256. UNITED KINGDOM: COURT OF APPEAL – 14 October 1985 – *S.L. Sethia Liners Ltd. v. State Trade Corporation of India Ltd.* *

Effects of an arbitration agreement on judicial proceedings – Referral of the entire dispute to arbitration

(See Part I. B.1)

Lord Justice KERR: This is an appeal from a judgment given by Mr. Justice Staughton on Apr. 19, 1985. It arises out of a contract dated July 18, 1983, for the sale f.o.b. West Coast of India port of 11,000 tonnes of sugar by the defendants, the State Trading Corporation of India Ltd., to whom I will refer as the sellers, to the plaintiffs, the buyers, S. L. Sethia Liners Ltd. There was a sub-sale, on the same terms, save as to price, but the Court has not looked at that sub-contract by Sethia to Cargill — I do not give their full name because we have not been referred to it — and then a further sub-sale to Golodetz — and again I do not give the name in full — who were the final buyers in the string.

There arose a dispute between the sellers and the buyers as to whether the sellers were liable for demurrage, since a demurrage provision, to which I will turn in a moment, had been incorporated into the sale contract.

On Dec. 13, 1984, the buyers issued a writ for $38,764.66, claiming that this was the amount of demurrage owed to them by the sellers, under the contract of sale. Alternatively they submitted that there had been a concluded agreement between the parties settling a dispute as to the demurrage, whereby the sellers had agreed to pay this sum.

On Jan. 2, 1985, the buyers issued a summons under O. 14 for summary judgment, and shortly thereafter, on Jan. 25, 1985, the sellers issued a summons to stay the action because the contract contained an arbitration clause. In the circumstances of these parties, this is governed by s. 1 of the Arbitration Act, 1975.

These summonses came before Mr. Justice Staughton on Apr. 19, and he dealt first with the

* The text is reproduced from Lloyd's Law Reports, 1, p. 32 ff. (1986)

buyers' application for summary judgment. He concluded that there was no arguable dispute between the parties as to the sellers' liability for demurrage, although he rejected the alternative contention of an agreed settlement. He accordingly gave judgment for the buyers for the amount claimed, and having done so concluded that there was nothing left to refer to arbitration. He accordingly made no order on the summons to stay the action.

I need not refer to the provisions of O. 14, which are well known. But it is important to bear in mind that s. 1 of the Arbitration Act, 1975, obliges the Court to stay an action and to refer the matter to arbitration unless the Court is satisfied — and I read the relevant words —

> . . . that there is not in fact any dispute between the parties with regard to the matter agreed to be referred.

The submissions of both parties have proceeded on the basis that the summonses under O. 14 and s. 1 are the reverse sides of the same coin, and we have been referred to Mustill and Boyd on Commercial Arbitration at pp. 90-92. Without expressing any concluded view on everything which is stated there, it seems to me that the position can be summarized as follows. If a point of law is raised on behalf of the defendants, which the Court feels able to consider without reference to contested facts simply on the submissions of the parties, then it is now settled that in applications for summary judgment under O. 14 the Court will do so in order to see whether there is any substance in the proposed defence. If it concludes that, although arguable, the point is bad, then it will give judgment for the plaintiffs. This course will also be adopted where there is a counter-application for a stay of the action. If the contract between the parties contains an arbitration clause to which s. 1 of the 1975 Act applies, then the Court is not thereby precluded from considering whether there is any arguable defence to the plaintiffs' claim. If the Court concludes that the plaintiff is clearly right in law then it will still give judgment for the plaintiffs. In the same breath, as it were, it will then have decided that in reality there was not in fact any dispute between the parties. If the Court is satisfied that the plaintiffs are clearly right in law, and that the defendants have no arguable defence, then it will not avail the defendants to have raised a point of law which the Court can see is in fact bad. In those circumstances the defendants cannot be heard to say that there was a dispute to be referred to arbitration. But if the Court concludes that the plaintiffs are not clearly entitled to judgment because the case raises problems which should be argued and considered fully, then it will give leave to defend, and it is therefore then bound to refer the matter to arbitration under s. 1 of the 1975 Act.

