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ROYAL COURT
(Samedi Division)

195

8th September, 1997

Before: Advocate B. I. Le Marquand, Greffier Substitute.

Between:	The Portsmouth Roman Catholic Diocesan Trustees Registered	Plaintiff
And:	Peter B. Rendle exercising the profession of Chartered Architects under the name and style of Breakwell & Davies	First Defendant
And:	Thatcher Limited	Second Defendant
And:	C.H. Rothwell & Partners Limited	Third Defendant

Application by the Second Defendant for a stay of this action as against the Second Defendant only pending the determination by arbitration of the issues between the Plaintiff and the Second Defendant.

Advocate J.P. Speck for the Plaintiff.
Mr. D. Young for the First Defendant.
Advocate N.M. Santos-Costa for the Second Defendant.

JUDGMENT

GREFFIER SUBSTITUTE: This action concerns the construction of the new St. Mary and St. Peter's Roman Catholic Church during 1984 and 1985. The Plaintiff alleges that there are various defects in the construction and has sued the Second Defendant, who was the builder, the First Defendant, who was the Plaintiff's architect, and the Third Defendant, who was the Plaintiff's consulting engineer. The parties were served with the Order of Justice on various dates in late May, 1994.

The Plaintiff had entered into a written contract with the Second Defendant in the general form of the R.I.B.A. standard form of building contract, 1963 edition with July, 1975, revision and this contained under paragraph 35 (1) an arbitration provision which reads as follows:-

> *"(1) Provided always that in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection*

therewith (including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in Clause 30 (5)(a) of these Conditions or the rights and liabilities of the parties under Clauses 25, 26, 32 or 33 of these Conditions), then such dispute of (sic) difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties, or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an Arbitrator, a person to be appointed on the request of either party by the President or a Vice-President for the time being of the Royal Institute of British Architects."

The written Contract contained a provision that the interpretation of the Contract and all matters relating thereto shall be governed by the Laws and Customs of the Island of Jersey.

There was no written contract between the Plaintiff and each of the First and Third Defendants and, therefore, no arbitration provision in relation to any disputes with those parties.

Once proceedings had been served upon the Second Defendant, their English solicitors immediately indicated that they wished to invoke the arbitration provision and attempted to agree with Messrs. Bailhache & Bailhache, who were then acting for the Plaintiff, who should be appointed as arbitrator and the terms of reference in relation thereto. The Second Defendant avers that agreement was reached with the Plaintiff that the disputes between them should be referred to arbitration and that the actual arbitrator and the terms of reference of the arbitration were also agreed. The Plaintiff avers that an arbitrator was not actually appointed and that all that was agreed was the name of a possible arbitrator and the terms of appointment thereof if the matter were to be referred to arbitration. I shall come back to this issue towards the end of this judgment. I shall ignore for the moment what was or was not agreed between the parties and proceed to set out the legal principles involved in a case in which the Plaintiff does not wish to go to arbitration but a Defendant does.

The case of G.K.N. (Jersey) Limited v. The Resources Recovery Board of the States of Jersey (1982) JJ 359 contains the following paragraphs (commencing with the third paragraph) on page 365 -

"The Attorney General submitted that because the Arbitration clause (Condition 36) formed part of the Contract between the parties, the principle of Jersey law that "La convention fait la loi des parties" applied to the clause and bound the parties, unless the facts of the case came within the exceptions to that principle. In Wallis v Taylor (1965) JJ 455, at 457, the Royal Court, having referred to that principle, stated that the Court would enforce agreements provided that, in the words of Pothier (Oeuvres de Pothier) Traité des Obligations, 1821 Edition, at p.91 -

> *"elles ne contiennent rien de contraire aux lois et aux bonnes moeurs, et qu'elles interviennent entre personnes capables de contracter."*

It was not suggested in the present case that the clause was contrary to the law or "aux bonnes moeurs", nor that the parties were not capable of contracting.

However, in Basden Hotels Limited v Dormy Hotels Limited (1968) JJ. 911, the Court stated at p.919 -

> *"...it is the often quoted maxim 'La Convention fait la loi des parties'. Like all maxims it is subject to exceptions, but what it amounts to is that the courts of justice must have high regard to the sanctity of contracts and must enforce them unless there is a good reason in law, which includes the grounds of public policy, for them to be set aside."*

The Court thus extended the exceptions already listed to include grounds of public policy.

