Bremer Vulkan v. South India Shipping (H.L.)

In fact no peremptory order was sought or made in this case, and part of the argument for the appellants was that it would have been essential for such an order to have been made by the arbitrator and disobeyed by the claimant, before the claim could be dismissed by the court. If that is right, it would mean that the respondent in an arbitration, who believes that the claimant's delay had been such as to prevent the possibility of a fair trial, would have to ask the arbitrator to make an order upon the claimant for lodging his claim by a specified date, while hoping that the order would be disobeyed so as to leave the way open for sanctions to be imposed. Why should the respondent be obliged to seek an order for something which would be directly contrary to his interests? It seems unreasonable. The argument in favour of requiring some such procedure depends, as I understand it, upon the view that a reference to arbitration, because it is contractual, differs fundamentally from litigation, particularly in respect that both parties to an arbitration have an obligation to avoid unreasonable delay. The result is said to be that, if the respondent in an arbitration remains inactive while the claimant delays to make his formal claim, he, the respondent, is not entitled to found on the delay as a reason for asking for dismissal of the claim. I recognise that an argument on these lines is acceptable to the majority of my noble and learned friends who heard this appeal, but I regret that I cannot agree with it. The contractual element in an arbitration such as the present, which depends upon an agreement made before any dispute had arisen, consists, in my opinion, of the choice of the tribunal which is to come in place of the court that would otherwise have had jurisdiction, in this case presumably a German court. The choice of an English arbitration as the tribunal would probably imply that the rules of the English Arbitration Act 1950 would apply to the procedure, but in this case the matter is put beyond doubt by a provision to that effect in the arbitration clause. Once the tribunal has been chosen, I agree with Donaldson J. and with Roskill L.J. that proceedings in the arbitration, like those in litigation, are in most cases, and certainly in the present case, adversarial in character. It is therefore for each party to act in what he conceives to be his own interest, subject of course to any agreement on procedure that may have been made between them, and to the relevant statutory provisions including the obligation to obey orders made by the arbitrator. But if no order is made, the respondent in an arbitration, like the defendant in an action, is in my opinion entitled to sit back and await a formal claim. In the words used by Donaldson J. he is entitled to let sleeping dogs lie. If the sleep lasts long enough and he is prejudiced thereby, he may seek a remedy for the delay.

What then is the nature of the right? In practice, I do not think it matters whether it be treated as one of natural justice which the courts in the exercise of a supervisory power will enforce, if need be, or as arising from an implied term of the arbitration contract. Whether the agreed process be a "look-sniff" commodity arbitration, or an award upon documents submitted without a hearing, or an award reached after a full-dress hearing

with pleadings, discovery, and evidence, the right is fundamental. But since the question has arisen and differing answers have been given, I will state my view. The right does not depend upon contract, and cannot be excluded by contract, save where statute allows its exclusion, as it may be that the Act of 1979 does in certain cases (though I reserve my opinion on the point). The right arises from the judicial element inherent in the arbitration process which is a process for reaching a decision where parties have not themselves resolved their difference. Nevertheless in most cases, and this is such a case, the right is implicit in the contract, and, if infringed, may be enforced as a right given by the contract. And, with respect, I do not see the case of *Reg. v. National Joint Council for the Craft of Dental Technicians (Disputes Committee) Ex parte Neate* [1953] 1 Q.B. 704 as an authority inconsistent with such a supervisory power. In that case the Divisional Court, though holding that the prerogative writs (or orders) would not go to a private arbitrator, did not rule out the possibility of injunction (see Lord Goddard's intervention at p. 206). Since, however, I accept the analysis which enabled the judges below to deal with this case as one of

Held, allowing the appeal, that the High Court had no inherent jurisdiction to supervise the conduct of arbitrators analogous to its power to control inferior tribunals, and its power to grant injunctions arose from the existence of a right to be enforced or protected, so that when there was a repudiatory breach of an arbitration agreement the innocent party, having elected to treat the contract as at an end, could obtain an injunction to restrain the party in default from proceeding with the arbitration; but (Lord Fraser of Tullybelton and Lord Scarman dissenting), since the parties were equally under an obligation to keep the procedure moving, both were under an obligation to apply to the arbitrator to prevent inordinate delay and, since the plaintiffs had made no such application, they were not entitled to rely on the defendants' breach as giving them the right to treat the agreement as at an end (post, pp. 978E-H, 979D-F, 980G - 981B, 982C-E, 986B-D,987G - 988A, A-B, 992F-G, 993B-C, H, 997B-C, F-G, G - 998A v,999F-H).