I should add, for the sake of completeness, that in relation to applications for summary judgment which raise a bare issue of law, the parties may of course agree to ask the Court to decide this as a preliminary, or as the only, issue in the action. But if they do not do so and the Court does not consider that the plaintiff is entitled to summary judgment, then the Court should not investigate a clearly arguable defence by going further in order to decide whether the defendant's contention is in fact correct, and then give leave to defend. That course was emphatically rejected by this Court in the unreported case of *Pinemain Ltd. v. Welbeck International Ltd.* on Oct. 11, 1984 (transcript No. 84 363). The proper course, if the Court considers that the plaintiff is or may not be right, is simply to give leave to defend, and accordingly, in cases where there is an arbitration clause, to refer the whole dispute to arbitration. I say that because both Counsel before us, without any agreement having been concluded between the parties to abrogate the arbitration clause, told us that they and their clients would wish this Court finally to decide the question of construction raised in this case, to which I turn in a moment. That would mean, or could mean, that if the Court was not satisfied that the plaintiffs were right, it would give a ruling on the legal position between the parties in favour of the defendants, but would then be bound to refer the remainder of the dispute to the arbitration tribunal in a situation where that tribunal would be bound by what, ex hypothesi, the Court will already have decided on the question of construction.

I would say for myself as strongly as I can that such a course would create an impossible position. It would result in a dispute — and by "dispute" I mean a bona fide and real dispute which is governed by an arbitration clause — being decided as to the law in the Court, and the remainder being referred to arbitration, to be dealt with by an award. That would appear to create problems under s. 1 of the 1975 Arbitration Act, and possibly also under the New York Convention. It would certainly be contrary to the legislation and practice under the Arbitration Act, 1979. In the absence of agreement waiving the right to arbitration, such disputes must prima facie go to arbitration, whether they be disputes as to fact or law, or mixed fact and law. Apart from such "special cases" as remain under the pre-1979 procedure, it is only in a limited number of cases and situations, governed partly by the 1979 Act and partly by the decision of the House of Lords in *The Nema*, [1981] 2 Lloyd's Rep. 239; [1982]

A.C. 724, and *Antaios Compania Naviera S.A. v. Salem Rederierna A.B.*, [1984] 2 Lloyd's Rep. 235; [1985] A.C. 191, that the Court will now be concerned with issues of law arising under contracts containing arbitration clauses, even though the sole dispute may turn on an issue of law.

Many may have reservations about that regime, but it is now our law. I would not be prepared to accept, as suggested by Counsel at one stage of the argument before us, that the parties may agree that an issue of law raised as part of a dispute in a matter which has to go to arbitration should be decided by the Court and the remainder referred to arbitration. I would regard that as a jurisdiction which at any rate the Court of Appeal does not possess and cannot accept by agreement. It would involve a split in the final decision between a judgment of the Court and an arbitration award. That, as at present advised, only appears to me to be permissible under s. 2 of the Arbitration Act, 1979, which does not arise here, there having been no reference to arbitration.

With this as background I turn briefly to the nature of the dispute in this case. I have already referred to the contract, a straightforward contract on f.o.b. terms. It appears to be the standard form of sugar sale contract used by the State Trading Corporation of India. It incorporates a number of printed provisions and the ones with which we are concerned are those in a lengthy clause VI under the heading "Shipping Terms & Conditions". This provides in a number of sub-paragraphs the terms on which the buyers must fix the chartered vessel or vessels, what the charter terms are to be in relation to demurrage, despatch, readiness and so forth; and then sub-cl. (k) is in the following terms:

> Despatch/Demurrage at the port(s) of loading shall be for the account of Seller. Despatch on all time saved basis shall be minimum half of the demurrage rate.

The issue between the parties is whether there is an absolute liability to demurrage by the sellers when the vessel has in fact become entitled to demurrage or whether this is a provision in the nature of an indemnity, so that the sellers can only be made liable to pay such demurrage if the buyers have either become liable to pay it or have in fact paid it. For the purposes of this appeal Mr. Dunning has conceded that it is sufficient if the buyers show that they are liable to pay it.

In the present case, because there was a series of string contracts, the buyers in fact never chartered a vessel, and if they became liable to pay any demurrage it is clear that such liability would only have arisen under the sub-contract with Cargill. The vessel was in fact chartered, we were told, by Golodetz, the sub-sub-buyers, evidently on terms which corresponded with the terms of the head contract of sale to which I have briefly referred, and it is not in dispute that the vessel in fact became entitled to demurrage at the loading port in the sum of $38,000 odd which I have mentioned. The buyers say that this being the position, they are entitled to that sum and that there is no arguable defence. Accordingly they ask for judgment for it.

