COURT OF APPEAL

Dec. 1, 1994

HALVANON INSURANCE CO. LTD.
v.
COMPANHIA DE SEGUROS DO ESTADO DE SAO PAULO AND OTHERS

Before Lord Justice STEYN,
Lord Justice ROSE and
Lord Justice MORRITT

Reinsurance — Arbitration clause — Stay — Leave to serve writ out of jurisdiction — Application to adduce further evidence — Dispute under reinsurance contracts — Whether defendants estopped from applying to stay action under the Arbitration Act, 1975, s. 1 — Whether claims time barred — Whether leave to serve out of jurisdiction should be granted — Whether further evidence should be adduced.

On June 12, 1990 the plaintiffs Halvanon (an Israeli insurance company) issued a writ citing as the defendants four Brazilian companies. The writ stated that the claim arose in respect of sums due from the defendants pursuant to contracts of reinsurance made between Halvanon and the defendants in 1976, 1977, 1978, 1979 and 1980 and evidenced in writing, such sums falling due between Mar. 31, 1979 and certain specified dates. The writ then further specified what sums were due in respect of each of the four defendants.

There were 12 reinsurance contracts, four of which contained arbitration clauses. They were arbitration clauses which, within the meaning of s. 1 of the Arbitration Act, 1975, were of a non-domestic nature and therefore subject to the mandatory stay provisions of s. 1 of that Act.

In due course Lord Justice Hobhouse granted leave to serve the proceedings in Brazil. The defendants resisted those proceedings.

It was argued that there should be a mandatory stay in respect of the four contracts subject to arbitration clauses of a non-domestic nature. The plaintiffs submitted on this issue that there was an estoppel arising from the conduct of the defendants in Brazil.

———*Held*, by RIX, J. that the statement of claim merely claimed a global sum against each of the four defendants; the inherent probability was that any claim or almost any claim under any contract which did not contain an arbitration clause was a time barred claim and there was no evidence to the contrary; it had not been made sufficiently clear that there was a serious issue to be tried under any of the eight contracts which did not contain arbitration clauses so as to make the writ a proper one for service out of the jurisdiction; the order giving the plaintiffs' leave to serve the writ on the defendants in Brazil would be set aside; and service of those proceedings would also be set aside.

The plaintiffs' applied for leave to appeal against that part of the order of Mr. Justice Rix whereby he set aside the order giving leave to serve the writ on the defendants in Brazil. The plaintiffs also applied to adduce further evidence at the hearing of the appeal.

———*Held*, by C.A. (STEYN, ROSE and MORRITT, L.JJ.) that (1) the submission that there was an estoppel founded on the defendants' conduct in resisting service of the English proceedings in Brazil would be rejected; the conduct of the defendants seemed clearly only to be referable to the service of the English proceedings in Brazil; there was no issue about arbitration in Brazil and it was impossible to spell out the promise contended for i.e. that the defendants would not apply for these particular matters to be referred to arbitration or make an application under s. 1 of the 1975 Act (*see* p. 304, col. 2; p. 305, col. 1);

(2) the submission that reliance ought to be inferred from the fact that expenses were incurred in regard to the opposition to service in Brazil would be rejected; those expenses resulted purely from objections to service in respect of all the contracts and did not, in any way, result from the terms of the objections in relation to the particular contracts containing arbitration clauses; there was no evidence to support any reliance (*see* p. 305, cols. 1 and 2);

(3) the submission that the Judge took the wrong order in respect of the relief that he granted would be rejected; the learned Judge had before him a defendant's summons for a stay and took the practical course of setting aside the leave to serve in respect of those four contracts containing arbitration clauses; that was a matter within his discretion and he was entitled to regard it as axiomatic that the defendants would apply for a stay and that they would obtain a stay; it would have been entirely within his power in those circumstances to set aside the service (*see* p. 305, col. 2);

(4) as to the time bar, the learned Judge's ultimate conclusion on the evidence was entirely correct; the writ simply contained global figures as did the affidavit evidence and Halvanon were put on clear notice that the time bar defence would be taken; the learned Judge's conclusion that he was not satisfied that the claims were not time barred could not seriously be questioned (*see* p. 305, col. 2);

