259. UNITED KINGDOM: COURT OF APPEAL – 19 March 1987 – *Etri Fans Ltd. v. NMB (UK) Ltd.* *

Effects of an arbitration agreement on judicial proceedings – Application for a stay by a party that is not sued

(See Part I. B.1)

WOOLF LJ (giving the first judgment at the invitation of Fox LJ). This is an appeal by two Japanese companies, Minebea Co Ltd (Minebea) and Kondo Co Ltd (Kondo), from a decision of Sir Nicolas Browne-Wilkinson V-C given on 22 October 1986, dismissing their applications to be joined as parties to the existing action between Etri Fans Ltd (Etri) and NMB (UK) Ltd (NMB) and for an order that the action be stayed under s 1 of the Arbitration Act 1975.

The appeal raises issues as to the interpretation of that section and the approach which the court should adopt to applications to be joined as a party to the proceedings where the only purpose of the application is to enable an application for a stay to be made.

Etri is a sister company of a French company, Etri SA (the French company), and NMB is a subsidiary of the Japanese companies. The French company designs, manufactures and markets a range of axial fans. Etri brings the action against NMB on the grounds that NMB has imported into this country, and offered for sale, fans which infringe the copyright of the French company in the original engineering drawings of axial fans manufactured by the French company. Etri makes its claim as assignee of the copyright of the French company.

The fans which are the subject of the action were manufactured by Kondo in Japan. Kondo had been granted a licence authorising the manufacture of the fans by the French company by an agreement dated 21 May 1966. Kondo also had a licence to sell the fans, but not in the United Kingdom.

The agreement under which the licences were granted has an arbitration clause in the following terms:

> 'All disputes shall be finally settled by arbitration to take place in accordance with the Rules of the International Chamber of Commerce by an arbitrator appointed in accordance with the said Rules. The said arbitration shall take place in the country of the defending party and any counterclaim shall be dealt with at the same place by the same arbitrator. Arbitration procedure shall be conducted in the English Language.'

I am by no means satisfied that the matters complained of by Etri involve a dispute which falls within this arbitration clause. However, the Vice-Chancellor dealt with the applications of the Japanese companies on the assumption that the agreement properly interpreted is sufficiently wide to cover the claims made by Etri, and I will adopt the same course. However, even on this basis, I am satisfied that while this case does, as the Vice-Chancellor stated, raise a number of difficulties, his decision is correct, and this appeal should be dismissed.

It is accepted that NMB, as opposed to the appellants, could not now succeed on an application for a stay. Having served a defence and having taken other steps in the action, even if the appellants' contentions on the facts and the law are correct, NMB would not be able to bring itself within s 1 of the 1975 Act, since an application under that section has to be made 'after appearance, and before delivering any pleadings or taking any other steps in the proceedings'. Furthermore, if the court has an inherent jurisdiction to grant a stay which goes beyond the statutory discretion given to the court by s 1 of the 1975 Act (a matter with which I will deal later) then, having regard to the history of the

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proceedings, there could be no ground for the court taking a different view under its inherent jurisdiction from that which it would take under the Act.

If the appellants are to succeed in this appeal, they have to show that the Vice-Chancellor was wrong in not permitting them to be joined as parties to the English proceedings, and that if they had been joined, they would have been entitled to have the proceedings stayed. While the court has a residual discretion where the conditions of s 1 of the Act can be complied with by an applicant not to grant a stay in the ordinary case, exercising its discretion judicially, the court has no option but to grant a stay to an applicant who can fulfil the requirements of s 1. If therefore, but for the fact that they were not parties to the proceedings, the appellants could bring themselves within s 1, so that they would almost inevitably be entitled to a stay, then they would have a powerful argument for saying that they should be allowed to join the proceedings so as to obtain the benefit to which they would then be entitled under s 1.

I therefore prefer, before dealing with the question of whether the appellants should be joined in the proceedings, to come to a conclusion as to the outcome of the application for a stay on the assumption that the appellants' application to be joined as a party was successful. If, on this assumption, their application for a stay would as a matter of law, fail, then there would be no purpose in allowing their appeal in respect of their application to be joined as defendants in the proceedings. (Etri only object to the appellants being joined in the action because their sole reason for wishing to be joined is that they believe this will enable them to achieve their object of having the action stayed).