It is clear that on behalf of the sellers various matters were raised in the correspondence before action, but not the point which I have already mentioned, which appears not to have occurred to anybody at that stage. That point occurred to the sellers' lawyers shortly before the O. 14 hearing and first surfaced during the argument before the Judge. It is submitted that on the basis of a number of cases the preferable view — and, indeed, the correct view — is that sub-cl. (k) is in the nature of an indemnity provision, particularly having regard to the words "for the account of". The authorities referred to were *Mallozzi v. Carapelli S.p.A.*, [1975] 1 Lloyd's Rep. 229, a judgment of mine, and the judgments of the Court of Appeal approving the decision on slightly different grounds in [1976] 1 Lloyd's Rep. 407. Similarly it was said on behalf of the sellers that the construction in favour of indemnity rather than absolute liability is supported by a decision of this Court in *Suzuki & Co. v. Companhia Mercantile Internacional*, (1921) 9 Ll.L.Rep. 171. On the other hand, on behalf of the buyers it is said that neither of those cases is conclusive, that the preferable construction, notwithstanding the words "for seller's account", is in favour of absolute liability, and that it is well-known nowadays, in the sugar and other commodity trades, that there may be string contracts, with the result that the vessel will not be chartered by the immediate buyers but by some sub-buyer. Therefore the buyers contend that the fact that they themselves have not chartered the vessel, with the result that they themselves have not incurred any liability for demurrage, at any rate under any charter-party, does not preclude them from claiming the appropriate sum, purely on the basis of arithmetic, if the final buyer has in fact incurred demurrage under the charter-party, because the vessel exceeded her laytime. This, no doubt, is an over-simplified presentation of the matters which are in dispute between the parties, but I think it can be seen that the problem is far from easy. The point raised is one of very considerable importance in the trade, not only in the sugar trade but in commodities generally,

since it is well-known that f.o.b. contracts nowadays frequently incorporate provisions dealing with demurrage and despatch between the parties to contracts for sale, as though one were dealing with charter-parties or bills of lading.

I do not find this issue easy to resolve and I am reluctant to express any view on it as a pure matter of construction on the short arguments submitted to us today, in particular since the parties have agreed to submit any dispute under this form of contract to a tribunal experienced in this particular trade. I have in mind that since this case is governed by the 1979 Act, it is important to have regard to what the House of Lords has said very forcibly about the weight which should be attached to the views of trade arbitrators, even on questions of law, let alone cases in which trade practices may play a part. It would in any event be undesirable, in my view, for the Court to regard this simply as a short point of construction which might be capable of being decided in favour of the buyers on the short argument which we have had this morning. On the contrary, I am left with the clear impression that the sellers — and I do not want to put it any higher and express no view on it — have a strongly arguable case, and I am far from satisfied that the buyers are so clearly right that they are entitled to judgment.

The Judge appears to have taken the same view about the arguability of the point which I have mentioned. He says at p. 23 of the bundle:

> . . . there is no evidence that the plaintiffs [— that is, the buyers —] have paid demurrage to the shipowners or anyone else, or that they incurred any liability to make such payment. Prima facie, this may well be a contract of indemnity, but, in my view, that is not sufficient to get leave to defend. Mr. Hickey, in his affirmation in support of the . . . application [— that is, the application for summary judgment under O. 14 —] says that the defendants are justly and truly indebted to the plaintiffs. Thus, the evidence is that the plaintiffs are entitled to the money.

In saying that he was merely referring to the standard formal allegation in the O. 14 affidavit that, in effect, there is no defence to the action and that the plaintiffs are entitled to judgment. But in this case the defendant sellers have raised what the Judge himself recognizes to be an arguable defence. He says "Prima facie this may well be a contract of indemnity". In these circumstances I cannot follow, with all due respect, how Mr. Justice Staughton could be satisfied that the plaintiffs were entitled to judgment. It is right to add that Mr. Jacobs, who has appeared for the buyers on this appeal and below, has not sought to support the Judge's conclusion on the ground to which I have just referred.

Accordingly on this point I am left with the clear view that this is a difficult and arguable matter, and in those circumstances the proper order is leave to defend. It then necessarily follows that the whole dispute must be referred to arbitration.

Before concluding I should mention that by a cross notice the buyers submitted, as they did below, that there had been a settlement between the parties whereby the sellers had agreed to pay the demurrage in question. There very nearly was a settlement in this case, and on the correspondence the sellers have never disputed their liability for demurrage in the sum now claimed. But what happened, as the Judge held, was that before the buyers agreed to accept the demurrage offered, albeit reluctantly, in lieu of a larger sum which they had previously put forward, the sellers coupled their willingness to pay this amount with a settlement in account of alleged despatch owed to them in relation to two other vessels. The Judge took the view that on the telex exchanges, which I need not go through, there was no acceptance by the buyers of an unconditional offer which related to this sum of demurrage alone. (The claim for despatch on the other vessels is now also going to arbitration and may be resisted by the buyers on the similar ground that they have not received it from Cargill.)

