Agromet Motoimport Ltd v Maulden Engineering Co (Beds) Ltd

QUEEN'S BENCH DIVISION
OTTON J
16 DECEMBER 1983, 9, 10, 11 APRIL 1984

Arbitration – Award – Enforcement – Action to enforce award – Agreement to submit disputes to arbitration – Time limit for bringing action to enforce award – Time limit six years from date on which 'cause of action' accrued – Whether limitation period running from date of accrual of original cause of action or from date of breach of implied promise to perform award – Whether breach of implied promise giving rise to separate cause of action – Limitation Act 1980, s 7.

It is an implied term of an agreement to submit to arbitration disputes arising under a contract that any award made on a submission will be honoured. A breach of that implied term arising out of the failure to honour an award gives rise to an independent cause of action to enforce the award distinct from the original cause of action for breach of contract which gave rise to, and was the subject matter of, the submission. Accordingly, the time limit prescribed in s 7[a] of the Limitation Act 1980, namely that 'An action to enforce an award' must be brought within six years from the date on which 'the cause of action' accrued, begins to run from the date of the breach of the implied term to perform the award, and not from the date of the accrual of the original cause of action giving rise to the submission, since the 'action' and 'cause of action' referred to in s 7 are the independent cause of action for breach of the implied term to perform the award and not the original cause of action (see p 423 *h* to p 434 *a* and *c d*, post).

Dictum of Slesser LJ in *Bremer Oeltransport GmbH v Drewry* [1933] All ER Rep at 857 and *F J Bloemen Pty Ltd v Gold Coast City Council* [1972] 3 All ER 357 considered.

Notes

For enforcement of an arbitration award, see 2 Halsbury's Laws (4th edn) paras 629–632. For the application of the Limitation Acts to arbitrations, see ibid paras 514, 515 and 28 Halsbury's Laws (4th edn) para 619.

For the Limitation Act 1980, s 7, see 50(1) Halsbury's Statutes (3rd edn) 1259.

Cases referred to in judgment

Bloemen (F J) Pty Ltd v Gold Coast City Council [1972] 3 All ER 357, [1973] AC 115, [1972] 3 WLR 43, PC.
Bremer Oeltransport GmbH v Drewry [1933] 1 KB 753, [1933] All ER Rep 851, CA.
Hodsden v Harridge (1670) 2 Wms Saund 61, 85 ER 672.
Norske Atlas Insurance Co Ltd v London General Insurance Co Ltd (1927) 43 TLR 541.
Pegler v Rly Executive [1948] 1 All ER 559, [1948] AC 332, HL.
Scott v Avery (1856) 5 HL Cas 811, [1843–60] All ER Rep 1.
Turner v Midland Rly Co [1911] 1 KB 832, DC.

Appeal

The defendants, Maulden Engineering Co (Beds) Ltd, appealed from the order of Master Prebble, dated 1 August 1983, dismissing the defendants' application to set aside an order dated 6 June 1983 whereby the plaintiffs, Agromet Motoimport Ltd, were given liberty to enforce an arbitration award dated 20 February 1980 in the same manner as a judgment. The defendants also sought a stay of execution of the order of 6 June 1983. The facts are set out in the judgment.

a Section 7 is set out at p 439 *a*, post

The facts are set out in the judgment.

George Newman QC and *Terence Walker* for the defendants.
Roger Buckley QC and *Laurence Marsh* for the plaintiffs.

OTTON J. On 6 June 1983 Master Prebble made an order that the plaintiffs be at liberty to enforce, in the same way as a judgment or an order to the same effect, the arbitration award of Dr Alfred Ernst, sitting as an arbitrator in Zurich, dated 20 February 1980. The order was made pursuant to s 27 of the Arbitration Act 1950 and s 3 of the Arbitration Act 1975. The master also made a further order whereby the defendants were at liberty to set aside the order pursuant to RSC Ord 73, r 10. The defendants gave notice, and on 1 August the master, having heard arguments from both parties, ordered that the defendants' summons be dismissed but ordered a stay of execution pending an appeal.

