1982 October 18

[A. LOIZOU, DEMETRIADES AND SAVVIDES, JJ.]

E. PHILIPPOU LTD.,
Appellants-Defendants.

v.

JOSEPHY HOYLE & SON LTD.,
Respondents-Plaintiffs.

(*Civil Appeal No.* 5751).

Contract—Commission contract—Agent not obliged to do any work for the principal nor principal to provide work for the agent——It can be terminated without notice—Sections 161-170 *of the Contract Law, Cap.* 149.

Damages—Breach of contract for sale of goods—Loss of profit not recoverable as a rule—Section 57 *of the Sale of Goods Law, Cap.* 267.

Two questions arose in this appeal namely whether respondents -plaintiffs could terminate an agency agreement without any notice and whether the appellants-defendants were entitled to damages for breach of contract by respondents to execute a confirmed order.

Held, (1) that in the case of a commission contract under which the agent is not obliged to do any work for the principal, nor the principal to provide any work for the agent to do, usually either party can terminate summarily; that since this was clearly a case of a commission contract under which the agent was not obliged to do any work for the principal, nor the principal to provide any work for the agent it could be terminated without notice (see sections 161-170 of the Contract Law, Cap. 149).

(2) That the loss of profit is not recoverable as a rule but only in exceptional cases where the seller is held liable for such loss of profits or expenses under the sub-sale when his liability is based on the contemplation of the parties of the consequences

of a breach the contract which depends on the knowledge, actual or imputed of the seller at the time of the contract (see Benjamin's Sale of Goods 1st ed. para. 1286); that as none of these prerequisites have been found on the evidence to exist, the exclusion of damages for loss of profit by the learned trial Judge was correct in law and therefore this ground of appeal should also fail (see section 57 the Sale of Goods Law Cap. 267).

Appeal dismissed.

Cases referred to:

Motion v. *Michaud* [1892] 8 T.L.R. pp. 253 and 447;

Joynson v. *Hunt & Sons* [1905] 93 L.T. 470;

Levy v. *Goldhill & Co.* [1916–17] All E.R. Rep. 226;

Hadley v. *Baxendale* [1854] 9 Exch. 341;

Markou v. *Michael,* 19 C.L.R. 282;

Jamal v. *Moolla Dawood Sons & Co.* [1916] 1 A.C. 175.

Appeal.

Appeal by defendants against the judgment of the District Court of Nicosia (Kourris, S.D.J.) dated the 12th September, 1979, (Action No. 2034/75) whereby their counterclaim for £590 loss of trading profit and for damages for breach of agency agreement was dismissed.

D. Liveras, for the appellants.

A. Dikigoropoulos, for the respondents.

Cur. adv. vult.

A. Loizou, J. read the following judgment of the Court. The respondent Company as plaintiffs filed an action against the appellant Company, as defendants, claiming C£2,169.048 mils on a Bill of Exchange, being the value of goods sold and delivered, to which claim they submitted to judgment as per claim with interest at 9% p.a. from 24.10.1974, with a stay of execution till the determination of their counterclaim which consisted of:

(a) C£590.- being a loss of the trading profit of £2.- per yard for an order for four pieces of 70 yards each woollen tweed which the respondents failed to execute, plus their discount and commission, totalling the said amount.

(b) Damages in lieu of notice and/or for breach of agency agreement.

It was the case of the appellants that they were, at all material times, the agents of the respondents and distributors of their products in Cyprus, namely, woollen and worsted fabrics, and enjoyed a commission of 5% on all orders placed directly or indirectly, as well as 3 3/4% discount in respect of goods paid in cash and that this agency was terminated by the respondents without any notice, causing them loss and damage. They further claimed that a reasonable notice in the circumstances would be six months. There was also the further claim regarding the failure of the respondents to execute the order hereinabove mentioned.

The learned trial Judge, after dealing extensively with the evidence adduced by both sides and for good reasons given, arrived at the conclusion that there had been duly concluded an agreement between them, that the appellants should be the sole agents in Cyprus of the products of the respondents, that agreement having been concluded with certain of their officials and that such an agreement was binding on the respondents notwithstanding their submission that these persons had no authority to bind them. He then went on to make the following finding:-

"Having found that there was an agency agreement between the parties to the effect that the defendants would be paid 5% commission on the sales effected by them, on the evidence adduced I am satisfied that this agency agreement was terminated by the plaintiffs without any notice. This is apparent from the evidence of the plaintiffs' own witness, Levon Sarian, who said that about the end of 1973 he met in London a certain Jonas who is an export director of Joseph Hoyles & Son Ltd. and who was operating from the London showroom and whom he knew before and who (Jonas) asked him whether he would like to act as their agent in Cyprus and this witness accepted.