With considerable reluctance I have come to the conclusion that the Judge was quite right on that issue. Although all the merits, subject to the arguability of this bare point of law, are therefore on the side of the buyers, I can nevertheless find no basis for giving them judgment.

Accordingly I would give unconditional leave to defend, refer the matter to arbitration, as I feel bound to do under s. 1 of the 1975 Act in the circumstances of this case, and allow the appeal.

Lord Justice RALPH GIBSON: I agree that the appeal should be allowed and with the order proposed by my Lord, and I agree with that proposed order for the reasons which my Lord has given.

Sir DENYS BUCKLEY: I also agree. I do not think I can usefully add anything.

Summary judgment under R.S.C. Ord. 14 and an arbitration clause

Where a claimant applies for summary judgment under R.S.C. Ord. 14, the defendant cannot obtain a stay because of the mere existence of an arbitration clause in the contract on which the claim is founded. Both under section 4(1) of the Arbitration Act 1952 (in which the grant of a stay is discretionary) and under section 1(1) of the Arbitration Act 1975 (in which the grant of a stay is mandatory) there must first be a dispute or difference within the jurisdiction of the arbitration clause before a stay can be granted.

Where the defendant admits the claim there is nothing to be referred to arbitration and a plaintiff's application for summary judgment under R.S.C. Ord. 14 is clearly appropriate. The difficulty arises where the defendant puts forward a defence to the claim and the claimant then asserts that the defence does not raise a *genuine* dispute.

Such a situation was before the Court of Appeal (Kerr, Ralph Gibson L.JJ. and Sir Denys Buckley) in *S.L. Sethia Liners Ltd.* v. *State Trading Corp. of India Ltd.*,[1] an appeal from a judgment of Staughton J.

The case arose out of a contract for the sale f.o.b. West Coast of India port of a quantity of sugar by the defendant sellers to the plaintiff buyers. There had been a subsale on the same terms except as to price, and then a further subsale to the final buyers in the string. The contract, apparently the standard form of sugar sale contract used by the State Trading Corp. of India, incorporated a number of printed provisions including lengthy "Shipping Terms & Conditions," among which there was a sub-clause reading:

> "Despatch/Demurrage at the ports of loading shall be for the account of Seller. Despatch on all time saved hours shall be minimum half of the demurrage rate."

The issue between the parties was whether there was an absolute liability to demurrage by the sellers when the vessel had in fact become entitled to demurrage or whether the sub-clause was a provision in the nature of an indemnity, so that the sellers could only be made liable to pay such demurrage if the buyers had become liable to pay it.

Because of the string of contracts, the buyers in fact did not charter a vessel, and if they became liable to pay any demurrage it was under their subcontract with the sub-buyers. The vessel was in fact chartered by the sub-sub-buyers, and it was not in dispute that the vessel in fact became entitled to demurrage at the loading port in the sum of about $38,000. The buyers, therefore, saying that they were entitled to that sum and that there was no arguable defence, issued a summons under R.S.C. Ord. 14 for summary judgment. Some days later the sellers issued a summons to stay the action under section 1 of the Arbitration Act 1975.

Staughton J., dealing first with the buyers' application for summary judgment, concluded that there was no arguable dispute between the parties as to the sellers' liability for demurrage and he accordingly gave judgment for the buyers for the amount claimed. He made no order on the summons to stay the action because in his view there was nothing left to refer to arbitration.

The Court of Appeal reached a different conclusion and allowed the sellers' appeal.

[1] *S.L. Sethia Liners Ltd.* v. *State Trading Corp. of India Ltd.* [1986] 2 All E.R. 395.

For the sellers it was submitted that on the basis of a number of cases the preferable view, and, indeed, the correct view, was that the quoted sub-clause was in the nature of an indemnity provision. On the other hand, on behalf of the buyers it was said that the cases referred to were not conclusive and that the preferable construction of the sub-clause was in favour of absolute liability, it being well known in the sugar and other commodity trades that there might be string contracts, with the result that the vessel would not be chartered by the immediate buyers but by some sub-buyer. The buyers therefore contended that the fact that they themselves had not chartered the vessel, with the result that they themselves had not incurred any liability for demurrage, did not preclude them from claiming the appropriate sum if the final buyer had in fact incurred demurrage because the vessel chartered by that buyer exceeded her laytime.

