GIFMAC LIMITED v CUBIERTAS GENERAL CONSTRUCTION COMPANY LIMITED

SUPREME COURT (Kneller, C.J.): March 4th, 1994

Arbitration—stay of proceedings—criteria—prima facie duty to give effect to arbitration agreement—stay of proceedings unless good reason shown—complexity of factual and legal issues irrelevant unless better heard by court—injunction against arbitration available if agreement void or voidable ab initio

Arbitration—stay of proceedings—jurisdiction—court's jurisdiction under Arbitration Act not ousted by term in arbitration agreement that arbitrator's decision final

The defendant applied for a stay of proceedings against it, under s.8 of the Arbitration Ordinance.

The parties entered a building contract containing an arbitration clause. The clause stated that the arbitrator's decision would be final, but provided for an appeal from an award or an application during the course of the reference to the Supreme Court on a point of law, "pursuant to the Arbitration Ordinance." A dispute arose, resulting in the plaintiff's withholding some of the moneys due to the defendant under the contract. The defendant gave written notice of its intention to refer the dispute to arbitration and offered the plaintiff a choice of arbitrators. The plaintiff refused to co-operate and commenced proceedings for an injunction to restrain the defendant from seeking an arbitration award, declarations relating to the parties' rights under the contract, and damages for breach of contract. The defendant applied for a stay of the proceedings.

It submitted that (a) the agreement was irrevocable save by order of the court under s.3 of the Ordinance and, under s.8, the court had a *prima facie* duty to give effect to it; (b) it was for the plaintiff to show why the arbitration should not proceed; (c) a stay should not be refused merely because the reference to arbitration involved questions of law or was otherwise suitable for trial by the court; (d) if necessary a reference could be made to the court by case stated during the arbitration on a point of law, under s.33 of the Ordinance; and (e) since the agreement was valid, the plaintiff was not entitled to an injunction.

The plaintiff submitted in reply that (a) the arbitration agreement was invalid, since it mistakenly purported to provide for a right of appeal from the arbitrator's decision which did not exist under the Ordinance; (b) the reference to arbitration was unsigned; (c) the dispute involved complex issues of fact and law best suited to resolution by the court; and (d) the

plaintiff would be unable to enforce the arbitrator's award, since the defendant had failed to provide the contractual performance guarantee, it no longer had an office, directors or assets in Gibraltar, and its Spanish owner was not liable for its debts.

Held, staying the proceedings:

(1) The court had a *prima facie* duty to ensure that the arbitration agreement was complied with, and would exercise its discretion to stay court proceedings unless the plaintiff showed a good reason why the arbitration should not proceed. The fact that complex issues of fact or law were involved in a reference to arbitration was not *per se* a reason to stay the proceedings, unless it would be better for the court to hear those arguments. It could issue an injunction to restrain the arbitration proceedings in appropriate circumstances, *e.g.* if the agreement were void or voidable. The court's jurisdiction would not be ousted by any provision in the agreement that the arbitrator's decision was final (page 270, line 25 – page 271, line 14).

(2) The proceedings would be stayed so that the arbitration could proceed. The arbitration agreement was apparently valid. It was immaterial that the reference to arbitration was unsigned. The issues to be referred had now been clearly defined. The parties had not intended the arbitrator's decision to be final and binding under Schedule 1, para. 6 of the Ordinance, as they had expressly provided for a right of appeal to the court, and the Ordinance provided a number of means by which questions could be referred to the court from the arbitrator and the parties could challenge his decision. If difficult questions of law arose in the course of the arbitration, they could be referred under s.33 (page 272, lines 20–39).

Cases cited:

(1) *Bremer Vulkan Schiffbau & Maschinenfabrik* v. *South India Shipping Corp. Ltd.*, [1981] A.C. 909; [1981] 1 All E.R. 289, observations of Lord Diplock applied.

(2) *Clough* v. *County Live Stock Ins. Assn. Ltd.* (1916), 85 L.J.K.B. 1185; 32 T.L.R. 526, applied.

(3) *Denton* v. *Legge* (1895), 72 L.T. 626; 11 T.L.R. 267, applied.

(4) *Ford* v. *Clarksons Holidays Ltd.*, [1971] 1 W.L.R. 1412; [1971] 3 All E.R. 454, applied.

(5) *Hodgson* v. *Railway Passengers Assur. Co.* (1882), 9 Q.B.D. 188, applied.

(6) *James* v. *James* (1889), 22 Q.B.D. 669; on appeal (1889), 23 Q.B.D. 12; 58 L.J.Q.B. 424.

