause and consequently that the action which had been instituted by the charterers was one which could be stayed if the other requirements of s. 8 of the Arbitration Law were fulfilled.

Jackson, C.J., having observed that neither party contested that finding above, in delivering the judgment of the Court, said at pp. 219-220:-

"It is well established by English authorities dealing with

the corresponding provisions of the English Arbitration Act, 1889, section 4, that when a Court is asked to stay legal proceedings in order that a dispute may be referred to arbitration in accordance with an agreement between the parties, the power of the Court to stay the proceedings is discretionary. In considering this appeal we have therefore tried to bear constantly in mind the principles upon which a superior Court should act in an appeal from the exercise of a discretion given to a lower Court. (See the case of *Osenton* v. *Johnston*, All E.R. 1941, Vol. 2 p. 245). Those principles have a special application when the exercise of the discretion given to the lower Court rests partly on the Court's view on a question of fact. Nevertheless, we feel compelled to examine the grounds upon which the District Court came to the conclusion that they were not satisfied that the shipowners were willing to go to the arbitration at the commencement of the action by the charterers.

The District Court said that they came to that conclusion from a perusal of the documents filed in the application for a stay of proceedings. The Court was evidently referring to a series of telegrams and letters which passed between the parties, beginning after the discovery of the refusal of the port authorities at Famagusta to allow the embarkation of 130 passengers on or about the 29th July, 1946, and continuing until the 5th August, when the charterers instituted their action. The District Court referred in particular to two documents. One was a letter of the 4th August, 1946, in which the appellants, without mentioning arbitration, claim to retain the payments already made to them as forfeited under the agreement. The other document was a letter of the 5th August from the respondents notifying the appellants that they intended to take legal proceedings and the Court observed that even then the appellants did nothing to claim arbitration. The fact that in their letter of the 4th August, the appellants claimed rights under the agreement affords, in our view, no ground whatever for a conclusion that they were unwilling to proceed to arbitration if the parties could not settle the dispute between themselves. They were still relying on the agreement and were putting their own interpretation on it. We think, further, that the delay of the appellants in responding to the letter of the 5th August is satisfactorily explained by the fact that it was addressed to the Cyprus

representatives of the shipowners' agents in Egypt. It introduced an entirely new situation, outside the agreement, and the Cyprus agents had to consult their principals. The first action they took, after entering appearance, was to apply on the 28th November, 1946, for a stay of the proceedings, which had been instituted on the 5th August. There was certainly no delay on the part of the charterers in abandoning the arbitration clause and in having recourse to an action of law.

In the face of the appellant's affidavit that they were and always had been, ready to proceed to arbitration, we can find no sufficient reason, in the correspondence to which the District Court referred, for a refusal to stay proceedings on that particular ground."

Then the learned Chief Justice, having considered other grounds with which we are not concerned in the case in hand, concluded as follows at p. 222:–

" It will now be clear, from what we have said, that we do not consider that the reasons given by the District Court for the exercise of their discretion are sufficient to support it. For one of their reasons, a refusal to believe that the appellants were willing to go to arbitration, there seems to us to be no ground at all.

.....

We think, therefore, that this appeal must be allowed with costs here and in the Court below and that the proceedings in that Court must be stayed."

In England, the House of Lords dealt in *Heyman and Another* v. *Darwins Ltd.* [1942] 1 All E.R. 337, with s. 4 of the Arbitration Act. 1889. In that case, there was an Arbitration clause which provided that "if any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained, or anything arising hereout, the same shall be referred for arbitration". A question whether one party had repudiated the agreement was held to be within the terms of the Arbitration Clause. In his speech, Viscount Simon, L.C., said at p. 343:–

" If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen

between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of', or 'with regard to', or 'under' the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly."

In the same case, Lord MacMillan said at p. 347:-

"I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other hinc inde; but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. Moreover, there is this very material difference that, whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages but its enforcement. Moreover, there is the further significant difference that the Courts in England have a discretionary power of dispensation as regards arbitration clauses which they do not possess as regards the other clauses of contracts".

Finally, he concluded his speech as follows at p. 348:-

"Applying to the present appeal the principles I have endeavoured to formulate, I have no doubt that the dispute between the appellants and the respondents, the nature of which has been fully set out by my noble and learned friend on the woolsack, is one which falls within the arbitration clause in the contract between them and that nothing has occurred to deprive that clause of its binding efficacy. I am also satisfied that, in the circumstances, the Court of

Appeal were justified in overruling the discretion exercised by the Judge of first instance in declining to grant a stay."