The Attorney General, whilst conceding that the existence of the Arbitration clause did not oust the jurisdiction of the Royal Court, submitted that the undoubted delay on the part of the Defendant was not so inordinate or unreasonable as to justify the Court, on the grounds of public policy, in setting aside that which the parties had voluntarily agreed to do at the time of the formation of the contract. He further submitted that the Defendant was not in breach of the clause because there was nothing in it which prevented the Plaintiff, having failed to obtain the express acceptance or rejection of the nomination of Mr. Haswell, from proceeding to the next stage envisaged by the clause, which was to request the President of the Institution to appoint an arbitrator.

We consider that the duty of this Court is to follow the local precedents which we have cited and to apply to this case the principle "La convention fait la loi des parties."

Both the parties brought to my attention the case of Selab Securities Limited and another v. Orthez Holdings Limited and another, (24th November, 1988) Jersey Unreported. Advocate Santos-Costa submitted that this was an example in Jersey of the principles which the Court would follow when there were parties involved who were not parties to the arbitration agreement. I do not find that judgment to be helpful upon that point because what the Court there found was that the relationship between the parties who were not parties to the arbitration agreement and the parties who were parties to the arbitration agreement was so close that the parties effectively fell into two groups and that it was appropriate that the disputes between the two groups be arbitrated. However, there is the following helpful passage towards the end of page 2 of the Unreported Judgment:-

> *"The general principles affecting the Court's response to a request of this kind, that proceedings be stayed pending*

arbitration, have been clearly established. They flow from the general rule that 'la Convention fait la loi des parties'. If the parties have agreed, in their contractual arrangements, that any dispute will be, or may be, referred to arbitration, and one of the parties so wills, there is a presumption that the Court will stay the Court proceedings. But the Court has a discretion. There may be good reasons why matters should not be referred to arbitration, matters relating for example to the conduct of the parties, or to the nature of the matter to be tried."

4 Halsbury's Laws of England, Volume 2, contains at paragraph 637 on arbitration the following section -

"637. The balance of convenience. An applicant who has failed to apply promptly may be refused a stay. If the matter is urgent, the court may deal with it itself rather than refer it to the slower process of arbitration. It is not material that, if a stay is granted, the plaintiff will be out of time to commence an arbitration. A stay may be refused if the result of its being granted would be that identical or connected issues would be tried in more than one forum. This might arise because the arbitration agreement covers only part of the matters in dispute, or because the arbitrator could not grant part of the relief claimed, or because the same or connected issues are being or will be tried in another action between different parties."

I am satisfied, in this case, that the written agreement was entered into between parties who were capable of contracting and that there was nothing contrary to good morals in the Arbitration clause. I am also satisfied that the Second Defendant has always been willing and ready to arbitrate the matter and has always wanted the disputes to be dealt with in this way and that there was no relevant consideration of delay which would prevent me from granting the stay requested.

However, the question does arise as to whether there were grounds of public policy to prevent the stay being granted. The English Court of Appeal case of Taunton-Collins v. Cromie [1964] 1 WLR 633 was very similar to this case. There, there was an R.I.B.A. form agreement between the Plaintiff and his builder which contained an Arbitration clause but the Plaintiff was also bringing an action against his architect. There is a helpful section commencing on p.635 of the judgment which reads as follows:-

"The contractors applied to the official referee to stay the proceedings as against them. They said that under the arbitration clause in the contract the dispute, so far as they were concerned - between the building owner and themselves - ought to be referred to arbitration. The official referee, considering the matter, in the exercise of a discretion which is given by the Arbitration Act, 1950, refused a stay. The contractor has now appealed to this court.

The matter is of considerable importance. There are a great number of contracts in the R.I.B.A. form, but there is very

little authority on this point. It seems to be most undesirable that there should be two proceedings in two separate tribunals - one before the official referee, the other before an arbitrator - to decide the same questions of fact. If the two proceedings should go on independently, there might be inconsistent findings. The decision of the official referee might conflict with the decision of the arbitrator. There would be much extra cost involved in having two separate proceedings going on side by side: and there would be more delay. Furthermore, as Mr. Finer pointed out, if this action before the official referee went on by itself - between the building owner and the architect - without the builders being there, there would be many procedural difficulties. For instance, there would be manoeuvres as to who should call the builders, and so forth. All in all, the undesirability of two separate proceedings is such that I should have thought that it was a very proper exercise of discretion for the official referee to say that he would not stay the claim against the builders. Everything should be dealt with in one proceeding before the official referee."

