[1991–92 Gib LR 66]

RITCHIE v. NORWICH UNION FIRE INSURANCE SOCIETY (GIBRALTAR) LIMITED

SUPREME COURT (Alcantara, A.J.): May 15th, 1991

Civil Procedure—judgments and orders—default judgment—setting aside—to set aside regular judgment, defendant to show arguable or triable issue in defence

Arbitration—stay of proceedings—criteria—under Arbitration Ordinance, s.8 applicant to show that (i) arbitration agreement valid, (ii) application made before pleadings delivered or other steps taken in proceedings, and (iii) ready and willing to arbitrate at commencement of proceedings—request for more time to serve defence not "step in proceedings"—discretion to refuse stay even if criteria met

The plaintiff claimed compensation for injury at work.

The plaintiff was employed as a harbour pilot. As a member of the Gibraltar Pilots Association, he was covered by an insurance policy in respect of accidents at work. The policy stated that compensation would be payable in the event of "temporary disablement which totally prevents the insured person from attending in any way to his/her normal occupation" for a maximum of two years, and that payment of compensation to an insured person would be evidence of the discharge of the insurer's liability in respect of such an event. The policy contained a clause for arbitration in the case of an unresolved dispute.

The plaintiff injured himself in the course of his work and was absent from work for a period of several months. He notified the insurer that he would be returning to work and collected the compensation due to him

under the policy for his absence. He signed a receipt stating that he had received "the sum of £2,000 in full and final payment for temporary disablement . . . for a period of eight weeks . . . at £250 per week as per policy conditions . . ."

The plaintiff then recommenced work as a pilot but found that he had not sufficiently recovered to climb ladders, an essential part of the job. He notified the insurer of his continuing disability and was told to supply further medical evidence, which he did after some delay.

In the meantime, he began work at a reduced rate of pay as a ship's master, which did not require him to climb ladders. The insurer informed him that it could not pay any further compensation, but later told him that he would be entitled to benefit covering the period from his receipt of the payment until the commencement of his new job if he had not worked during that time and could provide medical evidence. Some time later, he submitted a report from his osteopath to the effect that his injury was unlikely to improve sufficiently to enable him to resume his work as a pilot. The insurer refused to make any further payment and the plaintiff commenced proceedings to recover compensation for his continuing disability.

Despite requesting extra time in which to serve a defence to the claim, the insurer failed to serve a defence and judgment was entered in default. It applied to set aside judgment, and for a stay of proceedings under s.8 of the Arbitration Ordinance.

It submitted that (a) it had raised an arguable defence to the plaintiff's claim, since (i) the plaintiff had signed a receipt for payment in full and final settlement of his claim under the policy when he returned to work, and (ii) he had failed to prove that he was unable to work during the period for which he claimed compensation; (b) there was a valid agreement to refer disputes arising under the policy to arbitration; (c) its application had been made before it had delivered any pleading or taken other steps in the action, and its request for an extension of time in which to file a defence was not a "step in the proceedings" for these purposes; and (d) it was ready and willing to do all that was necessary for the dispute to be resolved by arbitration.

The plaintiff submitted in reply that (a) judgment should not be set aside, as there was no defence to his claim; (b) the proceedings should not be stayed, since (i) he had never seen the policy or the arbitration clause, (ii) the insurer's request for more time to serve a defence was a "step in the proceedings" which precluded a stay, and (iii) the insurer had never before mentioned its intention to refer the dispute to arbitration, and was not ready and willing to do so.

Held, setting aside judgment in default:

(1) Because the judgment obtained was procedurally regular, the defendant had to show its defence disclosed an arguable or triable issue in order to have the judgment set aside. The triable issues were whether the plaintiff had signed a receipt for payment in full and final settlement and

was therefore precluded from claiming further, and whether he had proved the requisite disability during the period for which he claimed. Judgment in default would be set aside. The insurer should serve its defence within two weeks (paras. 12–14; para. 24).

(2) The court would not stay the proceedings in its discretion under s.8 of the Arbitration Ordinance. It was satisfied that there was a valid arbitration agreement by which the plaintiff was bound, whether or not he had seen the policy (not least because he was seeking to claim under it). It was also satisfied that the defendant insurer had applied for a stay before it delivered any pleadings or took other steps in the proceedings, since an application for an extension of time to serve a defence was not a "step in the proceedings." However, the court was not satisfied that the insurer had been ready and willing to go to arbitration at the commencement of the proceedings. During lengthy correspondence with the plaintiff, neither the insurer nor its claims adjuster had ever mentioned the matter of arbitration rather than litigation. The insurer had nominated a solicitor to accept service of a writ. Furthermore, it had insisted that the policy could not be invoked by the plaintiff and yet now sought to show that it had itself been ready to do so. In any event, even if it had been prepared to arbitrate at the outset, the court would exercise its discretion in the plaintiff's favour and refuse a stay (paras. 16–23).

Cases cited:
(1) *Brighton Marine Palace & Piers Ltd.* v. *Woodhouse*, [1893] 2 Ch. 486, applied.
(2) *Farden* v. *Richter* (1889), 23 Q.B.D. 124, applied.
(3) *Turner & Goudy* v. *McConnell*, [1985] 1 W.L.R. 898; [1985] 2 All E.R. 34, referred to.