But, before reaching a conclusion, the formidable submissions of the appellants have to be considered. The first is that no relevant comparison is to be made between litigation and arbitration. It was argued, and, as I understand it, a majority of your Lordships accept, that the analogy is misleading. Litigation, it is submitted, is a compulsory process available as of right to anyone who issues a writ: it is not to be compared with the process of arbitration, which arises from consent and is conducted according to terms agreed, expressly or impliedly by the parties. Arbitration is, of course, subject to a measure of statutory control: but this control in no way detracts from the essentially contractual nature of arbitration. My Lords, all this is true. But arbitration, while consensual, is also an adversarial process. There is a dispute, the parties having failed to settle their difference by negotiation. Though they choose a tribunal, agree its procedure and agree to accept its award as final, the process is adversarial. Embedded in the adversarial process is a right that each party shall have a fair hearing, that each should have a fair opportunity of presenting and developing his case. In this respect, there is a comparability between litigation and arbitration. In each delay can mean justice denied.

And the analogy is not falsified because of the wide variation of types of arbitration. Whether the arbitration be "look-sniff" or a full-scale hearing with counsel and solicitors, the right to a fair arbitration remains. An unfair arbitral process makes no sense either in law or in fact. It is a contradiction which it is inconceivable that the law would tolerate or the parties select.

In the second case (the first appeal) it is *nine years* since some shareholders called Gregg in a publishing company sold their holding to Raytheon Ltd. The Greggs gave several assurances to Raytheon about the amount of business being done by the publishing company. The transaction was completed in 1970 those nine years ago when Raytheon took over the business. A few months later Raytheon complained that the business was not what it was represented to be. They claimed £500,000 as damages. The matter was referred to arbitration in accordance with the rules of the International Chamber of Commerce: but by agreement the arbitration was to be held in London. Over *six years* ago, in 1973, three arbitrators were appointed, all very suitable, Mr. Desmond Miller Q.C., Mr. Michael Mustill Q.C. and Mr. I. A. H. Davison. The arbitrators ordered pleadings and discovery. Over the years pleadings were delivered, but discovery was never complete. Time and time again the arbitrators fixed dates for hearing, but time and time again these were abandoned. The reason every time was because the claimants, Raytheon Ltd., had not given proper discovery. It was a case where full discovery was essential. The claimants had bought the shares and were in control of the publishing company. They would have all the papers showing what business the publishing company did before and after the deal, showing whether the assurances were broken or not, and if so, what the damages were. They promised many a time to get the documents from the U.S.A. Eventually, in July 1975, over four years ago, the three arbitrators adjourned the case generally with liberty to either party to restore. It never has been restored. The claimants went silent for three whole years. When they bestirred themselves, two of the arbitrators had gone off and put on new suits. Mr. Desmond Miller Q.C. had left the bar and become a man of business. Mr. Michael Mustill Q.C. had become a judge of the High Court. So it looks as if one or two new arbitrators will have to be appointed. It was only last November, 1978, after three years of silence, that the claimants' solicitor wrote offering inspection of thousands of documents. It will take a long time before these can be analysed and the case ready to be heard. And then much will depend on oral conversations 10 years before when the shares were sold. The judge held that the delay of the claimants was inordinate and inexcusable and that the prejudice to the respondents would be most serious. Is the arbitration to be allowed to go on?