Both parties referred me to the case of Bulk Oil (Zug) A.G. v. Trans-Asiatic Oil Limited [1973] 1 Ll Rep 129. In that case, the parties had entered into two separate agreements and had specified different methods of determining disputes between them in relation to the two agreements. On page 139 of the judgment, there is the following helpful section:-

"The defendants are therefore not in the same position as the plaintiffs in The Pinehill and in Taunton-Collins v. Cromie, in which the plaintiffs were faced with a duplication of issues before different tribunals through circumstances for which they were not directly responsible, and were also faced with a risk of losing both their alternative claims due to this duplication, which would have been an unlikely result if both claims were tried by the same tribunal."

The English Court of Appeal case of Berkshire Senior Citizens Housing Association v. McCarthy E. Fitt Limited and another 15 BLR 32 is also very similar to this case. There, as in the Taunton-Collins case, there was an R.I.B.A. form of contract with the usual Arbitration clause entered into between the Plaintiff and the Contractor and the Plaintiff was seeking to sue both the Contractor and the personal representatives of the architect. There was a very helpful quotation commencing with the second paragraph on page 33, which reads as follows:-

"There are, in my view, two conflicting principles, as clearly stated by Pearson LJ in Taunton-Collins v Cromie & Others [1964] 1 WLR 637 thus:

> *"In this case there is a conflict of two well-established and important principles. One is that parties should normally be held to their contractual agreements.... The other principle is that a multiplicity of proceedings is highly undesirable for the reasons which have been given. It is obvious that there may be different decisions on the same question and a great confusion may arise."*

In my judgment, where, as here, the plaintiffs (assuming they can prove their case) are innocent and have suffered through the wrong-doing of one or more of the people they employed, the second of those principles becomes of paramount importance because, if there were separate proceedings, they may lose altogether not by reason of separate defences but because the different tribunals reached different conclusions on the same facts and that, if it happens, must be a substantial injustice."

The above is a quotation from the judgment of Goff LJ. The judgment of Sir David Cairns in the same case commences as follows:-

"I agree that this appeal should be allowed. This is a strong case for the application of the doctrine of such cases as Taunton-Collins v. Cromie, that the desirability of avoiding several arbitrations so that issues between all concerned can be resolved in one action may be a proper ground for refusing a stay. It is a strong case because of the risk that if there were two arbitrations, or an arbitration and an action, the result might be that an innocent plaintiff, or claimant, might fail to get damages against anybody because of inconsistent findings in two different sets of proceedings."

In this case, Advocate Speck submitted that precisely that danger of substantial injustice to the Plaintiff existed. He submitted that if the arbitrator were to find that the second defendant were not responsible due to something which the architect had done or because of a lack of fraudulent behaviour on its part, but the Court were to find that the architect had not caused the Second Defendant to be relieved from responsibility or the Court were to find that there had been such fraud which had deceived the architect and which thus relieved him from responsibility, then there would be a danger that a tort or breach of contract had been committed but that the Plaintiff would be unable to recover from any party.

Advocate Santos-Costa submitted that no such risk existed in practise, but I cannot accept that that is so because the similarities both with the Taunton-Collins case and the Berkshire Senior Citizens' Housing Association case are too similar and in both those cases the English Court of Appeal found that a substantial risk of injustice existed.

Accordingly, apart from the question as to what was agreed between the Second Defendant's English solicitor and the Plaintiff's Advocate, I would decide that this was a case where I should refuse a stay because as a matter of public policy it was not right that the Plaintiff be put at risk of a substantial injustice being done to it by reason of its claim against the Second Defendant being arbitrated and its claim against the First and Third Defendants being tried by the Royal Court. The First and Third Defendants have, of course, indicated that they would not agree to the claims against them being arbitrated together with that of the Second Defendant. Considerations of justice to the parties are very important considerations of public policy and, in such a case as this, must override the principle that parties should normally

be held to their contractual agreements which, in Jersey, is reflected in the maxim, *"La Convention fait la loi des parties"*.

However, I am bound to consider the effect of the correspondence between the Second Defendant's English solicitor and Messrs. Bailhache & Bailhache.

