Neutral Citation Number: [2009] EWCA Civ 1330

Case No: A3/2008/2980

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION COMMERCIAL COURT
MR JUSTICE BURTON
[2008] EWHC 2826 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2009

Before :

LORD JUSTICE THOMAS
LADY JUSTICE HALLETT
and
MR JUSTICE COLERIDGE

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Between :

National Ability SA	**Appellant**
- and -	
Tinna Oils & Chemicals Ltd	**Respondent**

- -
- -

Peter Irvin (instructed by **Stephenson Harwood**) for the **Appellant**
Steven Gee QC (instructed by **Hill Dickinson**) for the **Respondent**

Hearing date: 6 October 2009

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Judgment

Lord Justice Thomas :

1. There are two methods of enforcing an arbitration award made in England and Wales – (1) an ordinary action on the award and (2) an application to enforce an arbitration award in the same manner as a judgment under the procedure set out in s.26(1) of the Arbitration Act 1950 and s.66 of the Arbitration Act 1996. The first method is subject to a limitation period of 6 years, unless the contract containing the arbitration agreement is made under seal. The appellants contend that the second method is not subject to that limitation period and that they can enforce an award that would otherwise be time barred if enforcement is attempted by action; the respondents contend that the period is the same. The issue arises under s.26(1) of the Arbitration Act because the original contract is of some age but the provisions of s.26(1) are in all material respects identical to the provisions of s.66 of the Arbitration Act 1996. It is because the issue is of some continuing importance that permission to appeal was granted by Moore-Bick LJ.

The factual background

2. As the issue is one of statutory construction, the facts can be summarised very briefly.

   i) The appellants, a Panamanian company, were the owners of the *Amazon Reefer*. They chartered her to the respondents, an Indian Company, under a charterparty on the Gencon form dated 29 April 1995 for a voyage from Kandla to Novorossiysk. The charterparty provided for the resolution of disputes by arbitration in London under English law.

   ii) Disputes arose between the appellant owners and the respondent charterers which were referred to arbitration in London. By awards dated 19 November 1998 and 12 October 1999, the arbitrators awarded the appellant owners approximately US$ 820,000, interest until the date of the award, the costs of the arbitration, and interest on the costs.

   iii) In the course of the arbitration proceedings, the respondent charterers entered into a scheme of arrangement in India with Tinna Finex Ltd (TFL) under the Indian Companies Act. There were proceedings in India between the appellant owners, the respondent charterers and TFL in which the High Court in Delhi held on 4 June 2008 that the proper party with the obligation to make payment under the awards was TFL and it dismissed the claim to enforce against the respondent charterers. That judgment is being appealed in India.

3. Nonetheless on 14 July 2008, the appellants sought and obtained an *ex parte* order from Aikens J giving them permission under s.26 of the Arbitration Act 1950 to enforce the awards as judgments against the respondent charterers and to enter judgment in terms of the awards. The respondents successfully applied to Burton J to set the order aside: [2008] EWHC 2826 (Comm)). He first decided that the order was obtained by serious material non-disclosure and discharged the order of Aikens J on that ground alone. Permission to appeal from that part of the decision was refused. He also decided that, as the application under s.26 could be made *inter partes*, he would treat it as if it had been made and heard at the hearing before him, so that the procedure was unaffected by the failure to make material disclosure. Nonetheless, that application in any event failed because the limitation period under s.7 of the

Limitation Act 1980 had expired and s.7 of the Limitation Act applied to the application under s.26.

4. The limitation period for an action on the award, as it is founded on the implied promise to pay, runs from the time the award should have been paid. Clearly more than six years had elapsed and so if the limitation provision of s.6 applied, then the claim was plainly time barred. However, as I have stated, permission was granted on the issue as to whether the limitation period of six years under s.7 of the Limitation Act 1980 was applicable to the application under s.26.

The methods of enforcing an arbitration award

5. It is necessary to say a little more about the two methods of enforcing awards obtained under the Arbitration Act 1950 (which continue to apply under the Arbitration Act 1996).

   i) Enforcement of an award by action is by an ordinary action brought in the High Court. The procedure is not subject to any statutory provision, but it has long been established at common law as an action founded upon the implied promise to pay the award. It is given statutory recognition in s.66(4) of the 1996 Act.

   ii) Enforcement of the award in the same manner as a judgment is a statutory process.

   s.26 (1) 1950 Act provides:

   > "An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award."

   S.66 of the Arbitration Act 1996 provides:

   > "(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
   >
   > (2) Where leave is so given, judgment may be entered in terms of the award."