My Lords, up to the 1960s, the High Court had applied the maxim vigilantibus non dormientibus, jura subveniunt to applications by defendants to dismiss an action for want of prosecution. The practice was that an action would not be dismissed for this reason upon the application of a defendant, unless he had previously obtained from the court a peremptory order requiring the plaintiff to take within a specified time the next step in the procedure that was incumbent upon him under the rules of court and the plaintiff had not complied with the order; or had given reasonable notice to the plaintiff

of his intention to apply for the dismissal of the action if the plaintiff did not take that step within a limited time. In the 1960's, however, largely as a result of legal aid, this practice had proved inadequate to prevent such inordinate delay by solicitors acting for plaintiffs in bringing actions on for trial, that, because memories would have faded and witnesses would have become unavailable, there was substantial risk that at the hearing the court would be unable to do justice. The mischief which the Court of Appeal sought to cure by the abandonment of the maxim about vigilantes in the case of applications for dismissal for want of prosecution is described in the judgments in *Allen v. Sir Alfred McAlpine & Sons Ltd.* The change in practice was instituted primarily to protect the interests of plaintiffs who had the misfortune to be represented by negligent solicitors, rather than in the interests of defendants, who already had adequate powers under the rules and practice of the court to compel the plaintiff to proceed (through his solicitors) with reasonable dispatch. But, for the reasons given in *Allen v. Sir Alfred McAlpine & Sons Ltd.,* it was seldom in the defendant's interest to have resort to those powers, since long delay was more likely to operate to the detriment of the plaintiff upon whom the onus of proof would lie at a belated trial, and any interlocutory proceeding initiated by the defendant would add to his costs, which would be irrecoverable against an unsuccessful legally-aided plaintiff. It was generally in the defendant's interest to let sleeping dogs lie. So the Court of Appeal, of which I was then a member, had to devise some other sanction against negligent dilatoriness on the part of solicitors for plaintiffs. This it did by dismissing the action for want of prosecution,

respondents' favour, in the absence of a notice making time of the essence for service of the points of claim, the respondents have failed to establish a repudiatory breach. The breach relied on is the failure to deliver the points of claim. It is admitted that there was a breach of the obligation but time was never made of the essence of the agreement of April 1972. The principle expressed in *Charles Rickards Ltd. v. Oppenhaim* [1950] 1 K.B. 616, 623-624, 628 applies generally to contracts. The leading case on sale of land is *Stickney v. Keeble* [1915] A.C. 386. See also *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* (1915) 32 T.L.R. 156, 157. The general rule is that notice must be given to make time of the essence: *Halsbury's Laws of England,* 4th ed., vol 9 (1974), para. 481, pp. 337-338, para. 485, p. 340. and *Chitty on Contracts,* 24th ed. (1977), vol. 1, para. 1271, pp. 604-606 A contract to arbitrate is subject to the general law. The breach was not a repudiatory breach since no notice was given making time of the essence. *Universal Cargo Carriers Corporation v. Citati* [1957] 2 Q.B. 401, 429-430, 433 was relied on against the appellants, but it was dealing with anticipatory breach looking to the future and is in a different category. The question is whether there is here an implied fundamental breach.

Much reliance was placed by Mr. Rokison upon the similarity of what he called "this kind of arbitration" to an ordinary heavy action in the Commercial Court. No doubt where heavy claims for damages under a shipbuilding contract are the subject matter of a reference to English arbitration before a legal arbitrator familiar with the procedure of English courts, and the parties are represented in the arbitration by English solicitors and counsel, the way in which the proceedings in the arbitration are, in fact, conducted,

except that they are not held in public or in wigs and gowns, will show considerable resemblances to the way in which an action to enforce a similar claim would be conducted in the Commercial Court. The method of trial when it comes to the hearing will be substantially the same. So, it is suggested on behalf of Bremer Vulkan, by agreeing to an English arbitration clause the parties to the contract are, in practical reality, doing no more than to make a choice between one trier of fact, the arbitrator, and another trier of fact, the commercial judge, by whom, in the absence of such clause, the case would fall to be decided. There is no reason, they submit, why the consequences of delay in prosecuting the claim before one trier of fact should not be the same as before the other; what is good for English High Court actions is good for English arbitrations.

