102. UNITED KINGDOM: COURT OF APPEAL - 23 March 1982 - Ellerine Bros (Pty) Ltd. and another v. Klinger *

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

(See Part I.A.3 and B.1)

TEMPLEMAN LJ. This is an appeal against an order of his Honour Judge Newey QC dealing with official referees' business, dated 27 August 1981, whereby he stayed all proceedings in the present action pursuant to s 1 of the Arbitration Act 1975.

By an agreement dated 13 October 1978 it was recited, inter alia, that the plaintiffs, who were parties to the agreement, had provided finance for making a film entitled 'Gold'. The plaintiffs' registered addresses were given as Johannesburg and Germiston in the Republic of South Africa. That is of some importance having regard to the provisions of the Arbitration Act 1975.

The agreement recited that the film had been distributed and had recovered its certified costs of production and was in profit. Certain disputes had arisen between all parties to the agreement, a squabble over how much was due to each and one or two other squabbles. In the event the defendant was appointed, and accepted appointment as, principal distributor of the film. By the agreement each plaintiff became entitled to 20% of the net receipts of the film.

The expression 'the net receipts' was defined as meaning—

> 'the gross monies in the hands of [the defendant] of the Film from all sources and hereafter arising from the exploitation of the Film after deduction of all fees deductible from such gross monies in accordance with any contractual obligation (provided that no such deduction of fees shall be made to . . . [the defendant] or any company with which [the defendant] is associated) and after deduction also of all expenses of distribution and exploitation of the Film actually incurred by [the defendant] or by any sub-distributor of the Film.'

The defendant undertook in the exercise of his appointment to distribute the film 'and to account to the parties entitled thereto for the Net Receipts of the Film' in accordance with certain instructions which had been given and which are not material.

There was also a provision that the defendant—

> 'shall keep all usual and proper books of Account showing the Net Receipts accruing from the distribution and exploitation of the Film throughout the world . . . which books of account and all contracts relating to the distribution of the Film shall be opened to the inspection of those authorised by [the plaintiffs] jointly and severally at reasonable times and they may take extracts therefrom or copies thereof.'

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There was a provision that—

> 'Within thirty days of receiving reports or statements of account rendered by distributors under distribution or sub-distribution agreements [the defendant] shall render a copy of each such report to each of [the plaintiffs] or as they may direct and shall at the time of delivering each such report deal with all monies received by [the defendant] and accounted for such report in the manner provided herein.'

The agreement was dated 13 October 1978 but, so far as the present evidence goes, nothing was done by the defendant in fulfilment of his obligations to account until May 1981.

Clause 12 of the agreement said it was to be read and construed in all respects in accordance with the laws of England. Clause 13 was an arbitration clause in this form:

> 'All disputes or differences whatsoever which shall at any time hereafter arise between the parties hereto or any of them touching or concerning this Deed or its construction or effect or as to the rights duties or liabilities of the parties hereto or any of them under or by virtue of this Deed shall be referred to a single Arbitrator to be agreed upon by the parties hereto or in default of Agreement to be nominated by the President for the time being of the Institute of Chartered Accountants in accordance with and subject to the provisions of the Arbitration Act 1950 or any statutory modification or re-enactment thereof.'

So far as the evidence goes, all was silent for nearly a year and then the plaintiffs woke up and they wrote to the defendant on 4 September 1980 saying: 'We have not received any statement of accounts or payments in respect of "Gold". Could we have a report from you please.' The silence continued and they wrote a reminder on 11 December 1980. There was then an oral request by one of the representatives of the plaintiffs who happened to see the defendant. Another reminder was sent on 8 January 1981 drawing attention to the clause of the agreement which cast on him the duties of keeping accounts and making reports and asking for an urgent reply. The plaintiffs received back on 19 January 1981 a perfectly polite but useless letter from the defendant's secretary saying that unfortunately the defendant was in the United States and would not be returning to London until the end of the month and that the plaintiffs might rest assured that their letters would be brought to his attention as soon as possible. Nothing of course happened. A reminder was sent on 11 February 1981 and a further apology was received from the secretary on 2 March 1981.

Finally, the plaintiffs lost patience and on 24 March 1981 they wrote to the defendant's solicitors giving an ultimatum saying:

> '. . . unless we receive a full and proper account together with payment of all sums due, within the course of the next seven days, proceedings will be instituted without further notice or delay.'