The plaintiffs are a Polish company and manufacturers of Ursus Tractors. Maulden Engineering Co (Beds) Ltd are an English limited company in Bedfordshire. Although strictly speaking they are not the defendants in the proceedings as at present constituted, I shall for convenience refer to them as such. By virtue of a franchise agreement between the parties the defendants were importers and distributors of the plaintiffs' tractors in England.

It is necessary to state briefly the history of the matter. In about June 1965 the defendants approached the plaintiffs with a view to the defendants distributing the plaintiffs' tractors in this country. On 10 December 1967 the parties entered into a sole distribution agreement for five years, which expired on 10 December 1972. In October 1978 a further agreement, known as the 'consignment stores agreement', was also entered into between the parties, which provided for stores to be held in Poland to be paid for as and when sold. I am not concerned with either of these two earlier contracts. During the currency of these contracts, disagreements arose between the parties, particularly in relation to spare parts. On 2 September 1972 a further sole distribution agreement for four years was entered into between the parties. It expired on 2 September 1976; this date is critical as is revealed by subsequent events. Further difficulties arose, particularly in the period between 1975 and 1976. The defendants' directors visited Warsaw, and the plaintiffs' representatives visited England with a view to resolving the differences. In July 1976 the parties met at the Royal Agricultural Show at Stoneleigh Park, near Coventry, and in August 1976 there was a further meeting in Poland. It would appear that at this time the defendants still contemplated a further agreement when the then current agreement expired in September of that year.

On 22 September 1976 (approximately three weeks after the agreement expired) a new company was formed called Ursus Bizon GB Ltd. They were appointed sole distributors of the tractors in this country in place of the defendants. On 10 December 1976 the plaintiffs, the defendants and Ursus Bizon GB Ltd through their representatives met at the Smithfield Show, and there was a large measure of agreement between the three parties in respect of claims and cross-claims between the plaintiffs and the defendants at that time. The defendants contend that it was agreed that Ursus Bizon GB Ltd should take over all spare parts held by the defendants, and would be responsible for payment to the plaintiffs, that Ursus Bizon GB Ltd have failed or refused to fulfil these obligations and the defendants have incurred storage charges as a result.

On 30 November 1979 the plaintiffs started a High Court action against the defendants for £30,000 or more in respect of spare parts. The plaintiffs' solicitors gave a general extension of time for service of the defence. In June 1983 (that is some 3½ years later) the plaintiffs' solicitors called for the defence in that action. The defence and counterclaim were served shortly afterwards. On 28 December 1982 the defendants began their own action against Ursus Bizon GB Ltd. Directions have been given in both actions. Ursus Bizon GB Ltd have become a third party in the action between the plaintiffs and the defendants. Discovery has reached an advanced stage but neither action has come down.

I now turn to the chronology of the arbitration. On 27 February 1978 the plaintiffs made formal demand of the defendants for the purchase price of 13 tractors, namely, £34,163·51, to be paid within 14 days, and in default the matter was to be presented by the plaintiffs for the decision of the arbitration tribunal in accordance with cl 13 of the sole distribution agreement dated 2 September 1972. Clause 13 provides:

> 'All disputes, controversions or differences which may arise between the parties or of, or in relation to, or in connection with the present Agreement or for the breach thereof shall be referred to and settled by arbitration, according to the Rules of Arbitration of [the] Economic Commission for Europe of the United Nations, which are known to both parties. The arbitration will take place in Zurich. To constitute the Arbitration Court each party appoints one arbitrator . . .'

The plaintiffs informed the defendants by letter that they had appointed Professor Ludwiczak as arbitrator. On 21 February the plaintiffs had laid their complaint before the arbitration court. It was apparent at an early stage that the defendants determined not to take part in nor co-operate with the arbitration procedure to which they had agreed. They did not appoint an arbitrator. In default the president of the Zurich Chamber of Commerce appointed an arbitrator for the defendants. In October 1979 the defendants' solicitors informed the arbitration court that the defendants did not submit themselves to the jurisdiction of the court and they failed to pay the recognisance required of them.