(7) *Kitts* v. *Moore (W.) & Co.*, [1895] 1 Q.B. 253; (1894), 64 L.J. Ch. 152, applied.

(8) *Phoenix Timber Co.'s Application, Re*, [1958] 2 Q.B. 1; [1958] 1 All E.R. 815, applied.

(9) *Willesford* v. *Watson* (1873), 8 Ch. App. 473; 42 L.J. Ch. 447, observations of Lord Selborne, L.C. applied.

Legislation construed:

Arbitration Ordinance (1984 Edition), s.3: The relevant terms of this section are set out at page 269, lines 17–20.
s.6: The relevant terms of this section are set out at page 269, lines 21–24.
s.8: The relevant terms of this section are set out at page 269, lines 29–41.
s.19(1): "In all cases of reference to arbitration the court may from time to time remit the matters referred … to the reconsideration of the arbitrators or umpire."
s.20(1): The relevant terms of this sub-section are set out at page 270, lines 1–2.
(2): The relevant terms of this sub-section are set out at page 270, lines 3–5.
s.26(1): The relevant terms of this sub-section are set out at page 270, lines 7–10.
(2): The relevant terms of this sub-section are set out at page 270, lines 11–13.
s.33(1): The relevant terms of this sub-section are set out at page 270, lines 15–19.
(2): The relevant terms of this sub-section are set out at page 270, lines 20–23.
Schedule 1, para. 6: The relevant terms of this paragraph are set out at page 269, lines 25–27.

P. Caruana for the defendant;
P.J. Isola for the plaintiff.

KNELLER, C.J.: Cubiertas General Construction Co. Ltd. ("Cubiertas") by its counsel, Mr. Caruana, applies for an order staying all further proceedings in this action by Gifmac Ltd. ("Gifmac") which, by its counsel, Mr. Isola, opposes the application.

Gifmac issued its indorsed writ of summons on April 28th, 1993 against Cubiertas claiming:

"1. An injunction restraining the defendants from seeking an arbitration award in respect of certain matters set out in a notice from the defendants to the plaintiffs dated April 14th, 1993 or in respect of any other matters in dispute relating to an agreement and conditions of contract made between the plaintiffs and the defendants dated March 21st, 1990 and agreements supplemental thereto made on March 24th, 1992 and October 14th, 1992 ('the building contract').

2. A declaration that the defendants have failed to complete all variations and make good all defects which by virtue of the building contract were required to have been completed by November 30th, 1992.

3. A declaration that the plaintiffs are entitled at the cost of the defendants to complete any of the variations and make good any of the defects hereinbefore mentioned which by virtue of the building contract were required to have been completed by November 30th, 1992 and which have not been so completed and made good by the defendants.

4. An order that the defendants do forthwith complete all variations and make good all defects (excepting any variations and defects which have been completed or made good by the plaintiffs as aforesaid), which by virtue of the building contract were required to have been completed by November 30th, 1992.

5. A declaration that the plaintiffs are entitled to withhold payment of the total sum of £346,247.37 to the defendants until such time as the defendants have fully complied with the aforementioned order to the satisfaction of the project manager, the plaintiffs deducting from the said total sum any sums expended by the plaintiffs in completing any variations and making good any defects as aforesaid.

6. An injunction restraining the defendants, their servants or agents from taking out of the jurisdiction of this honourable court the said sum of £346,247.37 until such time as a certificate of completion of making good defects has been issued pursuant to the building contract.

7. Damages for breach of contract."

Cubiertas filed its acknowledgement of service on May 14th, 1993 and on June 3rd, 1993 made its application for a stay under s.8 of the Arbitration Ordinance.

This Cubiertas is a building contractor incorporated in Gibraltar and working here. Its only beneficial shareholder is Cubiertas y Mzov, one of Spain's leading construction companies. Gifmac is the leasehold owner of a site at Glacis Road in the city and is now the leasehold owner of Portland House, which Cubiertas built for it. They began with a standard form of building contract ("the principal contract") dated March 21st, 1990 prepared by the Joint Contracts Tribunal. It was amended and expanded by supplemental agreements of March 24th and October 14th, 1992.

Gifmac and Cubiertas, by cl. 41.1 of the principal contract, agreed that if either of them required a dispute or difference between them to be referred to arbitration then either of them was to give written notice to the other saying so, and then the dispute or difference would go to arbitration before an agreed arbitrator. They had 14 days after the date of the written notice to agree who should be the arbitrator and if they failed to do so either Cubiertas or Gifmac could ask the President of the Gibraltar Chamber of Commerce to appoint the arbitrator.