Their basic case, of course, is to resist the appeal, submitting that, whether or not an arbitrator had (under the pre-1979 law) this power, the High Court certainly had power to restrain an arbitration on the ground of excessive and prejudicial delay. It is obvious that, if an arbitrator did have the power to dismiss, the occasions for the exercise of the court's power to restrain would be few. The respondents, if need be, are, however, prepared to contend that, in the present case where neither party went near the arbitrator after his appointment and where (as they submit) responsibility for delay was upon the claimants, the court may, and should, intervene to restrain the arbitration without prior recourse to the arbitrator, if the delay be excessive and destructive of the possibility of a fair arbitration. It will be convenient, therefore, to consider the powers of an arbitrator in the course of dealing with the appeal.

even after the coming into force of the Act of 1979. This power of the court has been exercised in many ways: for example, review of awards (limited, changed, regulated, but not discarded by the new Act), removal of arbitrators where their impartiality, fitness, or competence is impugned, the grant of injunctions to restrain arbitration proceedings where the arbitrator has been shown to be unfit or incompetent. Such landmarks in the law as the Act of 1854, *Scott v. Avery* (1856) 5 H.L.Cas. 811, *Beddow v. Beddow,* 9 Ch.D. 89, where an injunction to restrain an arbitration was granted, *Czarnikow v. Roth, Schmidt & Co.* [1922] 2 K.B. 478, and the Act of 1979 itself bear witness to the importance attached in the various branches of our arbitration law to a measure of judicial control and review. Though the jurisdiction of the courts may now be ousted in those international arbitrations where the new Act allows an exclusion agreement, it remains a vital, if no longer universal, principle of the law that the courts will act to prevent injustice arising in arbitration proceedings where it is necessary so to do.

We had a good deal of discussion about the facts in our two cases: especially as to whether there had been acquiescence by one party in the delay of the other. All I need say on this is that, so far as court cases are concerned, even when there has been acquiescence up to a point, nevertheless if the plaintiff is thereafter guilty of further delay, he does so at his peril: because on an application to dismiss for want of prosecution, the court can and should look at the whole of the case from beginning to end. If, owing to the plaintiff's inexcusable and inordinate delay - before and after the

acquiescence - a fair trial is impossible, the case may be struck out for want of prosecution. I agree entirely with the observation of Donaldson J. ante, pp. 917 - 918, on this point. I do not think we need pause on the unreported cases of *County & District Properties Ltd. v. Lyell* (unreported), July 12, 1977, Court of Appeal (Civil Division) Transcript No. 314 of 1977, C.A.; *Murrayfield Real Estate Co. Ltd. v. C. Bryant & Sons Ltd.* (unreported), July 20, 1978, Court of Appeal (Civil Division) Transcript No. 473 of 1978, C.A. They should be left in the oblivion to which the law reporters quite rightly consigned them.

After a full investigation of the facts which included the correspondence between the parties' solicitors he concluded (ante, p. 927G) "that the delay [by the appellants] in delivering the points of claim was both inordinate and inexcusable and, further, that no significant part of the delay was induced by the conduct of the [respondents]." He further found that the delay had caused the respondents serious prejudice in two ways: first, in the loss of witnesses by reason of death, retirement, or having left the respondents' employment: and secondly, in the effect of the delay upon the ability of the respondents to collect the necessary evidence to ensure that justice is done. The learned judge concluded (ante, p. 928F-G): "I am satisfied that if the proceedings had been pursued by action, I should have dismissed them for want of prosecution." The Court of Appeal concurred in his findings of fact and also accepted as relevant the analogy of litigation. The analogy is, of course, open to challenge in this House. But I do not think that the findings of fact can properly be challenged. Even if I were disposed to differ, which I am not, I would not disturb them. I accept, therefore, that the appellants have been guilty of delay which has made it impossible for the respondents to collect the evidence necessary to ensure that justice can be done at the hearing of the arbitration. I also accept that the respondents were not guilty of any acts which contributed to the delay: but I treat as open to decision by your Lordships' House the question whether the respondents could and should, by seeking the directions of the arbitrator, have ended the delay before it became excessive and prejudicial.