Legislation construed:
Arbitration Ordinance (1984 Edition), s.8: The relevant terms of this section are set out at para. 15.

L.E.C. Baglietto for the defendant;
C.A. Gomez for the plaintiff.

1 **ALCANTARA, A.J.:** There are two applications before me. In one of them the defendant is seeking that a judgment entered in default of defence, by the plaintiff against the defendant on October 29th, 1990, be set aside. In the other the defendant is seeking that all further proceedings in the said action be stayed pursuant to s.8 of the Arbitration Ordinance.

2 The plaintiff was a marine pilot in the Bay of Gibraltar at the relevant time. The defendant is an insurance company of considerable prestige. The pilot belonged to the Gibraltar Pilots' Association. The Association, on behalf of all the pilots, on November 19th, 1980 took out a Group

Personal Accident Policy from the defendant to cover all marine pilots, including the plaintiff.

3 The policy contained a number of conditions, two of which are very relevant to the present proceedings:

> "*Condition 5*:
>
> In the event of compensation being paid by the company in respect of the events stated in the schedule of benefits, payment may be made to the insured, the insured person or the insured person's legal representative as appropriate and a receipt signed by one of these parties as appropriate shall be evidence of the completion of the company's liability in respect of the event for which compensation is paid."

One of the events stated in the schedule of benefits is No. 5, which reads: "Temporary disablement which totally prevents the insured person from attending in any way to his/her normal occupation." The other relevant condition in the policy is:

> "*Condition 9*:
>
> Any difference arising hereunder shall be referred to arbitration if it is competent to do so in accordance with the laws in force in the territory in which the policy is used."

4 On May 31st, 1986, the plaintiff, who at the time was an insured person, suffered an accident in the performance of his occupation as a marine pilot. Compensation was paid to him at the rate of £250 per week. I need only set out two receipts signed by the plaintiff to contrast them. The first one is dated December 9th, 1986. It reads:

> "Received from the Norwich Union Fire Insurance Society (Gibraltar) Ltd., the sum of £3,500 as an account payment for Temporary Total Disablement commencing on September 1st, 1986 for a period of 14 weeks to December 7th, 1986 at £250 per week, as per policy conditions under policy No. 84GP–1005–11/2."

The other, and the last, receipt signed by the plaintiff is dated February 2nd, 1987. It reads:

> "Received from the Norwich Fire Insurance Society (Gibraltar) Ltd., the sum of £2,000 in full and final payment for Temporary Total Disablement commencing on December 8th, 1986 for a period of eight weeks to February 1st, 1987 at £250 per week, as per policy conditions under policy No. . . ."

5 According to the plaintiff, he resumed work as a marine pilot on February 10th, but was forced to resign on February 12th, 1987 because

of the injuries sustained in the accident. According to counsel for the plaintiff, the insured person went to the insurance company on February 2nd, 1987 and told them: "Pay me what is owed. I am going back to work." I think that this must have been so. There is no discrepancy as to the date of resignation, as the copy of the policy of insurance produced shows on the face of it that the plaintiff was deleted as an insured person on February 12th, 1987 ("resigned").

6 Some time later the plaintiff approached the insurance company for further compensation. A letter dated September 21st, 1987 from the insurance company to the plaintiff has been exhibited. It states: "After much consideration it has been agreed that the policy cannot be invoked because you have returned to work, albeit in a limited capacity."

7 There is evidence that the plaintiff has been in gainful employment at least since June 22nd, 1987, but not as a marine pilot.

8 There is a further note produced from the insurance company to the plaintiff dated December 4th, 1987. It reads: "Herewith the medical report as requested. If you did not work from February to July you are entitled to benefit. Please bring a letter from the doctor." The report referred to is the medical report on the plaintiff by Surgeon Commander A.C. Chakraverty, the consultant orthopaedic and general surgeon at St. Bernard's Hospital, dated July 17th, 1987, in which the plaintiff's present condition on that date is stated thus:

> "He has not been able to resume his position as a pilot because of lack of confidence with the shoulder, which is functioning pretty well but cannot be trusted in hazardous situations. However, he has been working as a first officer of a supply vessel for the last few months without great difficulty."

9 There was further correspondence between the plaintiff's solicitors and the insurance company and their claim adjusters, to which I might refer at a later stage.

10 On September 13th, 1990 the plaintiff issued a writ endorsed with a statement of claim against the insurance company, claiming 69 weeks' compensation, amounting to £17,250. The insurance company acknowledged service on September 17th, 1990, and on October 9th, 1990, the solicitors for the insurance company requested in writing an extension of time until October 22nd, 1990, to file the defence. The plaintiff granted the extension. On October 29th, 1990, no defence having been served, the plaintiff entered judgment in default of defence against the insurance company for the amount claimed. The plaintiff's solicitors duly informed the solicitors for the insurance company of this on November 1st, 1990.