Disputes have arisen between the parties, so much so that Gifmac has withheld £346,247.37 from the sum which Cubiertas says is due to it. The

disputes relate to the quality of work which Gifmac required and Cubiertas achieved, the "making good" of work not in accordance with the contract, the completion of other work, the valuation of it and, of course, the withholding of moneys.

Cubiertas, through its consultant, James R. Knowles of Liverpool, sent Gifmac its written notice dated April 14th, 1993 referring the disputes to arbitration. Cubiertas nominated three UK arbitrators and asked Gifmac to choose one or send a list of their three choices. They could all be Gibraltarians as far as Cubiertas was concerned. Gifmac did neither, but in a letter dated April 28th, 1993 from its solicitors, Isola & Isola, repelled the request for arbitration and revealed its intention to begin this action, which it did the same day by issuing its writ of summons.

Gifmac's solicitors pointed out that James R. Knowles's written notice of referral to arbitration was not signed by Cubiertas or its solicitors. It did not set out clearly and unambiguously all the matters which are in dispute. Some questions that might be raised on the arbitration would be serious issues of law, so the parties' disputes should be dealt with by the courts, especially as the Arbitration Ordinance made no provision for appeal from the arbitrator's decision. Both Gifmac and Cubiertas thought there was such a right of appeal to the Supreme Court from a decision of the arbitrator. The contract was in English form and its provisions were altered to allow for such an appeal.

Meanwhile, Cubiertas is willing to do everything necessary towards the proper conduct of the arbitration and requests the court to stay Gifmac's action so that the issues between the parties can go to arbitration, just as in their contract they agreed that they would.

Cubiertas asserts that the issues in the arbitration proceedings will be:

"(a) whether all or any part of the sum of £346,247.37 has become payable by the plaintiffs to the defendants under the terms of the contract;

(b) whether the defendants are entitled to withhold payment of all or any part of the said sum of £346,247.37 from the plaintiffs;

(c) whether the defendants have completed the construction of Portland House and executed all other works agreed to be carried out under the contract to the standard and specification required by the contract or at all;

(d) whether the defendants are liable to the plaintiffs in damages or otherwise under the contracts or are liable to complete further works thereunder, and if so what works and/or amounts;

(e) whether the plaintiffs are liable to the defendants in damages for breach of the contract and interest and if so in what amount;

(f) whether the plaintiffs are liable to the defendants for the value of building works carried out on Portland House over and above that agreed in the contract and/or carried out to specifications over and above those required by the contract; and

(g) such other issues as may arise either at the behest of the plaintiffs or the defendants."

Gifmac's opposition to having its disputes with Cubiertas referred to arbitration is also rooted in the fact that Cubiertas has no business, office, directors or assets here. Its control and management is outside Gibraltar. Cubiertas y Mzov in Spain is not liable for the debts of its subsidiary, Cubiertas of Gibraltar, so if Gifmac obtained a judgment here it could not be enforced in Spain. Cubiertas abandoned the Portland House site and its obligations to Gifmac. The project manager of the development, Mr. Gwyn Owen, declares that the value of the work which Cubiertas did not do is much greater than the £346,247.37 retained by Gifmac.

Gifmac also points out that under the contract, Cubiertas had to provide a performance guarantee for 10% of the contract sum during the construction of Portland House and then a bank guarantee for 5% of the contract sum to cover the defects liability period, but never did so. Gifmac therefore has no protection if it is successful in the action or the arbitration proceedings because Cubiertas provided no security as it was required to do under the contract and is no longer at work in Gibraltar.

Cubiertas takes up certain points in Gifmac's account of their relationship. It was Gifmac and its professional advisers who produced the contract and, as a result of negotiations, amendments were made to it. They were the ones who suggested and asked for the amendments to cl. 41. None of Cubiertas's directors has ever lived in Gibraltar. Cubiertas is not building anything in Gibraltar now, having completed all its other contracts, but it has tendered for building works such as the Europa Point Mosque.

Gifmac alleges that Cubiertas has not complied with the contract and Cubiertas claims that it has. This is the reason for going to arbitration. Cubiertas had to remedy certain defects which Gifmac set out in its notice of August 25th, 1993 and since the contractual period for doing so had not ceased in mid-September 1993, Cubiertas had not breached the contract on that score. It had not abandoned the site. Furthermore, the cost of rectifying the defects would not exceed the moneys Gifmac retained.