In May 1979 the plaintiffs' originating complaint was sent to the defendants. The defendants did not answer or even acknowledge receipt. In December 1979 the arbitration court informed the parties of the hearing. On 20 February 1980 the arbitration court heard the claim. The defendants did not attend, nor were they represented. The arbitration court therefore proceeded in their absence. An award was made in favour of the plaintiffs in the sum claimed, namely, £34,163·51 and it became a final award 30 days later. On the face of the award (para 11) the tractors were delivered 'in realisation of the Sole Distributorship Agreement of September 2nd, 1972 . . .'; and later 'The discussed delivery of the goods should thus be regarded as realised in accordance with the contract.'

Before the English court the defendants have admitted the delivery of 13 tractors and that they have never paid for them. However, they seek to argue (1) that the tractors were not supplied pursuant to the sole distribution agreement, but under a separate and independent contract, and (2) that although the tractors may have been ordered during the currency of the September 1972 agreement, but they were not delivered until after it had expired in September 1976.

The plaintiffs left the award on the file, as it were. No step was taken to enforce the award until 6 June 1983, that is some 3½ years after it had become a final award. No explanation has been given for this delay. Two methods of enforcement were open to the plaintiffs: (1) a conventional action on the award commenced by a writ and subsequent pleadings; or (2) a summary procedure provided by s 26 of the Arbitration Act 1950 (which by virtue of s 36 of that Act applies to foreign awards), and by s 3(1)(a) of the Arbitration Act 1975 (in respect of convention awards). Section 3 provides:

> 'A Convention award shall, subject to the following provisions of this Act, be enforceable—(a) in England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act of 1950.'

The agreement between the parties provided for arbitration in Zurich, Switzerland is a party to the New York Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958; TS 20 (1976); Cmnd 6419)) referred to in s 7 of the Arbitration Act 1975. The plaintiffs invoked the summary procedure by applying ex parte under RSC Ord 73, r 10, to which I shall have to refer later in the course of this judgment.

The defendants advance four contentions. First, it is submitted that the action to

enforce the award is statute-barred by virtue of the Limitation Act 1980; in particular reference is made to s 7 of that Act, which reads:

> 'An action to enforce an award, where the submission is not by an instrument under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued.'

Counsel for the defendants has presented an attractive argument in respect of this part of the case, and has given me much cause for thought. He submits that the cause of action arises when the breach of the original agreement occurred, that is when the defendants refused or failed to pay for the tractors after delivery. This, for the purposes of this proceeding, can be taken to be late 1976. Accordingly, the six-year limitation period expired in about November 1982. Counsel for the defendants contends that the proceedings to enforce the award taken in June 1983 were too late. He submits that the words 'cause of action' in s 7 of the 1980 Act can only refer to the breach of contract and not to the award or any action to enforce the award. He relies on s 38 of the 1980 Act, which defines the word 'action' as ". . . any proceeding in a court of law, including an ecclesiastical court'. He submits that these are proceedings in a court of law to enforce an award, and the plaintiffs' cause of action is that provided by the contract containing the arbitration clause.

In support of these contentions counsel for the defendants has taken me through various authorities, and I hope I do not do him an injustice if I state the proposition shortly and refer (equally shortly) to the authorities which he cited. The starting point was *Bremer Oeltransport GmbH v Drewry* [1933] 1 KB 753, [1933] All ER Rep 851. I read the headnote ([1933] 1 KB 753):

> 'On November 19, 1929, a charterparty was made in London which provided that any dispute arising during the execution of the charterparty should be settled by arbitration in Hamburg. In 1931, disputes arose between the parties which were submitted to arbitration in Hamburg, and an award [was] made against the defendant for £20,913.13s.7d., payment to be made in English currency. On November 29, 1932, the plaintiffs, who were a German firm, obtained ex parte an order that they should be at liberty to issue a writ against the defendant, who was residing in France, claiming the amount due and payable under the award, and to serve notice of the writ on the defendant in France. On January 5, 1933, the defendant applied to have that order set aside, but Goddard J. dismissed the application. On appeal:—*Held* (affirming Goddard J.'s decision), (1.) that the order for service out of the jurisdiction was properly made under Order xi., r. 1(f), as the action based on the award was for the enforcement of a contract made within the jurisdiction—namely, the submission to arbitration contained in the charterparty . . .'

