1976 October 27

[TRIANTAFYLLIDES, P., HADJIANASTASSIOU, MALACHTOS, JJ.]

PANICCOS HARAKIS LTD.,

Appellants—Defendants,

v.

THE OFFICIAL RECEIVER, AS ADMINISTRATOR OF THE ESTATE OF THE BANKRUPT TAKIS VRYONIDES,

Respondent—Plaintiff.

(*Civil Appeal No.* 5592).

Arbitrator—Misconduct—Notion of—A court will not interfere with an award if the complaining party has not, in fact, been injured—Failure of plaintiff to comply with request of arbitrator did not result in injury to defendants—No misconduct by arbitrator.

Arbitration—Award—Validity—Two issues left undetermined—But main matters fully and finally determined—Trial Judge properly exercised his relevant discretion by remitting case to arbitrator for determination of undetermined issues—Section 19 *of the Arbitration Law, Cap.* 4.

Arbitrator—Evidence—Arbitrator expert on the subject-matter—Entitled to use his own knowledge in order to derive assistance, in preparing his award, from documents containing technical information.

The trial Court, with the consent of both parties, appointed an arbitrator in order to deal with the matters in dispute between them, arising out of a written contract for the construction of a bridge.

The Court below dismissed the appellants-defendants' application for the setting aside of the award of the arbitrator and on appeal by the defendants the following issues arose for determination:

(a) Whether the arbitrator, by requesting the plaintiff contractor to dig a trench so that the arbitrator could

verify plaintiff's allegation regarding the hardness of the soil—a request which was not complied with by the plaintiff—has misconducted himself;

(b) whether the whole award should be set aside because the arbitrator left two issues undetermined; (in this connection the trial Court held that the better course was to remit the case to the arbitrator, for determination of the above issues, under section 19 of the Arbitration Law, Cap. 4).

(c) whether the arbitrator has wrongly received in evidence two documentary exhibits.

These exhibits were two hand-written documents which had been prepared by the supervising civil engineer, who was employed by the appellants, and they contained pre-estimates regarding the various items of the work to be undertaken by the plaintiff; and they had been checked by him together with the said civil engineer before the written contract between the parties was signed; there was no doubt that the arbitrator relied a lot on these two documents.

Held, (1) In the light of the true notion of misconduct (see *Galatis* v. *Savvides and Another* (1966) 1 C.L.R. 87 at pp. 96, 97) we fail to see how the arbitrator has misconducted himself in any way; we hold that, quite rightly, the trial Judge found that such a ground for the setting aside of the award was unfounded. Moreover, a Court will not exercise its discretionary powers of interfering with an award if the complaining party has not, in fact, been injured, as in this case (see Russell on Arbitration, 18th ed. p. 353).

(2) Unless there is misconduct which makes it impossible for the parties, or for the Court, to trust an arbitrator, the Court, in exercising its discretion, should remit the award rather than set it aside (see Russell, *supra*, p. 355). The main matters in dispute between the parties have been fully and finally determined by the arbitrator. As such matters are severable from those issues which were not finally determined and which are issues of a secondary nature, in the circumstances, we think that the trial Judge has exercised correctly his relevant discretion when he decided to remit the award to the arbitrator under section 19. We are not, therefore, prepared to interfere,

on appeal with his decision to do so; and we cannot agree with the submission of counsel for the appellants that the whole award should be set aside and that the arbitration proceedings should commence afresh as regards all the matters in dispute.

(3) Wrongful admission of evidence may amount to legal misconduct by an arbitrator (see Russell, *supra*, at p. 235); and it is not possible to admit extrinsic evidence in order to construe a written contract. But , what has taken place in the present case is not wrongful admission of extrinsic evidence in order to interpret the contract between the parties; what has, actually, happened is that the arbitrator, being himself an expert in the matter, checked the quantities and prices contained in the said two documents and, having found them to be correct, he then used them for the purpose of assessing, in the light of the evidence before him, the value of the work which has been left. The arbitrator being himself an expert in the matter he was entitled to use his own knowledge in order to derive assistance, in preparing his award, from these two documents, which contained technical information. (See *Mediterranean and Eastern Export Co. Ltd.* v. *Fortress Fabrics (Manchester), Ltd.*, [1948] 2 All E.R. 186 at pp. 188, 189).

