[1980–87 Gib LR 450]

CONCRETE PROOFING COMPANY LIMITED v. DAS ALUMINIUM AND GENERAL WELDING COMPANY LIMITED

COURT OF APPEAL (Spry, P., Fieldsend and Law, JJ.A.): February 26th, 1987

Arbitration—stay of proceedings—criteria—applicant to be "ready and willing" to arbitrate under Arbitration Ordinance, s.8—counsel's affidavit to this effect when seeking stay sufficient evidence if not rebutted

The plaintiff brought proceedings in the Supreme Court for damages arising from a breach of contract.

The plaintiff, DAS Aluminium and General Welding Company Ltd. ("DAS"), and the defendant, Concrete Proofing Company Ltd. ("CPC") were parties to a contract which contained a clause requiring the reference of any dispute to an arbitrator on notice being given by either party. A dispute did arise, but rather than giving notice, DAS served process upon CPC. CPC indicated on August 26th, 1986 that they would contest the proceedings, but then on September 11th, 1986 sought an order that proceedings in the case be stayed, as the parties had agreed to refer the matter to arbitration. CPC's supporting affidavit asserted that it was at all times ready and willing to do everything necessary for the proper conduct of the arbitration, as required by s.8 of the Arbitration Ordinance (1984 Edition). The Supreme Court (Alcantara, A.J.) refused to stay the proceedings on the ground that, although he was satisfied that there was a valid arbitration clause, he was not satisfied that CPC had been "ready and willing" to arbitrate.

On appeal, CPC submitted that the statement in its affidavit was evidence of its being "ready and willing" to arbitrate, and this evidence had not been rebutted by DAS. DAS submitted in reply that the decision of Alcantara, A.J. not to allow the stay was an exercise of judicial discretion, which an appellate court should not disturb unless satisfied that it was made under a mistake of law.

Held, allowing the appeal:

The stay would be granted, and the dispute referred to arbitration. Alcantara, A.J. had overlooked CPC's affidavit, which should have *prima facie* satisfied him that CPC was "ready and willing" to arbitrate as required by s.8 of the Arbitration Ordinance. The onus was then on DAS to show why a stay should be refused, which it had not done. The affidavit

stating CPC's readiness and willingness was not a mere formality, but evidence in support of this proposition. The judge had therefore erred in law by rejecting the stay (*per* Law, J.A. and Spry, P., para. 8; para. 10; para 20). Alternatively, Alcantara A.J. had considered, but had wrongly rejected, CPC's affidavit; the burden was on CPC to show that it was "ready and willing," and the unrebutted evidence in the affidavit was sufficient to do so. There was no justification for rejecting the affidavit, which should have been accepted (*per* Fieldsend, J.A. and Spry, P., para. 14; para. 19; para. 20).

Cases cited:
(1) *Clough* v. *County Live Stock Ins. Assn. Ltd.* (1916), 85 L.J.K.B. 1185, referred to.
(2) *Piercy* v. *Young* (1880), 14 Ch. D. 200, referred to.

Legislation construed:
Arbitration Ordinance (1984 Edition), s.8:

> "[A]ny party to an arbitration agreement . . . [may] apply to the court to stay the proceedings, and that court, if satisfied . . . that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

A. Isola for the plaintiff;
J.J. Neish for the defendant.

1 **LAW, J.A.:** The contract between the parties out of which this appeal arises is dated January 17th, 1985, but is referred to in the statement of claim (on the back of the specially endorsed writ which initiated these proceedings on April 7th, 1986) as "a written contract dated January 10th, 1985." The appellant's counsel, Mr. Neish, refers to it in his affidavit of September 25th, 1986, as being dated January 17th, 1985. Both dates are used throughout these proceedings. The learned judge describes it as a "sub-contract dated January 10th, 1985." I can only hope that we are dealing, on this appeal, with one and the same document: the sub-contract in writing exhibited to Mr. Neish's affidavit.