Slesser LJ reviewed the authorities which preceded this decision at great length, and stated ([1933] 1 KB 753 at 764, [1933] All ER Rep 851 at 857):

> 'It would appear, therefore, that the greater weight of authority is in favour of the view that in an action on the award the action is really founded on the agreement to submit the difference of which the award is the result. The legislation dealing with awards supports this view.'

He then set out what that legislation was, and continued:

> 'Interesting as these problems are, even if there still be recognized by the law such an action upon the award itself (where there is no order of Court under the Arbitration Act, 1889, s. 12, or under the Arbitration (Foreign Awards) Act, 1930, neither of which here apply) as appears to have been contemplated in the case of *Hodsden v. Harridge* ((1670) 2 Wms Saund 61, 85 ER [illegible] approved by MacKinnon J. in the *Norske Atlas Insurance* case ((1927) 43 TLR 541), [illegible]

for the purpose of the plaintiffs here to show that, at any rate, they are entitled to say that on their claim they are suing on the charterparty made in London and more particularly on the submission to arbitration therein contained.'

Counsel for the defendants submits that this case is an authority for the proposition that a cause of action arises out of the agreement. He also referred to the decision of the Privy Council in *F J Bloemen Pty Ltd v Gold Coast City Council* [1972] 3 All ER 357, [1973] AC 115. I quote from the headnote ([1973] AC 115 at 115–116):

'In 1965 the parties entered into a contract under which the appellants (the contractor) undertook to execute certain sewage works for the respondents (the council). Clause 35(*c*) of the contract provided that the contractor should be entitled to interest on all moneys payable to him but unpaid from the date on which payment became due. Disputes arose between the parties in the course of which the council purported to rescind the contract and the disputes were submitted to arbitration. On November 8, 1966, the arbitrator made an award in favour of the contractor. The council paid the sum awarded in two instalments on February 22, 1968, and on March 28, 1968. By a writ issued on May 13, 1969, the contractor claimed interest from November 8, 1966, on the amount of the award until payment under the terms of the contract. The council demurred to the statement of claim. The Full Court of the Supreme Court of Queensland by a majority allowed the demurrer holding, inter alia, that the award superseded the rights under clause 35(*c*) of the contract. On appeal by the contractor to the Judicial Committee:—*Held*, dismissing the appeal . . . that when an arbitrator fixed a sum to be paid by way of damages for breach of contract the award created a fresh cause of action superseding that arising from the breach, but it did not follow that the cause of action which came into existence when the award was made could not be said to have arisen under the contract which contained the submission . . .'

In particular, my attention was drawn by both counsel to the following passage in the judgment of the Board ([1972] 3 All ER 357 at 363, [1973] AC 115 at 126):

'The award of an arbitrator differs materially from a judgment. The plaintiff's right to sue and the court's right to give judgment for him if he proves his case are not derived from the agreement of the parties and the judgment when given is an entirely fresh departure. The award of an arbitrator on the other hand cannot be viewed in isolation from the submission under which it was made. It was this sort of consideration which led the Court of Appeal in *Brewer Oeltransport GmbH v Drewry* [1933] 1 KB 753, [1933] All ER Rep 851 to hold that an action brought to recover a sum awarded by an award made in Hamburg under a submission contained in a contract made in London was an action brought to enforce a contract made within the jurisdiction and their Lordships think that the same reasoning applies here. The distinction between an award which merely establishes and measures a liability under the contract and so does not create a fresh cause of action and an award of damages which supersedes the liability under the contract and creates a fresh cause of action, whatever its validity in other contexts, does not, in their Lordships' opinion, govern the broad question at issue here. Accordingly on this point they agree with Lucas J that sums payable under this award albeit payable in part by way of damages can be fairly said to fall prima facie within the scope of cl 35(*c*).'

Counsel for the defendants submits that on this basis it is impossible to disentangle the award from the contract, and that, therefore, the 'conventional period' (as he calls it) of six years' limitation applies.