Appeal dismissed with costs.

Cases referred to:

Galatis v. *Savvides and Another* (1966) 1 C.L.R. 87 at pp. 96, 97;

Prenn v. *Simmonds* [1971] 3 All E.R. 237;

Wickman Machine Tool Sales Ltd. v. *L. Schuler A.G.* [1972] 2 All E.R. 1173 (and on appeal to the House of Lords [1973] 2 All E.R. 39);

Kyriakides v. *Kyriakides* (1977) 7–8 J.S.C. 1265 (to be reported in (1976) 1 C.L.R.);

Mediterranean and Eastern Export Co. Ltd. v. *Fortress Fabrics (Manchester), Ltd.* [1948] 2 All E.R. 186 at pp. 188, 189.

Appeal.

Appeal by defendants against the order of the District Court of Limassol (Pitsillides, S.D.J.) dated the 7th May, 1976, (Action No. 139/74) whereby defendants' application to set aside the award of the arbitrator, who had been appointed by consent, was dismissed and it was ordered that the said award be remitted

to the arbitrator for final determination of two issues which were left undetermined.

V. Harakis, for the appellants.

J. P. Potamitis, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:

TRIANTAFYLLIDES P.: In this case the appellants—who were the defendants before the trial court—have applied, under section 20 of the Arbitration Law, Cap. 4, for the setting aside of the award of an arbitrator, who was appointed with the consent of both sides by the trial court in order to deal with matters in dispute between them in a civil action. The said award is dated May 8, 1975.

For the sake of completeness of this judgment it is quite useful to set out the history of the matter as it is adequately stated in the judgment of the learned trial Judge:-

> "The plaintiff of the action is the Official Receiver as trustee of the property of the bankrupt Takis Vryonides of Limassol and claims against the defendants the sum of £ 2,247.500 mils as balance due by the defendants to the estate of the said bankrupt for work done and materials provided for the construction of a bridge.
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> From the statement of claim it appears that the said Takis Vryonides agreed with the defendants by a written contract to be paid the sum of £ 7,000.- for the construction of a bridge; he also claims under an alleged orally agreed contract the sum of £ 538.- in case it was found that the underground soil was hard and, as it is alleged that the soil was hard, this sum is included in the claim. Also it is alleged that, due to the hardness of the underground soil and to the shortage of cement in Cyprus, Takis Vryonides delayed the execution of some work which was left unexecuted by him and which was carried out by the defendants and should cost to them the sum of £ 793.- This sum, together with the sum of £ 4,497.500 mils which is alleged to have been paid by the defendants to the plaintiff, are deducted from the sum of £ 7,538.- (which includes the amount of £ 538.- for work on hard soil) and thus the

sum of £ 2,247.500 mils, which is claimed in the action, is reached.

The defendants, by their statement of defence, deny that they orally agreed with Takis Vryonides to pay him any sum over and above the sum of £ 7,000.– in case the underground soil was found to be hard; they deny that the underground soil was hard, they deny that the work left unexecuted by Takis Vryonides is only that mentioned in the statement of claim or that it cost to the defendants only the sum of £ 793.– and they allege that, in view of the delay and neglect of Takis Vryonides to carry out the work, they terminated the contract which they had with him and they employed another person to carry out the unexecuted work whom they paid the sum of £ 2,570.800 mils to carry it out and thus, by paying to Takis Vryonides the sum of £ 4,497.500 mils, he received the sum of £ 68.300 mils over and above the cost of work carried out by him, since the total of the said two sums paid by the defendants exceeds the sum of £ 7,000.– agreed for the construction of the bridge by the sum of £ 68.300 mils and the defendants counterclaim this sum.

In his reply and defence to the counterclaim, the plaintiff joins issue with the defendants of their defence and they deny that Takis Vryonides left unexecuted work other than that mentioned in the statement of claim or that the defendants spent or had to spend any sum in excess of the sum mentioned in the statement of claim as required for the carrying out the unexecuted work or that the defendants suffered the alleged or other damage or that the defendants are entitled to their counterclaim.