So much for the background to the application. I turn to the agreement. According to art. 5 of the parties' contract—

"if any dispute or difference as to the construction of the contract or any matter or thing of whatever nature arising under it or in connection with it arises between Gifmac or its architect on its behalf and Cubiertas either during the progress or after the completion or abandonment of the works or after the determination of Gifmac's employment of Cubiertas the dispute or difference matter or thing shall be and is hereby referred to arbitration in accordance with cl. 41 [of the contract]."

The machinery for asking for a dispute or difference to be referred to arbitration is set out in cl. 41 of the contract.

One of its sub-clauses is cl. 41.6, which reads thus:

"The parties hereby agree and consent, pursuant to the Arbitration Ordinance, that either party—

(a) may appeal to the Supreme Court on any question of law arising out of an award made in an arbitration under this Arbitration Agreement; and

(b) may apply to the Supreme Court on any question of law arising in the course of the reference;

and the parties agree that the Supreme Court should have jurisdiction to determine any such question of law."

Subject to that right of appeal, the arbitrator's award is final and binding on Gifmac and Cubiertas, according to cl. 41.5. Clause 41.7 specifies that the proper law of the contract is the Law of Gibraltar and the provisions of the Arbitration Ordinance ("the Ordinance") shall apply to it.

Gifmac and/or Cubiertas referred to the following provisions in the Ordinance. Section 3 reads: "An arbitration agreement, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the court and shall have the same effect in all respects as if it had been made an order of court."

Section 6 reads: "An arbitration agreement, unless a contrary intention is expressed therein, shall be deemed to include the provisions set out in Schedule 1, so far as they are applicable to the reference under the arbitration agreement."

Schedule 1, para. 6 reads: "The award to be made by the arbitrator(s) or umpire shall be final and binding on the parties and the persons claiming under them respectively."

Section 8 reads:

"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 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."

(Section 4 of the Arbitration Act 1950 is in similar terms. Acknowledgement of service is construed as appearance under the Rules of the Supreme Court, O.12, r 10.)

Section 20 of the Ordinance reads:

"(1) Where an arbitrator or umpire has misconducted himself or the proceedings, the court may remove him.

(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the court may set the award aside."

Section 26 reads:

"(1) Subject to rules of court and to any right to have particular cases tried by a jury, the court may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee.

(2) The report of an official or special referee may be adopted wholly or partially by the court, and if so adopted may be enforced as a judgment or order to the same effect."

Section 33 reads:

"(1) An arbitrator or umpire may, and shall if so directed by the court, state—

(*a*) any question of law arising in the course of the reference; or

(*b*) an award or part of an award,

in the form of a special case for the decision of the court

(2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be directed by the court to be stated, notwithstanding that proceedings under the reference are still pending."

(The Arbitration Act 1979 has abolished this procedure by way of case stated.)

No decisions of any Gibraltar court on the issues in this action were cited and I have found none. The UK decisions that were submitted, or which I have culled, in my most respectful view constitute good law and I shall apply them. They include the following.

Gifmac must show that the dispute ought not to be referred to arbitration. If it cannot show some sufficient reason why the arbitration ought not to proceed, the court will assume there is no such reason: see *Hodgson* v. *Railway Passengers Assur. Co.* (5).

The court has a discretion to exercise under s.8 of the Ordinance and it is the *prima facie* duty of the court to act upon the agreement: see *Willesford* v. *Watson* (9) (8 Ch. App. at 480, *per* Lord Selborne, L.C.) and *Denton* v. *Legge* (3).

A provision in an arbitration agreement clause providing that the decision of the arbitrator should be "accepted by all parties as final" does not oust the jurisdiction of the court and affords no grounds for refusing a stay: see *Ford* v. *Clarksons Holidays Ltd.* (4).

The fact that the reference to arbitration involves difficult questions of law or is of a nature eminently suitable for trial in this court is not a sufficient ground for refusing to stay the action (see *Re Phoenix Timber Co.'s Application* (8)), unless it would be better to have them argued in this court (*Clough* v. *County Live Stock Ins. Assn. Ltd.* (2)).

Leave will be granted only very exceptionally to revoke a submission to arbitration under s.3 of the Ordinance on the ground that the arbitrator has made a mistake of law not amounting to excess of jurisdiction, refused jurisdiction, or not done something that part of his jurisdiction required him to do: see *James* v. *James* (6) (22 Q.B.D. at 673–674). The old rule of practice was that parties submitting to a reference took the arbitrator with his law, good or bad, for better or for worse.