He acknowledges that there is a divergence of opinion among academic writers on this particular issue, and both counsel agree that there is no authority on this fundamental question. I was referred to *Russell on Arbitration* (20th edn, 1982) p 4, ch 1, s 3. Under

'The Limitation Act and Arbitration', and sub-headed 'Limitation Act applies to arbitrations', the text reads:

'The Limitation Act [1980] applies to arbitrations as it applies to actions in the High Court and the making, after a claim has become statute-barred, of a submission of it to arbitration, does not prevent the statute being pleaded.'

Later under the heading 'Action upon an award', the following passage appears (at pp 5–6):

'1. *Timeous commencement of arbitration.*

The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued: "just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued". [That is a quote from *Pegler v Rly Executive* [1948] 1 All ER 559 at 562, [1948] AC 332 at 338. Even if the arbitration clause is in the "*Scott* v. *Avery*" form [see (1856) 5 HL Cas 811, [1843–60] All ER Rep 1], that is, there is provision that no cause of action shall accrue in respect of any matter agreed to be referred until an award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause. [That is provided by s 34(2) of the Limitation Act 1980.]'

Counsel for the defendants referred me to the language of s 34(2) and prays it in aid in support of his submission. Later *Russell* continues (at pp 6–7):

'*The Statute.*

An implication that arbitration proceedings stop time running may be gleaned from the provisions of the Limitation Act 1980, section 34(1) that its provisions "shall apply to arbitrations as they apply to actions in the High Court." But section 7 [to which I have already referred] provides that an action to enforce an award must be brought within six years of the time when the "cause of action" accrued, whilst leaving it unclear to what "cause of action" reference is intended.'

This highlights one of the problems I have to consider. The text continues:

'It would appear that, as observed above, even if there is a *Scott* v. *Avery* clause, the cause of action is that which there would have been had there been no arbitration clause. If, therefore, even an express attempt to constitute the award the "cause of action" does not have effect for the purposes of the Limitation Act—at least as regards section 34—it would require good reasons for construing "cause of action" as meaning the award in section 7; though the reference in section 7 to "submission" may be intended to give the expression "cause of action" a different meaning in section 7 from that which it bears in section 34.'

Later, when considering the authorities, my attention was drawn to the following passage in *Russell* (at pp 7–8):

'In former editions of *Russell* (see e.g. 18th edn, p 5), the case of *Turner* v. *Midland Railway* ([1911] 1 KB 832) was relied on as establishing that the "cause of action" was the award. But from the fuller account now given, it can be seen that the *ratio* was that in the normal case the cause of action is not the award, and it was only so in *Turner's* case because of the special circumstances that there was in that case no normal cause of action at all. [The text then sets out in summary form the circumstances and the decision in *Turner's* case, and continues:] This case appears to suggest that the period for enforcing an award arising out of an ordinary cause of action would start to run from the date of accrual of the original cause of action, and not from the mere date of the award.'

My attention, however, has been drawn to another respected publication, Mustill and Boyd *Commercial Arbitration* (1982) p 162, where, in a paragraph headed 'The beginning of the limitation period', there appears the following passage:

> 'The moment at which the period limited for the enforcement of claims begins to run depends on the wording of the statute. In the case of the six-year period under the Limitation Act 1980, time begins to run when the cause of action sued upon is complete. [There is then reference to carriage of goods by sea. The text continues:] Other statutes have different provisions. For the purpose of these various statutory provisions, there is no difference between arbitration and actions in the High Court. There are, however, two points which should be mentioned. First, when an action is brought upon an award, the six-year period of limitation runs from the date of the award and not from the moment when the claim arose, for the award itself gives rise to a new cause of action. [A footnote then refers to *Turner v Midland Rly Co*, to which I have already referred.]'