Thus, as it appears from the pleadings, the main disputed issues between the parties are the following:–

(a) Whether there was any oral agreement for payment by the defendant to Takis Vryonides of any sum in case the underground soil was hard and what was this sum.

(b) Whether the underground soil was in fact sufficiently hard to entitle Takis Vryonides to payment

in case there was an agreement entitling him to payment for the hardness of the underground soil.

(c) What part of the work was left unexecuted by Takis Vryonides, including any materials not provided by him, and what sum of money would be required to be expended by the defendants for the carrying out of such unexecuted work, including the money needed for the purchase of materials not provided by Takis Vryonides and were needed for the execution of such work."

The agreement for reference to arbitration was concluded on October 9, 1974, and was embodied in an order of the trial Court dated October 14, 1974. As correctly held by the trial Judge it is an agreement for reference to arbitration of all matters in dispute in the action.

The appeal has been argued on the same grounds on which the application to set aside the award has been based.

The first ground is that the abritrator misconducted himself to such an extent that the appellants, according to the contention of their counsel, have no longer any confidence in him.

The alleged misconduct, which is relied on by the appellants, is that the arbitrator—as he, himself, has openly stated in his award—requested the plaintiff in the action (whose trustee in bankruptcy is the respondent in these proceedings) to dig a trench so that the arbitrator could verify an allegation of the plaintiff regarding hardness of the soil; the arbitrator reminded repeatedly the plaintiff about his said request, but the plaintiff failed to comply with it, and, actually, the arbitrator complains, in his award, about such failure.

What is misconduct has been defined, on many occasions; we find it pertinent to quote the following passage from the judgment of Josephides J. in *Charalambos Galatis* v. *Sofronios Savvides and another* (1966) 1 C.L.R. 87 (at pp. 96, 97):-

> "The first principle in arbitration is that the arbitrator must act fairly to both parties, and that he must observe in this the ordinary well-understood rules for the administration of justice. The arbitrator must not hear one

party or his witnesses in the absence of the other party or his representative except in few cases, where exceptions are unavoidable, both sides must be heard and each in the presence of the other: see *Harvey* v. *Shelton* [1844], *supra*, to which we shall revert later. The principles of universal justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest cross-examination or himself to cross-examine, and to be able to find evidence, if he can, that shall meet and answer it; in short, to deal with it as in the ordinary course of legal proceedings: *Drew* v. *Drew* [1855] 2 Marq. 1, at page 3, per Lord Cranworth, L.C. There would seem to be an established practice for the umpire in commercial 'quality arbitrations' to depart from this rule: An arbitrator experienced in cloth was held justified in deciding a dispute as to quality upon inspection of samples only (*Wright* v. *Howson* [1888] 4 T.L.R. 386). Similarly an umpire expert in the timber trade properly decided a dispute as to quality on his own inspection (*Jordeson & Co.* v. *Stora etc. Aktiebolag* [1931] 41 Ll. L. Rep. 201, at page 204)."

In the light of the true notion of misconduct, we fail to see how the arbitrator has, in the present case, misconducted himself in any way; we hold that, quite rightly, the trial Judge found that such a ground for the setting aside of the award was unfounded.

Moreover, it is well-settled that the party seeking to impeach an award must have been injured by what he complains regarding the conduct of the abritration proceedings; a Court will not exercise its discretionary powers of interfering with an award if the complaining party has not, in fact, been injured (see Russell on Arbitration, 18th ed., p. 353). In the present case if anybody was injured by the failure of the plaintiff contractor to dig the trench, as requested by the arbitrator, in order to verify the hardness of the soil, he was the plaintiff himself, and not the appellants.

The next issue with which we have to deal is the appellants' complaint that the award is not in a form in which the decision of the arbitrator can be embodied into a Court order, and that

the reason for this situation is that the arbitrator failed to determine finally two issues:

First, whether or not there existed hardness of the soil, as alleged by the plaintiff; and to this issue there is related the subsidiary issue whether there was an agreement between the parties for extra payment in case of hardness of the soil.