If one party to the arbitration agreement can persuade the court it was void or voidable *ab initio*, by reason of fraud, mistake, *ultra vires*, or want of authority, it will accede to its application for an injunction restraining the other party from seeking an arbitration award: see *Kitts* v. *W. Moore & Co.* (7) and *Bremer Vulkan Schiffbau & Maschinenfabrik* v. *South India Shipping Corp. Ltd.* (1) ([1981] A.C. at 980–981, *per* Lord Diplock).

Mr. Caruana submitted that the arbitration agreement was valid, a dispute had arisen, Gifmac had served its writ, Cubiertas had acknowledged its service and was ready and willing to take all the necessary steps for this arbitration and so it asked for a stay.

Mr. Isola outlined the complex facts in the troubles that beset the parties but asserted that there were considerable matters of law and mixed fact and law involved. The Ordinance did not provide for judicial review, as the Arbitration Act 1979 did. Moreover, there was no right of appeal to the Supreme Court from the arbitrator's decision. The parties intended that there should be such a right, as the amendments to cl. 41 showed, but it was impossible to give effect to that, so the arbitration agreement was null and void. The parties could not by their agreement confer such a right on the Supreme Court.

Under s.33(1) of the Ordinance, "an arbitrator … may, and shall if so directed by the court, state (a) any question of law arising in the course of the reference; or (b) an award or part of an award, in the form of a special case for the decision of the court." Under s.33(2): "a special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be directed by the court to be stated, notwithstanding that proceedings under the reference are still pending."

Mr. Isola summed that up by saying: "Once the arbitrator makes an award he is *functus officio*."

Gifmac could apply to the court for revocation of the arbitration agreement under s.3 of the Ordinance or for the removal of the arbitrator if he misconducts himself during the arbitration. But the parties here, Mr. Isola continued, entered into this arbitration agreement believing they could appeal from the decision of the arbitrator even when he had made his award, which was a mutual mistake. This was a good and sufficient reason for not granting a stay.

In reply, Mr. Caruana was at pains to reassure Mr. Isola that Gifmac had more right to come to this court with regard to this arbitration, if there were

to be one, than he thought. There was provision for the statement of a special case for the decision of this court on a question of law arising in the course of the reference or an award or part of an award. This was tantamount to a right of appeal on an award or part of an award. The Arbitration Act 1979 did away with such special cases stated in the United Kingdom.

The court has power to remit an award for reconsideration or set it aside for misconduct by the arbitrator or because the award has been improperly procured: ss. 19 and 20 of the Ordinance.

The provisions to be implied in arbitration agreements under Schedule 1, para. 6 of the Ordinance include this: "The award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them." But s.6 expressly states that this is so unless a contrary intention is expressed in the arbitration agreement, which was so expressed in this agreement in cl. 41.6.

Dealing with other points in Mr. Isola's submissions, Mr. Caruana pointed out that Gifmac entered into this £7m. building contract with Cubiertas when its directors did not live in Gibraltar and it had no assets here, and it was unclear why these factors should now disturb Gifmac. This court had power under s.32, Schedule 2, para. 1 to make orders for security for costs.

The complaints that James R. Knowles's written notice by Cubiertas's directors of referral to arbitration was not signed by Cubiertas or its solicitors and that it did not set out clearly or unambiguously all the matters in dispute are not, in my view, of sufficient weight to deprive Cubiertas of the orders it seeks. The issues have now been drafted in a clear enough form by Cubiertas.

The principal contract was amended so that its provisions allow for an appeal to the Supreme Court and thus the parties, by expressing a contrary intention, excluded the Schedule 1, para. 6 provision that the award made by the arbitrator "shall be final and binding on the parties and the parties claiming under them."

Difficult questions of law are not likely to arise in the arbitration, but if they do Gifmac can apply for a case stated on a question of law in the course of a reference.

I am not persuaded that the agreement was void or voidable *ab initio*.

It is *prima facie* the duty of this court to act upon this agreement when exercising its discretion under s.8 of the Ordinance. Gifmac has not shown any sufficient reason why arbitration should not proceed, so, in the exercise of its discretion, the court orders that all further proceedings in this action be stayed pursuant to s.8 of the Ordinance.

If the parties cannot agree the order as to costs this matter may be listed for submissions before me in Chambers. It may be that 2 *The Supreme Court Practice 1993*, para. 5720, at 1746 and the authorities cited there will help them in their deliberations.

Proceedings stayed.