With the greatest respect to the learned authors, I doubt if the decision in *Turner v Midland Rly Co* [1911] 1 KB 832 is authority for that proposition. In that case, no cause of action arose at all until an award was made and, therefore, the cause of action arose on the award alone. However, later in the same work, there appears the following passage (at pp 367–369):

> 'B. OBTAINING A JUDGMENT OR ORDER
>
> There are two ways in which a judgment or order can be obtained on an award: 1 By the so-called "action on the award"; 2 By an application under section 26 of the Arbitration Act 1950.
>
> *1 Action on the award*
>
> Parties to an arbitration agreement impliedly promise to perform a valid award. If the award is not performed the successful claimant can proceed by action in the ordinary courts for breach of this implied promise and obtain a judgment giving effect to the award. The court may give judgment for the amount of the award, or damages for failure to perform the award. It may also in appropriate cases, decree specific performance of the award, grant an injunction preventing the losing party from disobeying the award, or make a declaration that the award is valid, or as to its construction and effect. The action is commonly described as an "action on the award", and indeed it has been suggested that an action may lie on an implied promise contained in the award itself without the necessity of pleading an arbitration agreement. [There is then reference to *Bremer Oeltransport GmbH v Drewry* [1933] 1 KB 753 at 758–765, [1933] All ER Rep 851 at 854–857 in a footnote which reads: 'Slesser LJ . . . discussed the problem at length and eventually left it undecided.' The text continues:] We submit that the better view is that the plaintiff must plead and prove both the arbitration agreement and the award; both are essential elements of his cause of action. It has sometimes been necessary to decide whether the action is "grounded upon a contract" or is brought "to enforce a contract". [There is then a further reference to *Bremer Oeltransport GmbH v Drewry*. The text continues:] These problems of classification necessarily give greater weight to one or other element of the cause of action, depending on the circumstances, but they should not be allowed to obscure the fact that both elements must be present before the plaintiff can sue. Thus, for the purposes of the Limitation Act 1980, it is necessary to classify an action on an award either as "an action to enforce an award, where the submission is not by an instrument under seal", for which the limitation period is six years, or as "an action upon a specialty", for which the limitation period is twelve years. But we submit that time begins to run from the date on which the implied promise to perform the award is broken, not from the date of the arbitration agreement nor from the date of the award.'

I emphasise the last sentence. Thus, if the learned authors are correct, the plaintiffs are not in any difficulty and their present proceedings are not statute-barred. There is, however, no authority to support the opinion expressed by the authors.

Counsel for the plaintiffs submitted that the views expressed by *Mustill and Boyd* are correct. He maintained that the action to enforce an award is an independent cause of action. It is distinct from and not entangled with the original contract or its breach. He submitted that there is an implied term of the original agreement that an award will be honoured, and if it is not honoured, there is then a breach of the implied term, and time, for the purposes of the Limitation Act, begins to run. He invited me to approach the authority of *Bremer Oeltransport GmbH v Drewry* [1933] 1 KB 753, [1933] All ER Rep 851 with some care. He submitted that the court was primarily concerned with jurisdiction of the English courts for the purpose of RSC Ord 11. He referred me to this passage in that case ([1933] 1 KB 753 at 764, [1933] All ER Rep 851 at 857):

> '. . . it is sufficient for the purpose of the plaintiffs here to show that, at any rate, they are entitled to say that on their claim they are suing on a charterparty made in London and more particularly on the submission to arbitration therein contained.'

In other words, he submitted, the plaintiffs only needed to substantiate their position to bring themselves within the jurisdiction of the English courts. He also referred me to *F J Bremen Pty Ltd v Gold Coast City Council* [1972] 3 All ER 357, [1973] AC 115. He relied on this decision to support his proposition that the award of the arbitrator was in effect an award of damages for breach of contract. He relied in particular on the passage that I have already quoted and an earlier passage which must be read with it ([1972] 3 All ER 357 at 363, [1973] AC 115 at 126).

> 'It is true—as the cases above referred to show—that when an arbitrator fixes a sum to be paid by one party to the submission by way of damages for breach of contract the award creates a fresh cause of action superseding that arising out of the breach. But it does not appear to their Lordships to follow from that that the cause of action which comes into existence when the award is made cannot be said to arise under the contract which contains the submission.'

Counsel for the plaintiffs said that the court was unequivocally saying that just because money falls due under the contract, it does not mean to say that there is not a new cause of action. On the contrary, he submitted, there is a new and independent cause of action flowing from the award itself and from the failure to acknowledge or honour the award. He further submitted that s 7 of the Limitation Act 1980 should be given its natural and ordinary meaning. The words 'action' and 'cause of', as they appear in the text of the section, refer to one another, so as to have the effect suggested by *Mustill and Boyd*.

