QUEENSWAY QUAY DEVELOPMENT COMPANY LIMITED v. INTERCON CONSTRUCAO INTERNACIONAL A.C.E.

SUPREME COURT (Pizzarello, A.J.): April 22nd, 1996

Civil Procedure—costs—security for costs—may order security under Rules of Supreme Court, O.23, r.1(1)(a) against party resident in and national of another Member State of European Community, despite prohibition on discrimination on ground of nationality in E.C. Treaty, art. 6—may only order security if cogent evidence of substantial difficulty in enforcing award

The applicant sought security for its costs in its arbitration proceedings with the respondent.

The applicant, a Gibraltar development company, entered into a contract with the respondent, a Portuguese construction consortium, to build a substantial development in Gibraltar. This stipulated that (a) Gibraltar law applied to the contract, in particular, the provisions of the Arbitration Ordinance from time to time in force; and (b) provided for arbitration to be conducted in accordance with the Rules of the International Chamber of Commerce. Differences arose between the parties which were referred to arbitration. The applicant made the present application to the Supreme Court for an order for security for its costs in the arbitration proceedings.

It submitted that (a) because the respondent was resident outside the jurisdiction, by O.23, r.1(1)(a) of the Rules of the Supreme Court, which applied by virtue of s.32(1) and Schedule 2 of the Arbitration Ordinance, the court had a discretion to order security and in the circumstances of the case, should make such an order because the respondent was impecunious and it would be extremely difficult to enforce any award made against it; (b) because the application of O.23, r.1(1)(a) was based on residence and not on nationality, an order made under it was not precluded against the respondent by art. 6 of the E.C. Treaty, which prohibited discrimination against a national of a Member State of the European Community on grounds of nationality; furthermore, because Gibraltar was not a party to the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, it could not be assumed that any award made against the respondent would be enforceable in Portugal, as it would be if Gibraltar were a party to that Convention and accordingly, the rationale of non-discrimination against nationals of Member States did not apply in the

present case; and (c) the conclusion that an order for security was appropriate in the present circumstances was a matter of Gibraltar law, which was explicitly made the law governing the contract between the parties, and it was irrelevant that to order security for costs might be rare in international arbitrations.

The respondent submitted in reply that (a) there was no doubt that it was able to meet any award made against it and security for costs was therefore inappropriate; (b) to award security against it on the ground that it was not resident in Gibraltar was in breach of art. 6 of the E.C. Treaty, by which all discrimination on grounds of nationality was prohibited: O.23, r.1(1) of the Rules of the Supreme Court, whilst creating a test based on residence rather than nationality, nevertheless indirectly discriminated against foreign nationals and did not therefore apply in relation to residents in and nationals of other Member States of the European Community; and (c) in any case, the parties' choice of the Rules of the International Chamber of Commerce showed an intention to be bound by the procedures governing international arbitrations and in such circumstances, domestic rules on security for costs were inappropriate; in international arbitrations, security was only allowed in exceptional circumstances which did not exist here.

Held, ordering security for the applicant's costs:

An order under O.23, r.1(1)(a) fell within the scope of the prohibition in art. 6 of the E.C. Treaty on discrimination against a national of a Member State of the European Community on the ground of nationality; furthermore, that sub-paragraph entailed an indirect form of discrimination against a party which was a national of and resident in another Member State. Taking this proposition in conjunction with the non-applicability of the Brussels Convention to Gibraltar, the proper rule was that the court retained the discretion to order security against such a party but should never do so unless there were cogent evidence that there would be substantial difficulty in enforcing an award, which was the case in the present proceedings. The application would accordingly be granted (page 278, line 22 – page 279, line 40).

Cases cited:

(1) *Berkeley Admin. Inc.* v. *McClelland*, [1990] 2 Q.B. 407; [1990] 1 All E.R. 958.
(2) *Coppée Lavalin N.V. (S.A.)* v. *Ken-Ren Chemicals & Fertilizers Ltd.*, [1995] 1 A.C. 38; [1994] 2 All E.R. 449, considered.
(3) *Fitzgerald* v. *Williams*, [1996] Q.B. 657; [1996] 2 All E.R. 171, applied.
(4) *Mund & Fester* v. *Hatrex Intl. Transp.*, [1994] E.C.R. I–467; [1994] T.L.R. 175, applied.
(5) *Parkinson (Sir Lindsay) & Co. Ltd.* v. *Triplan Ltd.*, [1973] Q.B. 609; [1973] 2 All E.R. 273, considered.