Sarian further stated that he transacted business with the plaintiffs in about February, 1974.

That this agency was terminated is also apparent from the contents of a letter of the plaintiffs dated 12.3.74 and

addressed to the defendants and which is exhibit No. 5 before the Court. I need not cite the whole of the letter but at page 2 it is stated:-

> 'We trust therefore that you will regard this as being a fair settlement of the matter and would like to emphasize once again that any future transaction between our two companies will be strictly on a principal to principal basis, that no commission being payable to any party'.

When Kritikos received this letter, he communicated with Mr. Broadley over the phone who told him that their decision was final with regard to the termination of the agency and that the defendants are no longer their agents but they can be treated as buyers. Further the plaintiffs transacted business with Sarian as early as in February 1974, and they effected sales in Cyprus without divulging the customers to the defendants and without paying to them any commission.

In view of this evidence I find that the plaintiffs terminated the agency with the defendants and the question arises whether any notice was necessary to be given to the defendants".

He then dealt with the question whether a reasonable notice claimed by the appellants to be six months in the circumstances was required. In that respect he referred to the cases of *Motion v. Michaud,* [1892] 8 T.L.R. pp.253 and 447; *Joynson v. Hunt & Son,* [1905] 93 L.T. p.470; *Levy v. Goldhill & Co.,* [1916-17] All E.R. Rep. p.226, which were summed up by him as follows:-

> "In the case of *Motion v. Michaud* the plaintiffs were merchants in London and the defendants were manufacturers in France. In 1890 the parties entered into an agreement whereunder the defendants would supply the plaintiffs with brandy and pay them 22% as commission upon sales. In 1891 the defendants terminated the agreement without notice. The London merchants filed an action against the defendants. The action was dismissed, there being no evidence of contract of service between the plaintiffs and the defendants.

In the case of *Joynson v. Hunt & Son* the defendants had entered into an agreement with the plaintiffs to pay the latter 2 1/2 commission on sales of the defendants' products made by the plaintiffs. The agreement was terminated by the defendants without notice. It was held that the evidence of custom was not ad rem and was excluded by the trial Judge. The judgment of the trial court was upheld by the Court of Appeal which held that notice of termination was necessary only where the agreement or contract showed that the plaintiff was employed by the defendant. Mathew, L.J., said at p.471:-

> 'When a person is engaged to sell goods on commission, it is indispensable that goods should be sold in order to provide the fund out of which commission is paid. The agent is not bound to get any orders and the principal is not bound to accept any orders' ".

In the case of *Levy v. Goldhill & Co.* the plaintiff while travelling about the country for his own business obtained orders for other traders on commission. The defendants by a letter addressed to the plaintiff agreed to pay him half the profit on receipt of orders provided the customer was good. The plaintiff obtained orders for the defendants but disputes arose between the parties and the defendants without giving the plaintiff notice terminated the agreement and repudiated liability to make any payment to the plaintiff in respect of "repeat" orders from customers introduced by the plaintiff and received by the defendants after the date of termination. It was held that since the plaintiff was not in the employment of the defendant, in the sense that he was not his servant, he was not entitled to notice of termination of the agreement and could not recover damages for wrongful dismissal. He was, however, entitled to commission on all orders received by the defendant after termination of the agreement from customers introduced by the plaintiff during the subsistence of the agreement.

Peterson, J., at page 231 had this to say:-

> "Part of the plaintiff's claim in the present action is for damages for wrongful dismissal, on the ground that he was entitled to reasonable notice. It was not attempted to prove a custom of the trade, but it was said the plaintiff

was entitled to reasonable notice. Now, in this case there was, in my opinion, no employment in the strict sense of the term. The plaintiff was not the servant in any way of the defendant; he was not bound to do any work whatever. The agreement merely provided that if the plaintiff introduced customers, and if the orders were accepted by the defendant, then the plaintiff should be entitled to half of any profits which were derived from those orders. There was no obligation on the part of the plaintiff to do work for the defendant, nor was there any obligation on the part of the defendant to provide work for the plaintiff, but there was merely a provision that the defendant would, in a certain event, pay certain remuneration to the plaintiff. In those circumstances *Joynson v. Hunt & Son* appears to me to be very much in point".