The reply to that, of course, was that the defendant's solicitors would take instructions. On 3 April the plaintiffs issued a writ, served by post on 7 April. That writ, after reciting the agreement, alleged that the defendant had duly distributed and exploited the film, though the plaintiffs could not give particulars until after discovery. The plaintiffs complained that—

> 'In breach of the said agreement and of the terms thereof although requested to do so by letter dated 24th March 1981 the Defendant has wrongfully failed and is failing: (i) To render any or any true or full or accurate accounts showing the net receipts accruing from the distribution and the exploitation of the film. (ii) To pay to the Plaintiffs and each of them a sum equal to 20% of the net receipts or any sums. AND THE PLAINTIFFS AND EACH OF THEM CLAIM: 1. An account of the net receipts accruing on the distribution and the exploitation of the film. 2. An order for the

This produced some results, though unsatisfactory, because on 6 May the defendant sent to the plaintiffs' solicitors what he called Report no 22 for the period 1 April 1979 to 31 January 1981. The account showed that he had received £12,921·14 and that, after deduction of distribution expenses and costs, he was £8,440·22 out of pocket and nothing was due to the plaintiffs. But the details given of the expenses which absorbed £12,921 of income, and more, included not only £6,895·22 of expenses paid to other persons, which appear to have been estimated, but also a charge for general overhead costs at the rate of £7,500 per annum. The plaintiffs are far from accepting the figures shown in the account. They wish the expenses which have been incurred to be vouched and they wish to dispute the entitlement of the defendant, on the true construction of the agreement, to claim general overhead costs and possibly some of the other items which he claims to deduct.

The day after the rendering of that account, that is to say on 7 May 1981, the plaintiffs took out a summons for an account under RSC Ord 43, r 1. That asked 'that an account may be taken as claimed in the writ of summons and that payment be made by the defendant to the plaintiffs on the amount found to be due on the taking of such account', and they asked for costs. They were sent some additional documentation, some of the vouchers, but not enough to satisfy them or make them accept that the defendant had discharged all his obligations under the agreement.

The defendant, in a letter of 1 June 1981, said: 'As you have questioned the precis of expenses incurred, we will prepare supporting evidence in respect of the expenses in question which are quite clearly allowed under the terms of our contract.' Nothing has been received to date.

In support of their application for an account, the plaintiffs put in an affidavit which was sworn by their solicitor on 17 June, complaining that the account which had been produced purported to make deductions which were not authorised under the agreement and were not supported by vouchers. On 18 June the summons for an account was transferred to an official referee.

On 2 July the defendant took out a summons asking for the proceedings to be stayed pending arbitration. He relied on s 4 of the Arbitration Act 1975. When the matter came before his Honour Judge Newey on 27 August the defendant obtained leave to amend and to ask for relief under s 1 of the 1975 Act.

At that hearing the judge had before him the summons by the plaintiffs for an account, the application by the defendant to stay the proceedings on the ground that the matter ought to go to arbitration and also an application by the plaintiffs for summary judgment under RSC Ord 14 for an amount which would be due to them if the overhead expenses claimed by the defendant were wholly disallowed. In the event, the battle took place round the defendant's application to stay and that application, as amended, was made under s 1(1) of the 1975 Act, which, if it applies, gives the court no choice in the matter.

Section 1(1) says:

> 'If any party to an arbitration agreement to which this section applies . . . commences any legal proceedings in any court against any other party . . . in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void . . . or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.'

Subsection (2) says that sub-s (1), which ties the hand of the court, is not to apply to a domestic arbitration agreement. Subsection (4)(*b*) makes it clear that 'domestic arbitration agreement' does not include an agreement if one of the parties to the

being incorporated in, or carrying on business with central man ...ment and control in South Africa, the agreement which I have recited was not ... domestic arbitration agreement and, therefore, if the conditions provided by s 1(1) are satisfied, the court must stay the proceedings. The judge so held and stayed the action accordingly.

Section 1(1) of the 1975 Act only applies, as indeed it expressly says it only applies, if an action is brought claiming in respect of any matter agreed to be referred to arbitration. What is said is that all the plaintiffs were doing was seeking an order to which they were entitled under the terms of the agreement (they were entitled to an account, there can be no dispute about that) and therefore the writ which they issued did not constitute legal proceedings 'in respect of any matter agreed to be referred' at the date when the writ was issued and the last phrase of the subsection, which enables the court to continue the action if 'there is not in fact any dispute between the parties with regard to the matter agreed to be referred', does not avail the defendant, because it must again be supported by 'a matter agreed to be referred' and which was the proper subject of arbitration at the date of the writ. If a dispute arose between the date of the writ and the date of the hearing by the court, nevertheless there was no relevant dispute, because the relevant time is the date when the writ was issued.