Then Lord Wright, in the same case, because he thought that the reasons given by the trial Judge were not sufficient to justify a stay of the action, said at p. 355:–

"The Arbitration Act, 1889, s.4, makes the power of the Court to stay an action under the arbitration clause a matter of discretion and not ex debito justitiae. Though the dispute is clearly within the arbitration clause, the Court 'may' still refuse to stay if, on the whole, that appears to be the better course. The Court must, however, be satisfied on good grounds that it ought not to stay. The onus of thus satisfying the Court is on the person opposing the stay, because in a sense he is seeking to get out of his contract to refer, though, in truth, an arbitration clause is not of strict obligation, because it is, under sect. 4 always subject to the discretion of the Court. In the present case the Judge (agreeing with the master) has exercised his discretion against the application of the arbitration clause. The Court of Appeal reversed the decision of the Judge. The Judge's discretion is, indeed, primary, but it is subject to appeal. The duty of appellate Courts on an appeal against the exercise of a discretion has been examined by this House in *Evans* v. *Bartlam*, [1937] A.C. 473, and in *Osenton* v. *Johnston*, [1941] 2 All E.R. 245. It is enough here to say that the appellate Court will only set aside the discretionary order if satisfied that it is clearly wrong. It will make every reasonable presumption in favour of upholding the Judge."

See also *Union of India* v. *Aaby's Rederi A/S* [1974] 2 All E.R. 874 H.L.

With those principles in mind, the first question to be decided in this appeal is whether the action of the plaintiff against the defendant should, on the application of the latter be stayed pursuant to s. 8 of the Arbitration Law, Cap. 4, in order that the matters in dispute be dealt with under the Arbitration Clause 14(1)(c).

The first complaint of counsel was (a) that the finding of the trial Judge that there was no dispute was wrong in law once in the affidavit of the husband of the defendant there was a reference to the arbitration agreement indicating that the dispute

was within the arbitration; and (b) that the trial Judge wrongly exercised his discretion in declining to grant a stay of the action.

The question is what is the present dispute about. We think that the answer has to be gathered from the affidavits filed in the application to stay and from the endorsement of the writ and of the statement of claim, as well as the accounts.

It has not been alleged that when the claim was made by the plaintiff, there was a letter from the defendant rebutting or denying the said claim, and going through all the material which was before the learned trial Judge, including the submissions of counsel, we find ourselves in agreement with the trial Judge that in spite of the reference to arbitration in the affidavit of the husband of the defendant, nevertheless, nowhere it is to be found what was the precise nature of the dispute which had arisen between the parties. Indeed, we would go further and state that even the new counsel before us when arguing the appeal, was not in a position to state clearly what was the disagreement between the parties in this case or what was the precise nature of the dispute which had arisen between the parties to be referred in accordance with the arbitration agreement.

With respect to counsel's argument, a mere reference to arbitration is not sufficient, and it was up to the affiant to point out clearly what was actually the dispute in more specific language, because once the plaintiff instituted proceedings, and the defendant was relying on paragraph 14(1)(c) containing the arbitration clause, it was up to him to pinpoint to the trial Judge the precise nature of dispute which has arisen between the parties in order to obtain a stay of proceedings.

We would, reiterate that, in such cases, there must be a dispute in fact, that is to say, there must be some issue joined between the parties which the arbitrator would have to try at the end. The effect of there being no dispute between the parties within an arbitration agreement is, of course, that the Court has no power to stay an action. See *Monro* v. *Bongor U.D.C.* [1915] 3 K.B. 167 at p. 171).

I think it is important to state first, that arbitration clauses in contracts vary widely in their language, for there is no limitation on the liberty of contracting parties to define as they please the matters which they desire to submit to arbitration. Some-

times the reference is confined to practical questions arising in the course of the execution of the contract; sometimes the most simple language is used so as to impress any question which may arise between the parties in any way relating to the contract. Consequently, many of the reported cases are concerned with the interpretation of the scope of the terms of reference, for an arbitrator has jurisdiction only to determine such matters as, on a sound interpretation of the terms of reference, the parties have agreed to refer to him.

The next question is what disputes the arbitration clause 14(1)(c) covers. The language of the arbitration clause in this agreement runs in the following terms:-

> " If any dispute shall arise between the employer or the architect on his behalf and the contractor, either during the progress or after the completion or cancellation, breach or abandonment of the contract, or as to the question of the contract, or as to the construction of the contract or as to any matter or anything arising thereunder, or the withholding by an architect of any certificate to which the contractor may claim to be entitled, then the architect shall resolve such dispute or difference by a written decision to be delivered to the contractor and the employer. The said decision shall be final and conclusive on the contracting parties unless the contractor or the employer within 14 days from the receipt thereof, by written notice to the architect declares his disagreement with such decision in which case or in the case the architect after the submission of a written request to him by the employer or the contractor neglects to give a decision as above stated, then such a dispute or difference shall be referred and is hereby referred to the arbitration of two arbitrators in accordance with the provisions of the Cyprus Law."

Having regard to the language of the arbitration clause which embodies the agreement of both parties that if any dispute arises with regard to the obligations which one party has undertaken to the other and once the appellant has failed to show what was the dispute or difference in fact which has arisen between them and as to whether there has been a breach by one side or the other, then in our view, in the absence of such dispute or difference we would dismiss the contention of counsel that (a) there was a dispute between the parties arising out of

the said contracts; and (b) that such dispute was within the arbitration clause.