The learned trial Judge accepted the contention of counsel for the respondents that since the defendants were not obliged to do any work for the plaintiffs and that the plaintiffs were not obliged to provide work for the defendants, then the agency in question fell within the principles enunciated in the aforesaid cases and no notice was required, and he concluded by saying:

"As the case was presented to me and bearing in mind the hereinabove mentioned cases, it appears to me that the plaintiffs could terminate the agency without notice and, therefore, the defendants' claim as to damages cannot stand".

The grounds upon which this appeal has been argued are the following:

"(a) In finding that respondents-plaintiffs could terminate the Agency Agreement without any Notice, contrary to appellants' contention that a six months prior notice was required.

(b) In failing to award the appellants-defendants with 5% commission on business transacted by the respondents-plaintiffs through Sarian at the material period.

(c) In failing to award the appellants-defendants with £590.- by way of damages for breach of contract by respondents-plaintiffs to execute a confirmed order."

There does not seem to be any disagreement as to the legal position governing the subject of the termination of an agency and as to when and if so how long a notice is required, which is summed up in Bowstead on Agency, 14th Ed., Article 63, at p. 193, as follows:-

"... Normally, however, an agency contract which is not for a fixed period can be terminated by either party. Whether or not notice is to be given will depend on the terms to be implied. In the case of a commission contract under which the agent is not obliged to do any work for the principal, nor the principal to provide any work for the agent to do, it appears that, usually, either party can terminate summarily. In some types of contract a term may be implied from the usage of the trade that notice is to be given. The usage may also provide how much notice is to be given.

If the contract is analogous to a contract of employment, notice will normally be required. Such notice must, in accordance with general principle, be reasonable notice in all the circumstances. Other factors, too, may be relevant. Thus, in *Martin-Baker Aircraft Co. Ltd. v. Murison* [1955] 2 Q.B. 556, the agent was described as sole selling agent, he had to expend a great deal of time and money in the performance of his duties and was subject to restrictions relating to products competitive with those manufactured by his principal. McNair J. held that in all the circumstances a term could be implied that twelve months' notice of termination was required."

This is the legal position in England which does not seem to differ in so far as the issues arising in this case are concerned from the position in Cyprus, which is governed by sections 161-170, both inclusive of our Contract Law, Cap. 149 (see Pollock and Mulla on the Indian Contract and Specific Reliefs Acts 9th edition pp. 740 and 741.)

Having gone through the evidence in relation to the findings made by the learned trial Judge and the conclusions drawn by him thereon, we have come to the conclusion that his approach was correct and that he guided himself properly by the principles of law applicable to such cases, and we are not prepared to interfere with his conclusions and the legal result arrived at by

him; this was clearly a case of a commission contract under which the agent was not obliged to do any work for the principal, nor the principal to provide any work for the agent. The first ground of appeal therefore fails.

The second ground of appeal must also fail once the learned trial Judge found that the agency in question was properly terminated by the respondents and that no notice was required in the circumstances. The appellants in such a case were not entitled to any commission in respect of the business transacted by Sarian after its termination.

Finally we turn to the third ground which is a claim of about £590.- damages which arise out of the failure of the respondents to execute a confirmed order placed with them by the appellants in February 1974 for four pieces of seventy yards each, woollen tweed for delivery in June 1974 as confirmed by them on the 27th February 1974 (exhibit 13). The learned trial Judge after hearing the evidence on these issues found that the respondents failed to execute the order of the appellants and that the appellants were entitled to damages although he did not exclude the possibility that the letter of the respondents inquiring as to whether in view of the Turkish invasion and the prevailing conditions in the island, the appellants were still interested in the execution of the said order, might not have reached them. On the basis of the prices given on exhibit 13, he found that the value of the goods in question was about £200.- Cyprus pounds on which the appellants were entitled to five per cent commission, i.e. ten Cyprus pounds and went on to say that the appellants could not claim loss of profits unless the respondents knew that the appellant presold the goods in question and it was within the anticipation of the parties. He further pointed out that the appellants ought to mitigate their loss and since this material was available in October 1974 when their Managing Director visited England they ought to have taken delivery of them unless the goods in question were of such a seasonal character that they could not be disposed of at that time.