That submission, by the light of nature and without reference to authority, would produce an awkward result. It would mean that if, in the present case, for example, there was no dispute and all the plaintiffs were asking for was for the defendant to do what he is admittedly bound to do, namely to furnish an account, then, notwithstanding that there were hidden behind the application for an account all kinds of embryonic questions which were bound to arise and which were the proper subject of arbitration, the arbitration clause would fail to have effect and the court would be entitled to continue to hear the action, notwithstanding that the real grievances between the parties fell fairly and squarely within the mischief of the arbitration clause. This would put a premium on plaintiffs issuing proceedings without waiting to hear from a defendant or without drawing reference to matters which were almost bound to be in dispute. Again by the light of nature, it seems to me that s 1(1) is not limited either in content or in subject matter; that if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say, 'I don't agree.' If, on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation.

Counsel for the plaintiffs rested his submissions on two matters. First, on what I would refer to as the literal wording of the section, which refers to an action 'in respect of any matter agreed to be referred'. He also relied on the House of Lords case of *London and North Western and Great Western Joint Rly Cos v J H Billington Ltd* [1899] AC 79. In that case there was statutory provision for arbitration as to sums which a railway company was entitled to charge for services rendered to traders. The railway company was empowered to make a reasonable charge and it was provided that 'any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party'.

The facts of that case were that the railway company had fixed what they said was a reasonable sum and the sum was 6d a day siding rent 'for every wagon not released and remaining on the company's premises after four days allowed to the respondents for unloading'. The defendants were held by the trial judge to know that was what the railway company was charging and, with that knowledge, apparently, they did allow their wagons to remain on the company's premises for more than the initial four days allowed to them; they were then sent a bill for the amount of the charge and it was then that they demanded that the question of the reasonableness of the charge should be referred to arbitration. As I read the speeches in the House of Lords, they are simply saying that the judge found that there was a contract between the railway company and ... to pay the charge, namely 6d a day levied by the railway company if he took advantage of the company's facilities and services; and, that ... g the contract between the parties, there was no room for arbitration: what he had agreed to pay he had to pay. If he did not like the charges he should either not have made use of the services or at any rate he should have gone to arbitration beforehand or made his acceptance of the contract conditional, if the railway company would ... him to do so, on the amount of the charge being settled by arbitration.

Counsel for the plaintiffs relies in particular on a passage from the Earl of Halsbury LC, where he said (at 81):

> 'The question which has been argued apparently before the Court of Appeal is a question no doubt of very great and serious importance both to the traders and to the railway companies; but, my Lords, so far as I am concerned, I propose to give no opinion upon the true construction of the statute, except this: that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched either by formal plaint in the county court or by writ in the superior Courts. Any contention that the parties could, when they are sued for the price of the services, raise then for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to me to be absolutely untenable.'

That speech was made against the background of the finding by the trial judge that there was no difference existing between the parties at the time the action was brought, because of the contract which had been made between them in the terms I have mentioned. That case seems to me to be a far cry from the present when the parties had in fact agreed nothing. It is quite clear that the rights claimed are an account and payment of the sum found due on the account and to have the account vouched. It is also quite clear that the defendant never accepted, never agreed that he was under an obligation to send an account or to vouch or to pay anything: he simply did nothing. In those circumstances, it seems to me that, even when the writ was issued, there was a dispute between the parties and that is illustrated by the relief sought in the writ, which claims not only an account but payment of the amount found due on the taking of the account. It appears from those words that there had been no agreement, that there was a dispute at the time when the writ was issued, namely the three issues whether there was a duty to account, whether that account should be proved by vouching and finally whether there was any money due to the plaintiffs or not. Although the defendant did not write back and say so, he was disputing the plaintiffs' claims by refusing to comply with the requests which were made on him by the plaintiffs. I do not excuse the conduct of the defendant. So far as the present evidence goes, it seems clear that he was prevaricating and playing for time. It may well be, and probably is, that his new-found enthusiasm for arbitration is another method of avoiding the evil day when he will have either to pay or to reveal the fact that he cannot pay. But these considerations cannot affect the question of cold law, namely whether there was a dispute at the date when the writ was issued which entitles the defendant to arbitration as against litigation.

Although in a different context, the conclusion which Kerr J reached in *Tradax Internacional SA v Cerrahogullari TAS, The M Eregli* [1981] 3 All ER 344 is in point. In that case there was a voyage charterparty which provided that all disputes from time to time arising out of the contract were to be referred to arbitration, but there was a time limit in that it was provided that —

> 'Any claim must be made in writing and Claimant's Arbitrator appointed within nine months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred.'