Both counsel for the appellants and Etri in their helpful submissions to this court, identified the same requirements which have to be fulfilled by the appellants before they can take advantage of s 1 of the 1975 Act, but they differ in the case of each requirement as to whether it was complied with by the appellants. However, it is sufficient for my purpose if I only deal with one of those requirements, namely the requirement which identifies the party who may apply to the court to stay the proceedings.

The part of s 1 which deals with this requirement reads as follows:

> '(1) If any party to an arbitration agreement . . . or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may . . . apply to the court to stay the proceedings; and the court . . . shall make an order staying the proceedings . . .'

In considering this requirement I will also assume (without expressing any opinion as to the correctness of the assumption) that (a) Etri are a person claiming 'through or under' a party to the arbitration agreement, (b) Etri commenced 'legal proceedings' against NMB who are a person 'claiming through or under' another party to that agreement and (c) the legal proceedings are in respect of a matter agreed to be referred to arbitration.

On these assumptions, counsel for the appellants submits the appellants would be a 'party to the proceedings' who is entitled to apply to the court to stay the proceedings once they had been joined in the proceedings, and that any interpretation which did not lead to the same conclusion would be contrary to the clear intent of s 1(1).

Counsel for Etri, on the other hand, submits that when the wording of the subsection is read as a whole, it is clear that before a party can have a right to apply for a stay, he must have been a party against whom legal proceedings had been commenced by the other party to the arbitration agreement, or at least a person claiming through or under him. He submits if the position were otherwise the consequence would be that, in a case where the existing parties did not want to go to arbitration, they would be forced to do so or at least proceedings would have to be stayed pending the outcome of the arbitration as a result of a party being added to the proceedings who they did not wish to have joined in the proceedings.

Of these two rival contentions, I have no doubt that the contention of counsel for Etri

is correct. When the subsection states that 'any party to the proceedings' may apply 'to stay', that is a reference to the 'any other party to the agreement or any person claiming through or under him' referred to earlier in the subsection against whom legal proceedings had been commenced by the other party to the arbitration agreement, or any person claiming through or under him. It is impossible to read the words 'any party to the proceedings' in a wholly unqualified manner, since this would lead to the result that where there was an action brought against two defendants, one of whom only was a party to the arbitration agreement, the other party (who was not a party to the arbitration agreement would be entitled to apply for (and obtain) a stay. Furthermore, it is my view that far from the interpretation of counsel for Etri leading to alarming consequences, it is the interpretation of counsel for the appellants which has that result. If a party entitled to the benefit of an arbitration agreement wishes to arbitrate if he is not sued, he is perfectly entitled to initiate the arbitration process himself, and he does not need to wait for an action to be commenced against him to enable him to do so.

The reason why the appellants do not wish to take that course in this case is because this would result, in accordance with their particular agreement, in the arbitration taking place in France instead of Japan, where they would prefer the arbitration to take place. However, as to the place of arbitration, they are in exactly the same position as they would be in if Etri had not commenced proceedings.

In my view the purpose and intent of s 1(1) of the 1975 Act is that the parties to an arbitration agreement and those claiming through or under them who are sued in relation to a matter which it has been agreed to refer to arbitration, should be entitled to seek a stay. It is not the intention of the subsection that those who have not been sued should be able to take advantage of the provisions of s 1(1), by applying to become parties to the proceedings against the wishes of a plaintiff merely for the purposes of obtaining a stay of an action which has been commenced not against them, but another party who either did not have or did not wish to avail himself of the right to seek a stay.

It follows, therefore, that on this ground alone I have come to the conclusion that if the appellants were joined in the proceedings (as least without the agreement of Etri), they would not then be entitled to rely on s 1(1). It is therefore unnecessary to consider the remaining requirements of that section.

It is, however, still necessary to consider the submission of counsel for the appellants that the court has an inherent jurisdiction which would entitle the court to grant the appellants a stay if they were joined in the proceedings, even though the appellants could not avail themselves of s 1 of the 1975 Act.