2 Be that as it may, the contract in question is described as a sub-contract for the execution of certain works forming part of the main contract, concluded earlier, between the Public Works Department of Gibraltar and Gunac Ltd. The particulars of the works to be done under the sub-contract are stated in Part I of the Appendix, and the value of the sub-contract works is stated in Part III, as being £72,540. The parties to the sub-contract were the Concrete Proofing Co. Ltd. ("the defendant"), and DAS Aluminium & General Welding Co. Ltd. ("the plaintiff").

3 The sub-contract contained, in cl. 24, an arbitration clause under which, if any dispute arose between the parties, then either party should give to the other notice in writing of it; the dispute would then be referred to an agreed arbitrator, or failing agreement, to an arbitrator appointed by the President of the Royal Institute of Chartered Surveyors. Disputes have arisen, which have resulted in the termination of the contract by the defendant. No formal notice of the existence of such dispute, or invitation to submit it to arbitration, has been given by either party. The last letter in the agreed bundle of correspondence was written by Mr. G.Z. Korab, the Managing Director of the defendant company, on January 30th, 1986 to the plaintiff's lawyers. That letter ends as follows: "We would hope that in the circumstances your clients will not seek to pursue this matter further, and we invite you to write to us confirming that this is the case."

4 The next step was the issue of a specially endorsed writ by the plaintiff, which was served on the defendant out of the jurisdiction, in England, by substituted service. By the statement of claim on the back of the writ, the plaintiff claimed the sum of £39,334 as due to it by the defendant, this allegedly being the amount outstanding of the agreed contract price. The defendant entered an appearance to the writ through its lawyers in Gibraltar on August 26th, 1986, indicating its intention to contest the proceedings. On September 11th, 1986, without having taken any further step in the matter, the defendants, through its lawyers Messrs. Triay & Partner, filed a summons asking for an order (pursuant to the Rules of the Supreme Court, O.73, r.3) that as the plaintiff and the defendant had by an agreement dated January 17th, 1985 agreed to refer to arbitration "the matters in respect of which this action is commenced," all further proceedings in the action should be stayed. The summons was supported by an affidavit sworn by Mr. James Neish, a partner in the firm of Messrs. Triay & Partner, dated September 25th, 1986, setting out in detail the particulars of the dispute between the parties, and ending with the statement that the defendant was at the time the action was commenced, and still remained, ready and willing to do and concur in all things necessary for causing the matters in dispute to be decided by arbitration under the contract between them, and for the proper conduct of such arbitration.

5 The summons was heard on November 17th, 1986, by Alcantara, A.J., who on November 20th, 1986 delivered his order dismissing the application for a stay. On December 1st, 1986, the defendant filed its notice of appeal against the order made by Alcantara, A.J. and applied for and obtained leave to appeal from the same learned judge on the same day. On the hearing of this appeal, Mr. Neish appeared for the defendant/appellant and Mr. A. Isola for the plaintiff/respondent.

6 Mr. Neish referred us to the learned judge's order. It begins by setting out the text of s.8 of the Arbitration Ordinance (1984 Edition), and refers

to *Chitty on Contracts*, 25th ed., paras. 979–981, at 517–20 (1983) which read as follows:

> "979. An applicant for a stay must show that he is now and was when the proceedings were commenced ready and willing to do everything necessary for the proper conduct of the arbitration . . .
>
> 981. The power conferred by section 4(1) of the 1950 Act [which corresponds to s.8 of the Arbitration Ordinance] is discretionary. But it is prima facie the duty of the court to enforce the agreement of the parties to resort to the tribunal that they themselves have chosen. Accordingly, once the party applying for a stay has shown that the dispute is within a valid and subsisting arbitration clause, the onus of showing that a stay should be refused is on the other party."