(5) there was an evidential burden on Halvanon to establish a case to the satisfactory standard; on the material before the learned Judge it was hopeless to contend that the required standard was satisfied or that Halvanon was able to identify a substantial claim unaffected by the arbitration clauses or the time bar defence (*see* p. 305, col. 2; p. 306, col. 1);

(6) the cause of action arose when the underlying liability was ascertained by agreement, by an award or by a judgment and it was not postponed until the rendering of an account; there was no prospect of the Court finding that an implication that time would only run from the time of submission, the rendering of accounts or the failure to do so, had been established; in the circumstances of this case there was a clear evidential burden to deal with the problem of the time bar and in the result one simply did not know one way or the other whether those claims were time barred on the plaintiffs' own case; the new material ought not to be admitted but even if it was it would make no difference;

both applications would be dismissed (*see* p. 306, cols. 1 and 2).

The following cases were referred to in the judgment of Lord Justice Steyn:

A & B v. C & D, [1982] 1 Lloyd's Rep. 166;

Ladd v. Marshall, [1954] 1 W.L.R. 1489.

These were two applications by the plaintiffs, Halvanon Insurance Co. Ltd. against the judgment of Mr. Justice Rix for leave to appeal against that part of the order whereby he set aside the order giving leave to serve the writ on the defendants, Companhia de Seguros do Estado de Sao Paulo, Companhia Uniao de Seguros Gerais, Vera Cruz Seguradora S.A. and Sul America Bandeirante Seguros S.A., in Brazil and to adduce further evidence at the hearing of the appeal.

Mr. Stephen Tomlinson, Q.C. and Mr. Peter Hayward (instructed by Messrs. Stephenson Harwood) for Halvanon; Mr. Jonathan Gilman, Q.C. and Mr. David Foxman (instructed by Messrs. Taylor Joynson Garrett) for the defendants.

The further facts are stated in the judgment of Lord Justice Steyn.

JUDGMENT

Lord Justice STEYN: Before the Court today are two applications by the plaintiff, Halvanon Insurance Co. Ltd., against the judgment of Mr. Justice Rix given on Apr. 18, 1994.

In his judgment Mr. Justice Rix dealt with a number of matters. He granted the defendants an extension of time within which to acknowledge service, to indicate an intention to defend the proceedings, to issue a summons under O. 12, r. 8, and to apply for a stay pursuant to s. 1 of the Arbitration Act, 1975. He ordered that the judgment in default entered by the plaintiffs on Nov. 5, 1993 be set aside; that the order made ex parte by Lord Justice Hobhouse on Nov. 28, giving the plaintiff leave to serve the writ upon the defendants in Brazil, be set aside; and that the service of those proceedings also be set aside.

There are now before us two applications only. The first is an application by Halvanon, the plaintiffs, for leave to appeal against that part of the order of Mr. Justice Rix whereby he set aside the order giving leave to serve the writ upon the defendants in Brazil. The second is an application by Halvanon to adduce further evidence at the hearing of the appeal.

The background can be stated very briefly indeed. On June 12, 1990, Halvanon (an Israeli insurance company) issued a writ. The writ cited as the defendants four Brazilian companies. The writ stated that the claim arose in respect of sums due from the defendants pursuant to contracts of reinsurance made between Halvanon and the defendants in 1976, 1977, 1978, 1979 and 1980 and evidenced by writing, such sums falling due between Mar. 31, 1979 and certain specified dates. The writ then further specified what sums were due in respect of each of the four defendants, splitting up the sums in respect of sterling, U.S. dollars and Canadian dollars but not in any way condescending to detail as regards the particular reinsurance contracts. The position is that there were 12 reinsurance contracts. Four of those contracts contained arbitration clauses. They were arbitration clauses which, within the meaning of s. 1 of the Arbitration Act, 1975, were of a non-domestic nature and therefore subject to the mandatory stay provisions of s. 1 of that Act.

In due course leave to serve proceedings in Brazil was obtained and there then followed a very lengthy period in which attempts were made to serve in Brazil. The defendants resisted those proceedings at all times. That in outline is the background to the judgment of Mr. Justice Rix.