6. The procedure for enforcement by action is little used in practice. For many years it has been the practice of parties who seek to use the enforcement mechanism of the court in England and Wales to use the procedure under s.26 of the 1950 Act and s.66 of the 1996 Act to enforce an award. The procedure is straightforward. The parties make an application to the court on an *ex parte* (or without notice) basis and any challenge to the enforcement is heard by the judge.

7. The procedure under s.26 and s.66 had its origins in earlier legislation and was a summary form of proceeding intended to dispense with the full formalities of the

action to enforce an award. The summary procedure was originally intended only to be invoked in reasonably clear cases – see *Boks & Co. v Peter Rushton* [1919] KB 491 at 497 where Scrutton LJ made clear it only be invoked in "reasonably clear cases". However, procedures were developed so that the court could decide summarily questions of law which did not involve issues of fact. By the 1980s courts were prepared to deal with all applications under the summary procedure provided objections could be disposed of without a trial: see, for example, *Middlemiss & Gould v Hartley Corporation* [1972] 1 WLR 1643 and *Hall and Woodhouse Ltd v Panorama Hotel Properties Ltd* [1974] 2 Lloyd's Rep 413. The summary procedure both under s.26 of the 1950 Act and s.66 of the 1996 Act is so convenient that it is by far the most common way of enforcing an award.

The construction of the Limitation Act 1980

8. The statutory provision in s.7 of the Limitation Act 1980 in relation to the enforcement of an award is clearly expressed:

> "An action to enforce an award, where the submission is not by instrument under seal, shall not be brought after the expiration of 6 years from the date on which the cause of action accrued."

The word "action" is given a broad definition in s.38(1):

> ""Action" includes any proceeding in a court of law, including an ecclesiastical court."

9. As an application under s.26 of the 1950 Act is clearly a proceeding in a court of law, it would at first sight appear to follow, as a matter of ordinary English, that an application under s.26 is an "action to enforce an award" within the meaning of s.7 of the Limitation Act. Certainly that has always been assumed to be the case. For example in *Good Challenger Navegante S.A. v Metalexportimport S.A.* [2003] EWCA Civ 1668, Clarke LJ (as he then was) recorded that it was common ground that when an *ex parte* application for leave was made under s.26, that was an action brought for the purposes of s.7 of the Limitation Act 1980; that was because such an application was an alternative to proceeding by way of writ or originating summons. It would make little sense for the period to be different, given that both were a means of enforcing an award. That same assumption was the basis on which a number of other decisions proceeded, including *Agromet Motoimport v Maulden Engineering Co (Beds)* [1985] 1 WLR 962 and *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corporation* [1996] 2 Lloyds Rep 474.

The argument of the owners

10. The argument that has been advanced by the appellant owners therefore appears to face formidable difficulties. Nonetheless, in his succinct and eloquent argument before us, Mr Peter Irvin submitted that it was necessary first to examine carefully the language of s.26(1) before assuming the language was clear and the assumption on which all had hitherto proceeded was correct.

11. The procedure under s.26 had to be viewed in two parts. It was first an application to obtain a judgment and then, once that judgment had been obtained, an application to

enforce that judgment. Viewed in that way there were no proceedings to enforce an award under s.26, merely proceedings to obtain a judgment.

12. By its terms s.7 of the Limitation Act did not apply to proceedings to enforce a judgment. The provisions of s.24 (1) of the Limitation Act 1980 were relevant to the enforcement of a judgment:

> "An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable."

In *Lowsley & Anr v Forbes* [1996] CLC 1370, this court had decided that garnishee proceedings to enforce a judgment were not subject to the limitation period in s.24(1); that section applied solely to an action to enforce the judgment and not to other procedural methods used to enforce a judgment. The distinction was explained by Evans LJ in the following terms:

> "The distinction between bringing an action to enforce a judgment, to which the *Limitation Act* applies, and bringing other forms of proceedings to enforce the original judgment, to which it does not, can perhaps be criticised as technical and indicating an out-dated preference for form over substance, but in my view the distinction can be justified. The policy reasons for barring the commencement of actions after a certain period has expired do not apply in the same way to the many different circumstances in which a successful plaintiff may seek to enforce a judgment which the defendant has ignored or failed to comply with for the same or a longer period after the judgment was given."

Saville LJ explained that the court had been compelled to reach this result because of the earlier decision of this court in *Lamb v Rider* [1948] 2 KB 331 as applied by *National Westminster Bank v Powney* [1991] Ch 339. In both of those cases it had been made clear that the limitation period had nothing to do with the procedural machinery enforcing a judgment when one was obtained.

13. The definition of proceedings in relation to s.24 had been accordingly construed so as to limit the application of s.24 of the Limitation Act to an action and not to the procedural machinery under s.26 of the 1950 Act. It therefore followed that procedural machinery was not machinery to enforce an award because enforcement came later.

