73. UNITED KINGDOM: COURT OF APPEAL - 4 November 1977 - *Willcock v. Pickfords Removal Ltd.**

Effects of an arbitration agreement on judicial proceedings - Existence of an arbitration agreement

JUDGMENT

Lord Justice ROSKILL: This is an appeal from a judgment of Mr. Justice Griffiths given in Chambers as long ago as Feb. 14, 1977, whereby that learned Judge reversed an order of Master Warren's. The matter arose in this way. The plaintiff is a Mrs. Willcock, who was minded to move from this country to New Zealand as a result of the breakdown of her marriage. She wanted a quantity of goods shipped there, and apparently there was a telephone conversation between her and the defendants, the well-known removal contractors Pickfords Removals Ltd., in the course of which she asked for an estimate. It seems that a representative of Pickfords came on Dec. 10, 1973, and inspected the goods. Then the defendants sent this lady a written estimate which was on a standard form, and subject to their standard conditions of business. Thus far the facts are not in dispute but there is thereafter a very considerable dispute what, if any, contract was made between the parties.

Unhappily before the goods were shipped to New Zealand and while in the possession of the defendants they were destroyed by fire. The plaintiff issued a writ in the High Court claiming against the defendants the value of those goods so destroyed. The defendants, while generally denying liability, took out a summons for a stay originally under s.4 of the Arbitration Act, 1950, now under s.1(1) of the Arbitration Act, 1975, on the ground that there had been a valid submission to arbitration by reason of an arbitration clause undoubtedly contained in the printed form which, as the defendants claimed, had been sent to the plaintiff.

There is on the affidavit a dispute as to the circumstances in which the arrangements were made, and it is the plaintiff's case that any contract concluded never included the printed conditions and therefore at no time included the arbitration clause.

* The original text is reproduced from Lloyd's Law Reports (1979), 1, 245 f.

This is not a case where a defendant, under a contract admittedly containing an arbitration clause, is applying for a stay under the relevant section. It is a case where a defendant is applying for a stay under the relevant section and the plaintiff is saying "I never made a contract with you which included that arbitration clause".

One thing is clear in this branch of the law. It has been clear ever since the decision of the House of Lords in *Heyman v. Darwin*, (1942) 72 Ll.L. Rep. 65. An arbitrator cannot decide his own jurisdiction. Therefore whenever a question arises whether or not there has been a submission to arbitration, an arbitrator cannot in English law decide that issue. The only tribunal to decide it is the Court, and that is one of the issues the plaintiff wants the Court to decide. The fallacy (if I may say that without disrespect) in Mr. Justice Griffiths' judgment lies in the following passage in his judgment. At the end he says

> .... I think that this contract was an offer to contract on the defendants' standard conditions. The telephone conversation was not a renegotiation of the contract. It would be quite divorced from commonsense to suggest that a new contract was made over the telephone. The plaintiff was accepting the defendants' offer to contract on their conditions at £176. Accordingly the stay is granted. This is a decision in an interlocutory matter. It is in Chambers. It is not binding on an arbitrator. This is of particular importance. However, the arbitration clause is not easily divorced from the application of the exclusion clauses ....

With respect, the last part of that passage involves that the learned Judge thought that it would still be open to the arbitrator to decide whether or not the arbitration clause was included in the contract when, for the reason I have just given, he cannot do so.

Then this is another fatal objection to the grant of a stay. Section 1(1) of the 1975 Act, like s.4 of the 1950 Act, applies only to an arbitration agreement, and s.7(1) of the 1975 Act defines "arbitration agreement" as -

> .... an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of settlement by arbitration ...

On the evidence before us it must be an open question whether or not there is an arbitration agreement (as defined) in the present case. As long as there is a dispute whether or not there is an arbitration agreement, it cannot be said that there is an arbitration agreement as defined in s.7 of the 1975 Act. Accordingly the provisions of s.1 are not complied with, because the opening words of sub-s. (1) make it plain that the rest of the sub-section applies only where there is an arbitration agreement in existence.

There is yet another difficulty in the defendants' way, and that is that s.1(1) does not apply to what is called a domestic arbitration agreement. I do not propose to go further into this point. A "Domestic arbitration agreement" is defined in s.1(4). Suffice it to say, without resting my judgment on the point, that it seems to me highly likely that if there were an arbitration agreement in the present case it would be a domestic arbitration agreement, and therefore the provisions of s.1(1) would not apply in any event.

In my view, with all respect to Mr. Justice Griffiths (from whose judgment I differ with great hesitation), the Master reached the right and the learned Judge the wrong decision. I would allow the appeal, set aside the stay and allow the action to proceed.

Lord Justice ORMROD: I agree.

Lord Justice BROWNE: I entirely agree.