Under the terms of the charterparty the plaintiffs became entitled to dispatch money and they sent invoices for the money which was due to them to the defendants. The defendants admitted that the invoices were correct and did not dispute the claim for ... but they did not expressly admit liability for the claim and simply

ignored it and all communications relating to it. The plaintiffs waited the nine months to run out. They then purported to appoint an arbitrator. The defendants contested the appointment on the grounds that the time had run out. The plaintiffs in turn said that time had not run out, because there was no dispute. There was no dispute because the defendants had simply ignored the demand which had been made but had never got round to saying, either then or subsequently, that the plaintiffs were or were not entitled to the sums claimed in the invoices.

Kerr J said (at 349) that the plaintiffs' claim was for a liquidated sum in relation to which there had never been any arguable defence but which was not expressly admitted. He continued (at 350):

> 'Where an arbitration clause contains a time limit barring all claims unless an arbitrator is appointed within the limited time, it seems to me that the time limit can only be ignored on the ground that there is no dispute between the parties if the claim has been admitted to be due and payable. Such an admission would, in effect, amount to an agreement to pay the claim, and there would then clearly be no further basis for referring it to arbitration or treating it as time-barred if no arbitrator is appointed. But if, as here, a claim is made and is neither admitted nor disputed, but simply ignored, then I think that the time limit clearly applies and that the claimant is obliged (subject to any possible extension of time) to appoint an arbitrator within the limited time. The fallacy in the plaintiffs' argument can be seen at once if one considers what would have been the position if the plaintiffs had in fact purported to appoint ... their arbitrator within the time limit of nine months. They could clearly have done so, and indeed any commercial lawyer or business man would say that this is what they should have done under the clause to enforce their claim. Arbitrators are appointed every day by claimants who believe, rightly or wrongly, that their claim is indisputable. However, on the plaintiffs' own argument, [the arbitrator] would have had no jurisdiction, since there was then, as they now say, no "dispute" to which the arbitration clause could have applied. In my view this argument is obviously unsustainable.'

As I understand it, the judge is saying (and I agree) that silence does not mean consent. If you can point, as was the case in *London and North Western and Great Western Joint Rly Cos v J H Billington Ltd* [1899] AC 79, to an express or implied agreement to pay a particular sum, then there is no dispute and the action can proceed. But the fact that the plaintiffs make certain claims which, if disputed, would be referable to arbitration and the fact that the defendant then does nothing (he does not admit the claim, he merely continues a policy of masterly inactivity) does not mean that there is no dispute. There is a dispute until the defendant admits that a sum is due and payable, as Kerr J said in the *Tradax* case. There was in the instant case a dispute when the writ was issued and there remained a dispute and there still is a dispute and the judge had no choice but to refer the dispute to arbitration.

In my judgment, the judge came to the right conclusion for the right reasons and I would dismiss the appeal.

WATKINS LJ. For some while I was persuaded by counsel for the plaintiffs in the course of his very able argument into thinking that this appeal ought to be allowed for the reason that the plaintiffs had properly claimed what was indisputably (so it could be said to be) a claim for an account under the arbitration agreement. That, an arbitration agreement notwithstanding, there can be such a remedy available either in the courts or in arbitration proceedings is, on the authority of Kerr J in *Tradax Internacional SA v Cerrahogullari TAS, The M Eregli* [1981] 3 All ER 344, without doubt.

In the *Tradax* case he stated (at 351):

> Claims which are covered by an arbitration clause, but which are said to be undisputable, are nowadays frequently put forward in an arbitration, but then also pursued [illegible]

(6) (7)

effect claimant can, and in my view should be able to, obtain an order for payment in such cases by either means, and the coexistence of both avenues towards a speedy payment of an amount which is indisputably due was recently referred to in this court by Robert Goff J in *The Kostas Melas* [1981] 1 Lloyd's Rep 18 at 27. It was there held that, as an alternative to an application for summary judgment under Ord 14 in an action, there was jurisdiction to make an interim award for an indisputable part of the claim in an arbitration; which also shows, incidentally, the misconception of the plaintiffs' first submission in the present case with which I have already dealt.'

If the various claims contained in the plaintiffs' statement of claim could properly be said to be severable, then I should have been tempted to hold that the claim for an account was allowable in the proceedings which were commenced by writ on 3 April 1981. But, for the reasons explained by Templeman LJ, I have not the slightest doubt now that these claims, which include a claim not only for a true or full or accurate account but also for a distribution of moneys found due as a result of that account to the plaintiffs, cannot be severed. This must mean that there was at all material times a running dispute between the parties which had under the agreement to be referred to arbitration.

Accordingly, I too agree that this appeal must be dismissed.

FOX LJ. I agree with the judgment that Templeman LJ has delivered and I too would dismiss the appeal.

Appeal dismissed, the court making it clear that the stay imposed in the order below not to bar an order for the sum claimed under Ord 14 if the judge or master so decides.