Mr. Justice Rix had to consider two aspects. First of all, it was argued before him that there should be a mandatory stay in respect of the four contracts subject to arbitration clauses of a non-domestic nature. The answer proffered by the plaintiffs to that contention was that there was an estoppel arising from the conduct of the defendants in Brazil. The second issue before Mr. Justice Rix related to the remainder of the claim arising under the other eight reinsurance contracts, or some of them. In that respect the Judge came to the following conclusion:

> The statement of claim merely claims a global sum in each of the three respective currencies against each of the four Defendants. The inherent probability is that any claim or almost any claim under any contract which does not contain an arbitration clause is a time barred claim, and there is no evidence to the contrary. In these circumstances I do not think that it has been made sufficiently clear to the court that there is a serious issue to be tried under any of the eight contracts which do not contain arbitration clauses so as to make this writ a proper one for service out of the jurisdiction.

On that basis he set aside the leave previously granted.

I turn first to the issue regarding the contracts embodying arbitration clauses. The foundation for the argument that there was an estoppel, as outlined to us this morning by Mr. Tomlinson, Q.C., rested

squarely on the defendants' conduct in resisting service of the English proceedings in Brazil. It is undoubtedly right that the defendants in Brazil had submitted that the only competent Court of jurisdiction in respect of the claims was in Brazil. They had argued that there was no choice of forum in the contracts, and that there was no indication in the contracts in which forum claims should be dealt with. They had also drawn no distinction between the contracts involving arbitration clauses and the others, and attention was never drawn to the fact that there were any arbitration clauses. For my part I regard this argument as doomed to fail. In order to succeed the plaintiffs would have to establish an estoppel. If such an estoppel is established I would accept that it may render the arbitration agreement inoperative within the meaning of s. 1 of the 1975 Act, either on the basis that the arbitration agreement is cancelled without further ado, or that there could be no references in respect of the matters specified in the proceedings served in Brazil. However, the essential point to bear in mind is that the allegation does not involve a representation of fact: what has to be established is a promissory estoppel. In short Mr. Tomlinson says that he does not contend that the arbitration agreements were cancelled, but he asserts that there is an estoppel with a relative effect in the sense that there was a promise not to apply for these particular matters (identified in the proceedings served in Brazil) to be referred to arbitration or make an application under s. 1 of the 1975 Act.

The conduct of the defendants seems clearly only to be referable to the service of the English proceedings in Brazil. There was no issue about arbitration in Brazil. In the circumstances I would find it impossible to spell out the promise contended for. That, of course, is really the end of the estoppel.

However, I turn to the other aspect, namely, whether any reliance has in any event been established. We are invited to say that one could infer such reliance. There is nothing wrong with the process of drawing inferences from circumstances, but we are being asked here to speculate and to infer reliance from the fact that expenses were incurred in regard to the opposition to service in Brazil. But those expenses resulted purely from objections to service in respect of all the contracts and did not, in any way, result from the terms of the objections in relation to the particular contracts containing arbitration clauses. There was a further suggestion that Halvanon might have appointed an arbitrator. That is a proposition that I would also not accept for the simple reason that there is no evidence to support it. I would therefore hold that there was no evidence at all to support any reliance and, for these reasons, I hold that the Judge came to the right conclusion.

Mr. Tomlinson also submitted to us that the Judge took the wrong order in respect of the relief that he granted. He had before him a defendant's summons for a stay. It may be that there had not been any acknowledgment, but in any event the Judge, in reliance of the authority of *A & B v. C & D*, [1982] 1 Lloyd's Rep. 166 at p. 171, col. 2, took the practical course of setting aside the leave to serve in respect of those four contracts containing arbitration clauses. That was a matter within his discretion and he was entitled to regard it as axiomatic that the defendants would apply for a stay and that they would obtain a stay. It would have been entirely within his power, in those circumstances, to set aside the service. Therefore, I do not believe that there is the slightest prospect of Halvanon obtaining any relief under that heading relating to the form of order that the Judge made.