7 The learned judge then expressed himself to be satisfied that there was a valid arbitration clause, but not satisfied that the defendant had shown that it was ready and willing to do everything necessary for the proper conduct of the arbitration when the proceedings commenced. As to this, there is the specific statement in para. 10 of Mr. Neish's affidavit of September 25th, 1986, in which he deposed as to the defendant's willingness and readiness. Mr. Neish cited the case of *Piercy* v. *Young* (2) and the following passage from the judgment of Jessel, M.R. (14 Ch. D. at 209):

> "I think it is right to say that the Court should have required an affidavit to be produced of readiness and willingness to refer to arbitration at the time when the motion was heard in the Court below . . . the Court is required to be satisfied under the section, and therefore of course the Court must see that there is some evidence in support of the affirmative proposition. In this case there was none . . ."

8 Clearly an affidavit of readiness and willingness is more than a mere formality; it is evidence in support of the affirmative proposition that the defendant was at all times ready and willing to go to arbitration. Mr. Isola's affidavit in reply, dated October 30th, 1986, did not specifically deny para. 10 of Mr. Neish's affidavit. He said that oral representations had been made by the plaintiff to the owner of the buildings and to the defendant, suggesting arbitration, but that the owner was reluctant to become involved. He said nothing about the defendant's reaction to the proposal, or that any members of the company had said they were unwilling to go to arbitration. Mr. Neish's statement that it was, and still is willing to arbitrate stood unrebutted. The stage was then reached when the learned judge ought, in my view, to have been *prima facie* satisfied on the evidence that the defendant was ready and willing to arbitrate, whereupon it became incumbent on the plaintiff to discharge the onus of showing that a stay should be refused—which it did not do. Mr. Isola submitted that the learned judge's decision represented an exercise of judicial discretion,

which an appellate court should not disturb unless satisfied that it was made under a mistake of law, and that it should be assumed that the judge correctly exercised his discretion unless the contrary was shown. He relied on *Clough* v. *County Live Stock Ins. Assn. Ltd.* (1).

9 In considering the submissions in this case, I cannot help feeling that it is unfortunate that the issue of the writ was not preceded by the usual letter before action. If this had been done, the defendant could then either have stated its willingness and readiness to go to arbitration, or, if it ignored the letter, this might have provided evidence that it was unwilling to go to arbitration.

10 In conclusion, I have formed the view that, having expressed himself to be satisfied that there was a valid and subsisting arbitration clause, and that the dispute fell within that clause, the learned judge ought in addition to have held that the unrebutted evidence of Mr. Neish established *prima facie* that the defendant had shown that it was ready and willing to arbitrate, whereupon the onus of showing that they were not so ready and willing was placed on the plaintiff, which did not discharge that onus. In these circumstances, in my view, the learned judge erred (in law) in rejecting the defendant's application for a stay. The only real evidence as to readiness and willingness to go to arbitration is to be found in para. 10 of Mr. Neish's affidavit, and that evidence appears to have been overlooked by the learned judge. That evidence remains unrebutted.

11 I would in these circumstances allow this appeal, order a stay of the proceedings as prayed, and order that the matters in dispute be remitted to arbitration in accordance with the arbitration agreement between the parties.

12 **FIELDSEND, J.A.:** I agree with the conclusions of my brother Law, J.A. but have reached that conclusion by a slightly different route. It was common cause that the arbitration clause was valid and that the dispute between the parties fell within that clause. What was not common cause was whether the defendant had shown that it was ready and willing to submit to arbitration.

13 In terms of s.8 of the Arbitration Ordinance, it was for the defendant to satisfy the court that it was ready to submit to arbitration. The question of judicial discretion comes into play only if the court is satisfied on this point. *Chitty on Contracts*, 25th ed., para. 981, at 520 (1983), which refers to the power to stay being discretionary, must be read in this light, and not as indicating that there is any burden on the plaintiff to show that the defendant was not ready and willing.