Under section 57 of the Sale of Goods Law, Cap. 267, where the seller wrongfully neglects or refuses to deliver the goods to the buyer the buyer may sue the seller for damages for nondelivery. This provision corresponds to section 51(1) of the Sale

of Goods Act 1893, which however contains two more subsections which speak of the measure of damages as being the sued loss directly and naturally resulting in the ordinary course of events from the sellers breach of contract, (subsection 2) and under subsection 3 thereof where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract and the market or current price of the goods at the time or times when they ought to have been delivered or if no time was fixed, then at the time of the refusal to deliver.

The provisions of subsection 2 are in the terms of the first rule in *Hadley v. Baxendale* [1854] 9 Exch. 341 and subsection 3 sets out the normal application of the rule in subsection 2 to the situation where there is "an available market for the goods", following the Common Law before the Act (see Benjamin's Sale of Goods, 1st Ed., paras. 1261-1263).

Section 57 as well as its corresponding English section 51 deals only with general damages. Rules as to special damages and interest are saved by section 61(1) - subsection 2 thereof, corresponding more or less to subsections 2 and 3 of section 49 of the English Act, but we are not concerned with them - of our law and section 54 of the English Act, whereby "the buyer also has his right to recover interest and special damages e.g. for unusual loss resulting from special circumstances known to the contract breaker, or in certain circumstances loss of profit under a resale" (see Benjamin's (supra) para. 1261).

The omission of the aforesaid paragraphs from our section 57 does not create any gap as the right of damages for breach of contract, as well as the quantum of damages recoverable must be deemed to be regulated by the provisions of section 73(1) of our Contract Law, Cap. 149, which provides as follows:

> "When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach".

This section has been held in *Markou v. Michael,* 19 C.L.R., 282, merely to re-enact the Common Law rule in *Hadley v. Baxendale* for assessing damages in contract. A similar approach has been taken of section 73 of the Indian Contract Act, where it was held that this section is declaratory of the Common Law as to damages (see Pollock & Mulla, 9th Ed., p.529 et seq., and *Jamal v. Moolla Dawood Sons & Co.* [1916] 1 A.C. 175).

With regard to loss of profits in Pollock & Mulla (supra), after referring to the case of *Hadley v. Baxendale,* it is stated at p.536:

> "The loss of profits on a contract of which the defendant had not notice is clearly too remote. But where the defendant failed to supply an essential part of a machine which the plaintiff, to his knowledge, was under contract to supply to a third person, and the plaintiff, by the defendant's default, lost the benefit of that contract, the defendant was held liable both for the loss of profit and for the plaintiff's charges in making other parts of the machine: *Hydraulic Engineering Co. v. McHaffie* [1878] 4 Q.B.D. 670".

Also in page 537 a notice of a contract of resale is necessary for the recovery of loss of profit and it is stated:

> "If C only knew generally that A wanted the iron for resale he would not be entitled to damages beyond the difference between the contract price and the market price at the date of the breach: *Thol v. Henderson* [1881] 8 Q.B.D. 457. What is contemplated is that if the goods are not delivered to him, A will go out into the market and buy similar goods and honour his contract with B in that way. If there is no market price the measure of damage is the difference between the resale price and the contract price: *Patrick v. Russo-British Grain Export Co.* [1927] 2 K.B. 535 (*Thol v. Henderson* was not cited); *Emil Adolph Zippel v. Kapur & Co.,* 1932 A.S. 9; 139 I.C.114".

Furthermore in McGregor on Damages, 14th Ed., para. 602, it is stated:-

> "For, as was made clear by Devlin J. in *Kwei Tek Chao v. British Traders* [1927] 2 K.B. 535, damages for loss on a resale are not recoverable merely because the seller knows that the buyer is a merchant buying generally for resale, as what is contemplated on non-delivery where there is a market is that the buyer will go out into the market and buy. Only if the seller contemplated that the buyer could only carry out his sub-sale by delivering the very same goods will he be liable for loss on a resale where there is a market".

From the aforesaid exposition of the law, it is clear that loss of profit is not recoverable as a rule but only in exceptional cases where the seller is held liable for such loss of profits or expenses under the sub-sale when his liability is based on the contemplation of the parties of the consequences of a breach of the contract which depends on the knowledge, actual or imputed of the seller at the time of the contract (see Benjamin's (supra) para. 1286).

As none of these prerequisites have been found on the evidence to exist, we feel that the exclusion of damages for loss of profit by the learned trial Judge was correct in law and therefore this ground of appeal should also fail.

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

Appeal dismissed with costs.