That brings me to the second issue and that is the view that the Judge took about the time bar aspect. Mr. Tomlinson has, to my satisfaction, demonstrated that there was at least one error of fact in the Judge's reasoning, and possibly another. As far as I am concerned the Judge's ultimate conclusion on the evidence, as it stood before him, was entirely correct. I have come to that conclusion on the basis that, as the Judge pointed out, the writ simply contains global figures, and that the affidavit evidence before him also contained global figures. In this regard one has to bear in mind that Halvanon was put on clear notice that the time bar defence would be taken. Indeed it goes further. When an application for leave to serve out of the jurisdiction was made Lord Justice Hobhouse raised the question of the time bar. Alarm bells should have rung at that stage. They apparently did not. Mr. Dillon made clear in his affidavit that this point was being taken. Nevertheless, the information placed before the Judge was entirely general. Even if there are minor imperfections in his reasoning, I do not believe that the Judge's conclusion (that he was not satisfied that the claims were not time barred) can seriously be questioned.

Mr. Tomlinson addressed us on the basis that an applicant in the position of Halvanon can face very great practical difficulties, particularly in this type of reinsurance. That is undoubtedly so. He submitted that there was no onus on an applicant to condescend to details in that regard. I find it quite unnecessary to give any guidance in this case as to what the proper legal approach is. Much may depend on the facts of particular cases and that is notably important here where the plaintiffs have been put on notice that a defence would be taken. In those circumstances I would hold that there was an evidential burden on them to establish a case to a

satisfactory standard, having regard to the nature of the application before the Court. I am entirely satisfied that, on the material before the Judge, it is hopeless to contend that the required standard was satisfied, or that Halvanon is able to identify a substantial claim unaffected by arbitration clauses or the time bar defence.

That brings me to the application to adduce further evidence. The purpose of the application is really a two-fold one and that is to place evidence before the Court of a break-down under the particular contracts, and to demonstrate that such sums became due less than six years before issue of the writ. It is quite true that this application is not governed by *Ladd v. Marshall*, [1954] 1 W.L.R. 1489 principles. Nevertheless, the Court has a discretion and it must take into account in this particular case that Halvanon was put on express notice that the matter would be raised. Given that very clear advance warning I would refuse leave to adduce this new evidence on that ground alone. But I would go further. The new evidence is based on the proposition that a cause of action in this field arises when an account is rendered. In my judgment that proposition is contrary to well-established principles. In the absence of special clauses that is not the case. The cause of action arises when the underlying liability is ascertained by agreement, by an award or by judgment. It is not postponed until the rendering of an account. Here I pause to say that nobody has in this case suggested that there was any account stated in the classic sense.

How was Mr. Tomlinson to avoid the consequences of this rule? He approached the matter on the basis that it would be possible for a Court to find a constructional implication, from the terms of the reinsurance contract that time would only run from the time of submission, the rendering of accounts or the failure to do so. For my part I am satisfied that there is not sufficient material to warrant such an implication. It is well-established that a construction implication, like any other implication, can only be found if a strict test of necessity is satisfied. The contract here is perfectly workable without such application and I rule that there is no prospect whatever of a Court finding such an implication established. Although Mr. Tomlinson disputes it, I regard the new evidence as infected by the difficulty that it is entirely based on the proposition that the operative date is the date on which accounts are rendered.

Mr. Tomlinson puts to us the fact that one cannot say that all the claims even on this basis are time barred; indeed one cannot say one way or the other. That brought him back to his point that there was no burden on the plaintiffs, and in the circumstances the burden would be on the defendants. As I have indicated before, I reject that submission about the burden. Leaving questions of legal burden aside and having regard to the fact that they were clearly put on notice, I would hold that in the circumstances of this case there was a clear evidential burden to deal with the problem about the time bar, and in the result one simply does not know one way or the other whether these claims are time barred on the plaintiffs' own case. I think Mr. Tomlinson accepted that if he was wrong on the issue of principle and on the aspect of the burden, the application must inevitably fail. If I am wrong and attribute too much to him there, that is in any event the ruling that I would make. My conclusion is that as matters stood before the Judge, his eventual conclusion was correct and, having regard on a de bene esse basis to all the new material, I would rule that not only should that material not be admitted, but if it was admitted it would make no difference. I would dismiss both applications.

Lord Justice ROSE: I agree.

Lord Justice MORRITT: I also agree.