11 Unknown to the solicitors for the plaintiff, because they had never been informed or given any intimation, the solicitors for the insurance company purported, on October 18th, 1990 (prior to the date of judgment), to issue a summons asking for a stay of the proceedings pursuant to s.8 of the Arbitration Ordinance. I use the word "purported" advisedly because this is what the solicitors for the insurance company did. A summons was presented at the Registry, paid for and left there. No return date was given. It was not collected until early November 1990, with a return date of December 12th, 1990. Some sort of explanation is to be found in the affidavit of Mr. L. Baglietto in support of the application by the insurance company to have the judgment set aside.

12 I will deal with this application first. In this case the judgment was a regular one, so the application should be supported by an affidavit of merits; that is, an affidavit stating facts showing a defence on the merits: see *Farden* v. *Richter* (2).

13 The present application is supported by an affidavit of merits deposed to by Mr. David Joseph Abudarham on January 22nd, 1991. The deponent states not only that the plaintiff signed a full and final settlement, but that the plaintiff returned to work, and that, in any case, the plaintiff has failed to prove his incapacity for work during the period for which he is claiming compensation.

14 For the purpose of setting aside a default judgment, the defence on the merits that the defendant is required to show need only disclose an arguable or triable issue: see *The Supreme Court Practice 1991*, para. 13/9/5, at 136. Mr. Gomez, for the plaintiff, submits that on the face of the affidavits before me, there is no defence to the action. I disagree. The test is not whether the defence will succeed at the trial, but whether it has been shown to my satisfaction that there is an arguable or triable issue. The answer is that there is such an issue. In the exercise of my discretion, I think that it is proper that the judgment should be set aside. I so order.

15 Now we come to the question of whether a stay of proceedings should be granted pursuant to s.8 of the Arbitration Ordinance. The section provides:

> "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 arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the

arbitration agreement, and that the applicant was, at the time when the proceedings 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."

16 In so far as the present application is concerned, the insurance company has to satisfy me that—

(a) there is a valid agreement to have the dispute concerned settled by arbitration;

(b) the application is made after appearance by that party, and before he has delivered any pleadings or taken any other "steps in the proceedings"; and

(c) the party applying for a stay was and is ready and willing to do all things necessary to the proper conduct of the arbitration.

17 Dealing with (a) first, it is accepted that the policy of insurance contains an arbitration clause. Counsel for the plaintiff submitted that it was not a valid arbitration agreement because the plaintiff had never seen the policy. However, he later accepted that his client was a party to the policy. This submission has little merit, as the plaintiff, by his conduct, is clearly bound by the arbitration agreement.

18 As regards (b), there is no doubt that the application for a stay was made after an appearance and before any pleadings were delivered. This is common ground. But, were other "steps in the proceedings" taken? There was a request in writing for an extension of time in which to deliver a defence. Notwithstanding *Brighton Marine Palace & Piers Ltd.* v. *Woodhouse* (1), counsel has tried to persuade me that other steps were taken. In that case it was held that an application by letter under the rules of court for an extension of time to put in a statement of defence, was not taking a "step in the proceedings," within the meaning of s.4 of the Arbitration Act 1889 (in Gibraltar, read s.8 of the Arbitration Ordinance).

19 Counsel referred me to *Turner & Goudy* v. *McConnell* (3), inviting me to rule that the *Brighton* case should no longer be followed. I decline such temerity and hold that the *Brighton* case is good law and applies to Gibraltar. I find that the insurance company has satisfied me as to this particular requirement.

20 Before dealing with (c), I must go back to the correspondence exchanged between the plaintiff's solicitors and the insurance company, and their claims adjuster. From November 1989 to May 1990, the plaintiff's solicitors were writing to them stating that the plaintiff was going to take legal proceedings to further his claim. In not one of the letters by the insurance company or their claims adjuster was the plaintiff ever told or his mind directed to the question of arbitration. Quite the

contrary. Mr. David Dumas of Messrs. J.A. Hassan & Partners was nominated to accept service of any writ on behalf of the insurance company.

21 Now I come to (c). It is not contested that the defendant is now ready and willing to arbitrate, but was it ready and willing at the time of the commencement of proceedings? Counsel for the plaintiff says "No" because of the correspondence which lead the plaintiff to believe that litigation was in order. There was also the fact that service of the writ was effected on the solicitor nominated by the insurance company. I agree with counsel. There is another fact which I consider of some relevance. The plaintiff was told in a letter by the insurance company as far back as September 21st, 1987 that "the policy cannot be invoked."

22 If the plaintiff could not invoke the policy, how can the insurance company pretend to invoke it? Probably, "invoke" was the wrong word to use. The inference I draw from the evidence that has been placed before me is that the insurance company was not ready and willing to arbitrate at the commencement of proceedings. I so find.

23 Finally, there is the question of discretion. Section 8 of the Arbitration Ordinance ends by stating that the court "may make an order staying the proceedings." The words are permissive, not imperative. Had I found (c) in favour of the defendant, I would have exercised my judicial discretion in favour of the plaintiff.

24 Judgment in default is set aside and leave is granted to the defendant to serve a defence within 14 days. The application for a stay is refused. The plaintiff is to have the costs of both applications.

Order accordingly.