Kerr L.J., in his leading judgment, with which Ralph Gibson L.J. and Sir Denys Buckley agreed, said[1]:

> "I think it can be seen that the problem is far from easy. The point raised is one of very considerable importance in the trade, not only in the sugar trade but in commodities generally, since it is well known that f.o.b. contracts nowadays frequently incorporate provisions dealing with demurrage and dispatch between the parties to contracts for sale, as though one were dealing with charterparties or bills of lading."

It was undesirable in his view for the court to regard the issue simply as a short point of construction capable of being decided in favour of the buyers on a short argument. On the contrary, he was left with the clear impression that the sellers had a strongly arguable case, and he was far from satisfied that the buyers were so clearly right that they were entitled to judgment.

The court therefore held that the proper order was leave to defend, and it then necessarily followed that the whole dispute had to be referred to arbitration.

It is worth noting Kerr L.J.'s explanation in general terms of the position which is reached when there are summonses under Ord. 14 and section 1 of the Act of 1975. Kerr L.J. said[2]:

> "If a point of law is raised on behalf of the defendants, which the court feels able to consider without reference to contested facts simply on the submissions of the parties, then it is now settled that in applications for summary judgment under Ord. 14 the court will do so in order to see whether there is any substance in the proposed defence. If it concludes that, although arguable, the point is bad, then it will give judgment for the plaintiffs. This course will also be adopted where there is a counter-application for a stay of the action. If the contract between the parties contains an arbitration clause to which section 1 of the 1975 Act applies, then the court is not thereby precluded from considering whether there is any arguable defence to the plaintiffs' claim. If the court concludes that the plaintiff is clearly right in law then it will give judgment for the plaintiffs. In the same breath, as it were, it will then have decided that in reality there was not in fact any dispute between the parties. If the court is satisfied that the plaintiffs are clearly right in law, and that the defendants have no arguable defence, then it will not avail the defendants to have raised a point of law which the court can see is in

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[1] At [1986] 2 All E.R. 398.
[2] At [1986] 2 All E.R. 396.

fact bad. In those circumstances the defendants cannot be heard to say that there was a dispute to be referred to arbitration. But if the court concludes that the plaintiffs are not clearly entitled to judgment because the case raises problems which should be argued and considered fully, then it will give leave to defend, and it is therefore then bound to refer the matter to arbitration under section 1 of the 1975 Act."

Finally, both counsel had told the Court of Appeal that they and their clients would wish that court to decide finally the question of construction raised in the case. The court held that such a course would create an impossible position, resulting in a dispute being decided as to the law in the court, and the remainder being referred to arbitration, to be dealt with by an award.

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Banking

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Partnership money used for gambling

In this case,[1] involving bankers, Lloyds Bank were held liable in respect of money coming from a partnership account and used by a partner (known to the bank to be a compulsive gambler) for playing the tables. Money was utilised by the endorsement of a banker's draft obtained for another purpose by the partnership who were solicitors. In this case the bank was held to have given knowing assistance to a fraudulent scheme. The local manager of Lloyds Brook Street Branch knew of the partner's gambling habit but did not inform his head office. The partner had withdrawn money from the clients' account and used it. There was no defect in the partnership's accounting system.

A claim against the gambling house failed because they relied on section 16(4) of the Gaming Act 1986 as a defence which preserved the validity expressly of cheques exchanged for cash or tokens which otherwise would have been null and void under the Gaming Act 1845.

Liability under a guarantee

In this case[2] the question arose as to the right of the bank to claim against its customers despite their counterclaim that the bank had been negligent. Bank guarantees were treated like letters of credit in that, if they could not be relied upon irrespective of set-off or counterclaim, their purpose would be thwarted. The document had stated that payment should be made free of any set-off or counterclaim and the court would not interfere. It was held that cross-claims could not answer the summary judgment, given against a third party, in the same way as in respect of bills of exchange in the case of *Nova (Jersey) Knit*.[3] To bankers the case recalls the last throw of the debtor—to allege negligence by the bank, in failing to extricate the customer from its perilous financial condition.

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[1] *Lipkin Gorman v. Karpnale Ltd.*, *Financial Times*, June 12, 1986; see [1986] J.B.L. 263 (July issue).

[2] *Continental Illinois National Bank and Trust Company of Chicago v. Papamichalis*, *Financial Times*, July 9, 1986.

[3] *Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei G.m.b.H.* [1977] 1 W.L.R. 713.