ante, p. 915E-F, questions of great importance relating to the conduct of arbitrations in this country and especially in relation to the conduct of those arbitrations to which section 5 of the Arbitration Act 1979 will not apply. Before us the appeal in *Gregg v. Raytheon Ltd.* was argued before the appeal in *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.,* though before the judge the cases were apparently heard in the reverse order. I shall call the first appeal "the Raytheon appeal" and the second "the *Bremer* appeal." In each action the judge has held that the appellants, who were the defendants in the two actions and the respective claimants in the two arbitrations had been guilty of inordinate and inexcusable delay which had caused such prejudice to the plaintiffs in each of the two actions, who were the respective respondents in the two arbitrations and of course in these appeals, that had the appellants commenced these proceedings in the High Court by way of action instead of by arbitration in accordance with the arbitration clauses in the respective agreements under which the disputes concerned arose, such proceedings would have been dismissed by the High Court for want of prosecution in accordance with the

principles laid down in *Birkett v. James* [1978] A.C. 297 and *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229. The judge summarised those principles in six succinct paragraphs, ante, pp. 916 - 918. Subject to what I say in the next sentences on the question of acquiescence - see paragraph 5 of the judge's summary - I accept as correct and gratefully adopt the judge's summary without repetition. Mr. Butler argued that acquiescence was an absolute bar and that once there was acquiescence in delay, the existence of that delay ceased to be relevant. Only further delay is relevant. Since I take the view, as did the judge, that there was no acquiescence in the *Bremer* case, this point does not arise for decision. But, as at present advised, I think Mr. Butler's argument is inconsistent with what Salmon L.J. said in *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229, 232.

The arbitration clause constitutes a self-contained contract collateral or ancillary to the shipbuilding agreement itself: *Heyman v. Darwins Ltd.* [1942] A.C. 356. It expressly incorporates, by reference, "the rules, regulations, etc., of the [Arbitration Act 1950]," many of whose sections deal with various provisions that are deemed to be contained or included in every arbitration agreement unless a contrary intention is expressed therein. Of these the most important for present purposes is section 12 (1) which deals with the duties of the parties during the course of the reference. This statutory incorporation into all English arbitration agreements of so many implied terms unless they have been expressly excluded, does not rule out the possibility that terms additional to these are to be read into the arbitration agreement by necessary implication, though it makes somewhat less likely the need to do so. For example, in addition to those terms that are spelt out expressly, the Act itself in section 24 (1) recognises by implication the right of each party to an arbitration agreement to have the dispute decided by an arbitrator who is impartial, and, for the protection of that right, to obtain an injunction to restrain the other party from proceeding with the reference before an arbitrator who has been shown to be biased. The concept of "arbitration" as a method of settling disputes carries with it by necessary implication that the person appointed as arbitrator to decide the dispute shall be and remain throughout free from all bias for or against any of the parties; and it was in enforcement of this right that injunctions had been sought in *Malmesbury Railway Co. v. Budd,* 2 Ch.D. 113, and *Beddow v. Beddow,* 9 Ch.D. 89.

Mr. Saville was quick to attack the implied term theory both in principle and in its application to the facts of these cases. In principle, he said, there was no need to imply any such term as being both reasonable and necessary in order to make the agreement to arbitrate work. The Arbitration Act 1950, like its predecessors, in the absence of any contrary agreement, imported by statute certain implied terms into a submission to arbitration, for example, section 12 (1). There was, therefore, no need in order to make the agreement to arbitrate work to imply any other terms and no justification for so doing. Moreover, whereas in the *Raytheon* appeal the complaint was of delay in giving discovery, the respondents had ready to hand a statutory remedy by application to the High Court under section 12 (6) (*b*), a submission much relied upon by Mr. Saville in his

argument on the facts that the respondents were responsible for much, if not all, of the delay by failing to pursue their statutory rights under that paragraph, as indeed they had indicated in correspondence at one time that they intended to do.