Conclusion

14. I cannot accept that argument. In the first place there is a clear distinction between an arbitration award and a judgment. An arbitration agreement is in essence enforceable because of the implied contractual promise to pay an arbitration award contained in the arbitration agreement; all measures of enforcement essentially rest upon the contract. The provisions of s.26 of the 1950 Act and s.66 of the 1996 Act must be seen in that context. They are simply procedural provisions enabling the award made in consensual arbitral proceedings to be enforced. This is quite different to the

pronouncement of a judgment by a court where the State through its courts has adjudged money to be due.

15. Second, as a challenge to the enforcement of an arbitration award can be made on the basis that there is no arbitration agreement, and on a number of other grounds, there is a much wider scope for challenge than there is to the enforcement of a judgment.

16. Third, the interpretation given to s.24 of the Limitation Act 1980 in *Lowsley v Forbes* rested upon a detailed examination of the evolution of the law relating to limitation in the case of the enforcement of judgments and in particular the decision in *W T Lamb & Sons v Rider* [1948] 2 KB 331. It is apparent from the opinion of Lord Lloyd of Berwick in *Lowsley v Forbes* [1999] 1 AC 329 at 339 that the House considered that it could not overrule the decision in *Lamb v Rider* upon which the decision of the Court of Appeal had rested. The position was explained in the opinion of Lord Hoffmann in *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844 at paragraph 15 where he said of *Lowsley v Forbes*:

> "In that case, the Court of Appeal in 1948 (*W T Lamb & Sons v Rider*) had given a provision of the Limitation Act 1939 an interpretation which the House thought was probably wrong. But Parliament had then enacted the Limitation amendment Act 1980 in terms which made sense only on the basis that it was accepting the construction which had been given to the Act by the Court of Appeal. The House decided that it was therefore too late to overrule the decision: see Lord Lloyd of Berwick, at p 342."

17. It is therefore clear that the decision in relation to s.24 of the Limitation Act proceeds on a basis of statutory construction with its own history.

18. It is not necessary to interpret the term "proceedings" in s.7 in the same way. Not only is the position of an arbitration award quite different to that of a judgment for the reasons I have explained, but the interpretation depends upon a close examination of case law on a provision to which different considerations apply.

19. It seems to me a matter of considerable importance to the conduct of international arbitration in London that the law should be simple and clear. Where it is set out in a statute, a court should be very reluctant to construe that statute in a manner that does not follow the clear language of the statute. In his detailed argument to us, Mr Gee QC, on behalf of the respondent charters, felt compelled to commence his citation of authority with the Civil Procedure Act 1833 (and other succeeding Limitation Acts), the Arbitration Act 1889 (and other succeeding Arbitration Acts), legal textbooks commencing with the First Edition of Preston and Newsom on Limitation of Actions and cases commencing with *Ex Parte Caucasian Trading Corporation: Bankruptcy Petition* [1896] 1 QB 368. The bundle of authorities encompassing the materials which he considered necessary to have available for the court contained 25 separate authorities. Although Mr Gee QC plainly placed all this before us out of abundance of caution, it is a good illustration of what can happen if statutory provisions relating to arbitration (and limitation periods associated with it) are not simply set out in statute and the words of the statute carefully followed by the court. It would have been no credit to the law of arbitration of England and Wales if it had been necessary

to rely on all this authority on what is a simple point. The Court of Appeal Criminal Division has recently in *Erskine* [2009] EWCA Crim 1425 at paragraphs 66 and following pointed to the problems that arise out of the excessive citation of authority in the administration of the criminal law. It cannot be said that the great learning displayed by Mr Gee QC in putting before us so many authorities is an example of excessive citation, but it demonstrates a similar danger to the law of arbitration.

20. As the report of the Departmental Committee on Arbitration made clear at paragraph 1 of its 1996 Report and as the Arbitration Act 1996 set out to achieve, it is essential that the law of arbitration is retained in an accessible form, available to those who, like the parties in this case, are not nationals of the United Kingdom. Its language was intended to be "sufficiently clear and free from technicalities to be readily comprehensible to the layman". Its statutory provisions should therefore, wherever possible, remain capable of interpretation without the encrustation of authority, as the language of the statutory provisions is in general a model of clarity. Although this case is concerned with the provisions of the Limitation Act 1980 relating to arbitration, there is a similar reason for giving the statutory language the ordinary and plain meaning which it has been understood to bear for many years.

21. For those reasons, therefore, though paying tribute to the elegant and succinct way in which Mr Peter Irvin raised the point, the appeal must be dismissed.

Mr Justice Coleridge:

22. I agree.

Lady Justice Hallett:

23. I have had the opportunity of reading the judgment of Thomas LJ in draft. I am indebted to him for the clarity of his analysis. I agree and have nothing to add.