Secondly, whether the appellants were entitled to an amount of C£ 114 for having purchased an extra quantity of iron bars in order to complete work which was left unexecuted by the plaintiff.

The trial Judge held that the better course was to remit the case to the arbitrator, for determination of the above issues, under section 19 of Cap. 4.

As it is stated in Russell, *supra*, p. 355, unless there is misconduct which makes it impossible for the parties, or for the Court, to trust an arbitrator, the Court, in exercising its discretion, should remit the award rather than set it aside.

In this case, though it is correct, as has been found by the trial Judge, that the award cannot be deemed as final in view of the issues which were left undetermined, the main matters in dispute between the parties, that is the value of the work done and the value of the work left to be done because of the contractor having not completed the project were fully and finally determined by the arbitrator; such matters being severable from those issues which were not finally determined and which are issues of a secondary nature. In the circumstances, we think that the trial Judge has exercised correctly his relevant discretion when he decided to remit the award to the arbitrator under section 19, and we are not, therefore, prepared to interfere, on appeal, with his decision to do so. Consequently, we cannot agree with the submission of counsel for the appellants that the whole award should be set aside and that the arbitration proceedings should commence afresh as regards all the matters in dispute.

Counsel for the appellants has contended, too, that the arbitrator has wrongly received in evidence two documentary *exhibits* (referred to in these proceedings as *exhibits* 3 and 5); they were two hand-written documents which had been prepared by the supervising civil engineer, who was employed by

the appellants, and they contained pre-estimates regarding the various items of the work to be undertaken by the plaintiff; and they had been checked by him together with the said civil engineer before the written contract between the parties was signed; there is no doubt that the arbitrator relied a lot on these two documents.

It is correct that wrongful admission of evidence may amount to legal misconduct by an arbitrator (see Russell, *supra*, at p. 235); and it is, also, well established that it is not possible to admit extrinsic evidence in order to construe a written contract (see, *inter alia*, *Prenn* v. *Simmonds*, [1971] 3 All E.R. 237, *Wickman Machine Tool Sales Ltd.* v. *L. Schuler A. G.*, [1972] 2 All E.R. 1173, and on appeal to the House of Lords [1973] 2 All E.R. 39, as well as the case-law which was referred to, recently, by this Court in *Kyriakides* v. *Kyriakides*, C.A. 4799, not reported yet*). But, what has taken place in the present case is not wrongful admission of extrinsic evidence in order to interpret the contract between the parties; as it has been correctly found by the trial Court what has, actually, happened is that the arbitrator, being himself an expert in the matter, checked the quantities and prices contained in the aforementioned two documents and, having found them to be correct, he then used them for the purpose of assessing, in the light of the evidence before him, the value of the work which has been left unexecuted by the plaintiff.

In our opinion he was entitled to derive help, as above, from these two documents and it cannot be said that they were erroneously treated as evidence.

It is, also, to be noted that when such documents were produced before the arbitrator no objection was raised by the appellants as regards their admissibility; the only argument that was advanced in relation to them was to the effect that they could not be used to construe the written agreement between the parties or be treated as part of such agreement. But, the arbitrator did not do this, and, as already pointed out, being himself an expert in the matter he was entitled to use his own knowledge in order to derive assistance, in preparing his award,

* See now (1977) 7—8 J. S. C. 1265 to be reported in (1976) 1 C.L.R.

from these two documents, which contained technical information.

In this connection it is useful to quote the following passage from *Mediterranean and Eastern Export Co. Ltd.* v. *Fortress Fabrics (Manchester), Ltd.*, [1948] 2 All E.R. 186 (at pp. 188, 189), which was cited, with approval, by our Supreme Court in the *Galatis* case, *supra*:-

> " Whether the buyers contested that statement does not appear, but an experienced arbitrator would know, or have the means of knowing, whether that was so or not and to what extent, and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken, I think, that, in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of arbitrators. The modern tendency is, in my opinion, more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow indeed to set aside his award.
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> In my opinion, the arbitrator did act in this case within the submission, and I think also he has acted as the parties intended he should act and I see no reason for interfering with his award. This motion fails and must be dismissed with costs."

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

Appeal dismissed with costs.