I have considered these submissions with great care and, as I have already indicated, I have found it a difficult decision to make. I have perused the judgment of Slesser LJ in *Bremer Oeltransport GmbH v Drewry* [1933] 1 KB 753, [1933] All ER Rep 851 with great care. I have come to the conclusion that I must prefer the submissions made by counsel on behalf of the plaintiffs and reject the submissions made on behalf of the defendants. I am satisfied that I can and should adopt the approach of *Mustill and Boyd*. In my judgment, the action on the award and the action to enforce an award is an independent cause of action. It is distinct from and in no way entangled with the original contract or the breach occurring from it, as reflected in the award. I have come to the conclusion that there is nothing repugnant in implying such a term into the contract. Indeed, in argument counsel for the defendants conceded that such an implied term could be read into such a contract. In my view, therefore, there is such an implied term that an award will be honoured when it is made. That implied term is, of course, in the original agreement of 2 September 1972, and the implied term continues, that if the award is not honoured there is then a breach of that implied term and time begins to run for the purposes of the Limitation Act. If, as is contended by counsel for the defendants, the contrary were to prevail it would produce a surprising result. [illegible]

.ard was made or handed down or made final more than six years .en the limitation period had already expired. He suggested that this .e cured by the plaintiffs issuing a protective writ for the declaration .e arbitration award which is yet to be given. In my view, it is doubtful .ne courts would entertain such proceedings. It would also have the somewhat .d result that if the defendants had a counterclaim they, too, might feel obliged to .ue a writ to protect their own position.

As I have already indicated, when Slesser LJ in *Bremer Oeltransport GmbH v Drewry* considered the problem he did not decide this matter but left it open. However, I am satisfied that there is nothing in what fell from Slesser LJ which prevents or is repugnant to the decision I have arrived at. I am further satisfied that s 7 of the 1980 Act should be given its ordinary and natural meaning, and that no special interpretation is necessary to give the section its proper effect. So, where it says 'An action to enforce an award where the submission is not by an instrument under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued', it follows that the cause of action accrues (on my reading of the section), from the breach occasioned by the defendants' failure to honour the award when called on to do so.

[His Lordship then considered the defendant's remaining contentions and held (1) that although the plaintiffs' affidavits in support of their application for leave to enforce the arbitration award did not comply with Ord 73, r 10(3), the exhibits to the affidavits did so, and in any event the deficiency in the affidavits was a mere irregularity, within Ord 2, r 1(1), which could be cured by the plaintiffs swearing a further affidavit strictly complying with Ord 73, (2) that the other defect in the affidavits could also be remedied, (3) that the arbitrator's award did not contain a decision on any matter that was not within the terms of the submission to arbitration, and (4) that the defendants were not entitled to a stay of execution, under RSC Ord 47, in the action to enforce the arbitration award. His Lordship continued:]

However, in the exercise of my discretion, I propose to grant a stay on terms. The first reason for doing so is that I accept the contention of counsel for the defendants that there has been an inordinate delay and there would be no hardship for the plaintiffs to wait for the limited period of time until after determination of the litigation. Secondly, I consider that there is just sufficient force in the argument of counsel for the defendants that as the plaintiffs have no registered office and no assets within the jurisdiction the defendants might experience some difficulty in recovering their money if my decision should be found to be wrong hereafter. I am open-minded as to how this should be accomplished, but I think that at least the money should be brought into court, or, alternatively, should be put into a joint bank account to which the solicitors to both parties can be signatories, but I leave it to the parties to decide between themselves how to achieve that. However, if they cannot agree, I will hear further submissions.

Accordingly the appeal against the order of the master fails, and the order which he made on the action to enforce the arbitrator's award stands. The question of how to implement the stay is now under further consideration.

Appeal dismissed; stay of execution on terms.

Solicitors: *Zaiwalla & Co*, agents for *Williams & Co*, Bedford (for the defendants); *Amhurst Brown Martin & Nicholson* (for the plaintiffs).

K Mydeen Esq Barrister.