I had before me the relevant correspondence together with affidavits both of Mr. S.J.A. Tolson and of Advocate O'Connell. From these it is clear to me that agreement had been reached in principle as to a possible arbitrator and as to his terms of reference. All that would have been required in order to bring the arbitration into being was a letter of instructions from Advocate O'Connell and the indication of the arbitrator that he was willing to so act. However, Advocate O'Connell never wrote the letter of instructions and Mr. Goodall quite properly indicated that he was a Roman Catholic and had had some dealings with both the First and Third Defendants. Advocate O'Connell never indicated whether, in the light of those circumstances, Mr. Goodall would have been acceptable as an arbitrator because at that point in time he realised that the First and Third Defendants would not co-operate in one arbitration of all matters and that it was not in his client's interest for the matters to be dealt with in two separate sets of proceedings. In my view, notwithstanding the terms of Advocate O'Connell's affidavit, there was agreement in principle that the matters in dispute between the Plaintiff and the Second Defendant should go to Arbitration. What then is the effect of that agreement in principle?

In England, if an arbitrator is appointed then there is a statutory provision in relation to his removal. The provision is set out in RSC (1995 Ed'n) s.5702 at p.1724, and reads as follows:-

> *"Authority of arbitrators and umpires to be irrevocable.*
>
> *(1) The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the High Court or a Judge thereof."*

The commentary on this on page 1726 of the 1995 White Book includes the following section:-

> *"Section 1 of the Act was enacted in order to make it difficult to revoke an arbitrator's authority; revocation pursuant to the section should be granted only in very exceptional circumstances, and not where the application for leave to revoke is based on considerations of convenience rather than justice".*

I have no doubt that in Jersey the Royal Court has a power to revoke the appointment of an arbitrator. I also have no doubt that that power extends to preventing an arbitration from continuing where it has been commenced but the matter should, for reasons of justice, be dealt with before the Court.

In my view, considerations of justice are paramount in such circumstances as this and, even though I have found that there was an

agreement in principle that the matter should be arbitrated, it seems to me that the serious possibility of injustice to the Plaintiff in this case overrides that agreement. If the matter had proceeded one stage further and the arbitrator had actually been appointed and had unconditionally accepted that appointment then I would have granted a temporary stay of the action against the Second Defendant pending the application of the Plaintiff to the Royal Court for the removal of the arbitrator or for an order that the arbitration not continue.

Accordingly, the application of the Second Defendant for a stay of the present action as against it so that the disputes between it and the Plaintiff may be arbitrated, is dismissed.

I will need to be addressed by all parties who were present before me in relation to the costs of and incidental to the application. For the record, I would mention that the First Defendant supported the opposition of the Plaintiff to the stay being granted and this both upon the grounds put forward by the Plaintiff and by reason of the procedural difficulties which would be caused if the matters in issue between the parties were not all dealt with in one forum.

Finally, I am bound to say that the agreement in principle of the Plaintiff to the matter being referred to arbitration and the subsequent change of mind will need to be reflected in some way in an order for costs if justice in that connection is to be done to the Second Defendant.

Authorities

R.S.C. (1995 Ed'n): pp.1724 - 1726; s.5702.

4 Halsbury Vol.2: para. 637.

Grimshaw -v- Ruellen (1976) JLR 299.

Cleveland Bridge and Engineering Company Limited -v- Sogex (International) Limited (1982) JLR 101.

G.K.N. (Jersey) Limited -v- The Resources Recovery Board of the States of Jersey (1982) JLR 359.

Selab Securities Limited & Another -v- Orthez Holdings Limited & Another (24th November, 1988) Jersey Unreported.

Tirel -v- Sinel (19th July, 1993) Jersey Unreported.

Cunningham-Reid & Another -v- Buchanan-Jardine (1988) 1 WLR 678.

Rennell -v- Le Mière (30th April, 1993) Jersey Unreported.

Alberto -v- Skelley (10th November, 1995) Jersey Unreported.

Taunton-Collins -v- Cromie [1964] 1 WLR 633.

Bulk Oil (Zug) AG -v- Trans-Asiatic Oil Ltd [1973] 1 Ll. Rep. 129.

Berkshire Senior Citizens Housing Association Ltd -v- McCarthy E. Fitt Ltd 15 BLR 27 & 32.

Cunningham-Reid -v- Buchanan-Jardine [1988] 2 A11 ER 438.

Beghins Shoes, Ltd & Another -v- Avancement Ltd (11th January, 1994) Jersey Unreported.