Counsel for Etri submits there is no such inherent jurisdiction. Here I prefer the submission of counsel for the appellants that there is such an inherent jurisdiction in the court. In particular, in order to protect itself in relation to attempts to abuse the process of the court, the court has undoubtedly very wide powers of staying proceedings. However, as counsel for the appellants concedes, because here the area covered by that inherent jurisdiction has been the subject of detailed and precise Parliamentary intervention, the circumstances in which the court will grant a stay under its inherent jurisdiction in situations dealt with by the statutory provisions, but where it could or would not do so in exercise of its statutory jurisdiction, will be rare. The jurisdiction is truly a residual one principally confined to dealing with cases not contemplated by the statutory provisions.

The facts of this case fall within the situation dealt with by the statute, and I am satisfied there could be no question of the court using this inherent power to grant a stay in favour of the appellants, even if they were joined in the proceedings.

In his sixth affidavit, Mr Butcher, the solicitor acting for NMB and the appellants, explains the difficulties that the appellants, as Japanese companies, had in understanding the nature of the action which has been commenced by Etri against NMB, and on this basis counsel for the appellants submits any delay on the part of the appellants in applying to be joined in the proceedings is excusable.

Sir Nicolas Browne-Wilkinson V-C dealt with this aspect of the case in the following terms:

> 'The evidence shows, as one would expect, that the applicants have been fully aware of the proceedings from the outset, have been involved in the preparation of NMB's defence and used the same solicitors as NMB. Yet NMB has not pleaded the defence now sought to be raised nor has NMB made any application for a stay under the Act. The 1975 Act makes it clear that any application for a stay must be made before service of a defence. What, therefore, is sought to be done in this case is to escape that provision by joining the applicants as new parties after their own subsidiary has chosen to defend the action, thereby precluding the subsidiary itself from asking for a stay. It seems to me wrong to sanction such an evasion of the requirements of the Act in the circumstances of this case where all the facts have at all times been known to the applicants, where their only right to a stay is necessarily based on fact that the existing defendant is their subsidiary and where such subsidiary is itself precluded from applying for a stay since it has served a defence'.

Since Sir Nicolas Browne-Wilkinson V-C's decision, the defence of NMB has been amended, but that does not alter the force of his conclusions. In relation to the question of whether the inherent jurisdiction could appropriately be exercised in favour of the appellants, his conclusions, which are fully justified on the evidence, are highly material and, having regard to those conclusions, I am quite satisfied that there could be no possibility of the inherent jurisdiction in this case being exercised in favour of the appellants.

It follows, therefore, that even if the appellants were to be joined in the proceedings, they would not be entitled to a stay. There is therefore no purpose in their being joined in the proceedings, and on this ground by itself their appeal should be dismissed.

In his judgment Sir Nicolas Browne-Wilkinson V-C came to the same conclusion by a somewhat different route. He came to the same conclusion as I have as to the words 'commences any legal proceedings . . . against any other party to the agreement' and held that these require that the proceedings be brought by the plaintiff against such party. However, he did not deal with the argument of counsel for Ets which was advanced in this court, which limits the persons who are entitled to apply to the court as being a 'party to the proceedings'. Sir Nicolas Browne-Wilkinson V-C assumed that once joined as a party, Minebea or Kondo would be entitled to apply for a stay under s 1, even though they were not parties against whom proceedings had been commenced. He therefore went on to consider, as a matter of discretion, whether it would be right under RSC Ord 15, r 6(2)(b)(ii), to accede to the application for joinder. He points out that there are arguments that can be advanced in favour of the Japanese companies, but he came to the conclusion the arguments against joinder were overwhelmingly stronger. I do not dissent from this view of the Vice-Chancellor, but as on my approach to the interpretation of s 1 this issue does not arise, I prefer not to express any final conclusion on it. However, I note that it was the same reason which caused the Vice-Chancellor to decide against making an order to join the Japanese companies which caused the Vice-Chancellor to come to the same decision to which I have come about the issue, as to how the court should exercise its inherent jurisdiction.