Turning now to the next complaint of counsel arising out of point 3 of the grounds of law, that the trial Judge made a wrong use of his discretion in refusing the stay, we think our Arbitration Law Cap. 4, s. 8, makes the power of a Judge to stay an action under the arbitration clause a matter of discretion. Even though the dispute is clearly within the arbitration clause, the Judge may still refuse to stay the action, if on the whole that appears to be the better course. The Court must, however, be satisfied on good grounds if it ought not to stay. The onus of thus satisfying the Court is on the person opposing the stay to show some sufficient reasons why the matter should not be referred. (See *Ford* v. *Clarksons Holidays Ltd.*, [1971] 3 All E.R. 454, and *Bloemen* v. *Council of City of Gold Coast*, [1972] 3 All E.R. 357, where the Privy Council applied *Heyman* v. *Darwins Ltd.*, [1942] 1 All E.R. 337).

In the present case, as we said earlier, the trial Judge exercised his discretion in refusing the stay of the action, and the further question posed is when does the appellate Court interfere; The duty of appellate Courts on an appeal against the exercise of a discretion has been examined by the House of Lords in *Evans* v. *Bartlam*, [1937] A.C. 473; and in *Osenton and Co.* v. *Johnston*, [1941] 2 All E.R. 245. We think, for the purposes of the appeal, it is enough to say that the appellate Court will only set aside the discretionary order of a trial Judge if satisfied that the Judge was wrong. But conversely it will interfere if it can see that a Judge has been influenced by other considerations which ought not to have weighed with him; or not weighed so much with him, as in *Hennell* v. *Ranaboldo* [1963] 1 W.L.R. 1391. "It sometimes happens that the Judge has given reasons which enable this Court to know the considerations which have weighed with him; but even if he has given no reasons, the Court may infer from the way he has decided, that the Judge must have gone wrong in one respect or the other, and will thereupon reverse his decision; see *Grimshaw* v. *Dunbar*, [1953] 1 All E.R. 350".

In *Re F. (an Infant)*, reported in the Times of November 18, 1975, the House of Lords dealt with the question of discretion and Lord Justice Browne said:–

> " It had been clearly established by *Evans* v. *Bartlam* [1937] A.C. 473 and *Charles Osenton and Co.* v. *Johnston*, [1942]

A.C. 130 that a discretion entrusted to a Judge could be reviewed not only on the grounds that he had erred in principle but also where he had not given proper weight to a relevant factor. In *Ward* v. *James*, [1966] 1 Q.B. 273, Lord Denning said:-

> 'The Court of Appeal will interfere if it can see that the Judge has given no wight (or no sufficient weight) to those considerations which ought to have weighed with him.'

Lord Justice Stamp thought that a different rule applied in infant cases and that the Court of Appeal could not reverse the Judge on the ground that he had gone wrong in the balancing operation implicit in a reference to weight. There his Lordship's opinion differed from that of Lord Justice Stamp. In his judgment there was no reason why the general principle applicable to the exercise of discretion in respect of infants should be any different from the general principle applicable to any other form of discretion. In *re O. (infants)* [1971] 2 All E.R. 744 Lord Justice Davies said: 'If an appellate Court is satisfied that the decision of the Court below is improper, unjust or wrong, then the decision must be set aside. I am quite unable to subscribe to the view that a decision must be treated as sacrosanct because it was made in the exercise of discretion: so to do might well perpetuate injustice'."

In *Hadjiathanassiou* v. *Parperides and Others*, (1975) 1 C.L.R. 401, this Court in reviewing the discretion of the trial Court, came to the conclusion, having adopted and followed the principle formulated by Lord Denning M.R. in *Ward* v. *James*, [1965] 1 All E.R. 563, that this Court can, and will, interfere if it is satisfied that the Judge was wrong. See also *Instrumatic Ltd.* v. *Supabrase Ltd.*, [1969] 2 All E.R. 131; in *Re F. (a minor)*, [1976] 1 All E.R. 417; and in *Re O. (infants)*, [1971] 2 All E.R. 744.

In the light of these weighty judicial pronouncements, it seems to us that in the case in hand the Judge, in exercising his discretionary powers refused to stay the action and has given reasons which enable this Court to know the considerations which have weighed with him. It is true that one of the considerations was also the matter of delay of 6 months which the defendant took in applying for the stay, and which the Judge

thought was an unreasonable delay, but having considered the matter, we do not think that such a consideration had weighed with him so much or that it influenced him in such a way—as counsel claims—justifying this Court to interfere with the discretion of the Judge. We think, having regard to the careful judgment and the reasons put forward by him, we are not disposed to interfere with the discretion of the Judge in these circumstances, and for the reasons we have endeavoured to advance, we would affirm his decision because we are of the opinion that he rightly exercised his discretion in rejecting the stay of the action.

We would, therefore, dismiss the appeal with costs in favour of the plaintiff.

Appeal dismissed with costs.