14 Here the burden was on the defendant to show that it was ready and willing to submit to arbitration, hence the specific assertion in para. 10 of Mr. Neish's affidavit of September 25th, 1986 that this was so. Mr. Isola's

affidavit in reply of October 30th, 1986 did not deny the allegation. He sets out that oral representations for arbitration were made by the plaintiff to the Government (as owner of the property concerned) and to the defendant, and that the owner was reluctant to become involved. He says nothing about the defendant's reaction. Had the plaintiff wished to contradict Mr. Neish's affidavit this was the place to have done it.

15 Without referring to these paragraphs in the affidavits, the learned judge *a quo* stated that he was not satisfied that the defendant had shown that it was ready and willing to submit to arbitration. In reaching his conclusion he relied on two matters stating that—

(i) before the issue of the writ the defendant was talking about proceedings or action in relation to differences or disputes; and

(ii) most significant was the failure of the defendant to instruct solicitors to accept service of the writ, or at the very least to say that it was not willing to accept service but willing to go to arbitration.

16 On the first matter the learned judge must have been relying on two letters written to the plaintiff. The first was that of November 11th, 1985, written in reply to a letter from the plaintiff's lawyers of November 8th. This latter letter was the first lawyers' letter, and stated that all the plaintiff's rights under the contract were being reserved. While not a specific threat of litigation, this is some indication that some action might be in mind. The letter of November 11th was in some respects a conciliatory one and included the sentence: "If your clients are prepared to fulfil their contractual obligations then this matter can be dealt with without recourse to litigation." This sentence in the context cannot be regarded as a threat of litigation. It merely expresses the hope that there need be no litigation between the parties of any sort. It certainly is no indication that the defendant was then unwilling to go to arbitration.

17 The second letter is that of January 23rd, 1986 from the lawyers of Gunac Ltd. The final paragraph referred to rumours heard that the plaintiff was disposing of its assets to deprive creditors of their remedies and concluded: "We would put you on notice that should this be the case our client company will take a most serious view and adopt such action in both the civil and criminal courts as may be available to them."

18 This sentence read in its context is not related to a threat of proceedings in connection with anything arising out of the contract. It is a warning that the writer will take legal action to prevent any disposal of assets by the plaintiff if there is an intention thereby to deprive creditors of their remedies. Such action would be outside the contractual arbitration clause.

19 On the second matter the failure to instruct solicitors to accept service of a writ can in no way indicate an unwillingness to go to

arbitration. In any event there is nothing on record to show that the defendant was asked to appoint solicitors to accept service, or even that they were threatened with a writ. These two factors go no way to rebutting the uncontradicted affidavit made by Mr. Neish that the defendant was ready and willing to submit to arbitration. There was in my view no justification for the rejection of that affidavit, which the learned judge should have accepted.

20 **SPRY, P.** concurred with both judgments.

Appeal allowed.

[1980–87 Gib LR 456]

GUERRA v. ULLGER

SUPREME COURT (Alcantara, A.J.): March 6th, 1987

Criminal Procedure—bail—bail conditions—bail conditions not to be phrased in alternative—surety to be required first and if none available, deposit required instead—if accused unable to raise deposit specified, court may reduce under Criminal Procedure Ordinance, s.7—counsel to help by suggesting possible range affordable by accused

The applicant was charged in the magistrates' court with theft.

The applicant was caught attempting to steal a bicycle and admitted to having stolen several others. He appeared in the magistrates' court and was granted bail on the following conditions: "£100 on his own recognizance together with either a surety of £300 provided by a resident of Gibraltar or a deposit of £300 to secure his appearance before the magistrates' court on March 16th, 1987."

The applicant was unable to comply with the conditions of bail as he was unemployed, had no connection whatsoever with Gibraltar and was therefore unable either to find a surety or raise £300 and consequently remained in custody.

In the Supreme Court, he sought to vary the terms of bail specified by the Stipendiary Magistrate. He submitted that (a) the Stipendiary Magistrate had not appreciated that he would be unable to comply with the conditions; and (b) the only way to alter them was by application to the Supreme Court.