(6) *Porzelack K.G.* v. *Porzelack (UK) Ltd.*, [1987] 1 W.L.R. 420; [1987] 1 All E.R. 1074, considered.

Legislation construed:

Arbitration Ordinance (1984 Edition), s.32(1): The relevant terms of this sub-section are set out at page 274, lines 15–18.

European Communities Ordinance (1984 Edition), s.3(1): The relevant terms of this sub-section are set out at page 275, lines 35–43.

Rules of the Supreme Court, O.23, r.1(1): The relevant terms of this paragraph are set out at page 274, lines 24–28.

Treaty Establishing the European Community (Rome, March 25th, 1957; UK Treaty Series 29 (1996)), art. 6, as amended by the Treaty on European Union (Maastricht, February 7th, 1992; UK Treaty Series 12 (1994)), art. G(8): The relevant terms of this article are set out at page 275, lines 30–33.

D. Thomas and *L.E.C. Baglietto* for the applicant;
T. Elliott and *L.W.G.J. Culatto* for the respondent.

PIZZARELLO, A.J.: The applicant in this matter seeks security for costs in the matter of arbitration proceedings which are being held in London. The arbitrators have been agreed and Dr. John Luff, Q.C. is chairman of the Tribunal.

The arbitration arises out of a dispute between the applicant, which conceived the development known as Queensway Quay, a property in Gibraltar, and the respondent, which was contracted by the applicant to build the same. The applicant is a company incorporated in Gibraltar and is a joint venture between the Government of Gibraltar and Taylor Woodrow International Ltd. The respondent is a construction company and is a consortium of Portuguese companies. It is itself a Portuguese entity and therefore resident outside of Gibraltar with its own legal identity. The parties entered into a JCT contract on October 25th, 1990. The respondent ceased to operate in Gibraltar in 1993.

The arbitration proceedings were commenced in August 1995 by the respondent. It had taken them two years to commence proceedings and produce the statement of case. There are 15 lever-arch files involved in its confection and there are some 40 more files which may have to be perused. The arbitration agreement is contained in cl. 41 of the agreement dated October 25th, 1990. Gibraltar law applies and the arbitration is brought under the Rules of the International Chamber of Commerce, Paris, as provided in the arbitration agreement. The applicant has to meet a very detailed and voluminous case: the answer is expected to be ready in June 1996 and it is obvious that both parties are incurring very substantial costs.

The parties have agreed that the Supreme Court of Gibraltar has jurisdiction to hear this application. The jurisdiction of the court is conceded by the respondent for the purpose only of this application as it (and everyone else) does not wish to lose time. It is not agreed that the court has jurisdiction to order that security be given.

For the applicant, it is argued that by virtue of cl. 41.7 of the contract, the Arbitration Ordinance in force from time to time applies. Clause 41.7 reads:

> "*Laws of Gibraltar*. The law of Gibraltar shall be the proper law of this contract and in particular the provisions of the Arbitration Ordinance in force from time to time shall apply to any arbitration under this contract wherever the same, or any part of it, shall be conducted."

Section 32(1) of the Arbitration Ordinance states:

> "The court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of any of the matters set out in Schedule 2 as it has for the purpose of and in relation to an action or matter in the court. . . ."

Schedule 2 is entitled "Matters in respect of which the Court may Make Orders" and as item 1 there appears "Security for costs." Therefore, it is submitted, the court has jurisdiction to make an order for costs.

The respondent is resident out of the jurisdiction and so O.23, r.1(1)(a) of the Rules of the Supreme Court applies. Order 23 applies to Gibraltar and r.1 provides: "Where . . . (a) . . . the plaintiff is ordinarily resident out of the jurisdiction . . . then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give security for the defendant's costs of the action or other proceedings as it think fit."

It is submitted by counsel for the applicant that clearly this court has jurisdiction to order costs in its discretion and the court should exercise its discretion in favour of the applicant because (a) the respondent is impecunious; (b) an award against it will be difficult to enforce; and (c) the respondent is being funded by a third party, albeit that the party funding it is one of the constituent members of the legal entity by which the respondent is known. It is conceded that this third party is a substantial company, but, it is said, it is in the construction business and might not be as affluent in the days to come. Counsel took me through such of the evidence that shows that the respondent will be unable to meet the applicant's costs out of its own resources, and also took me through the evidence supporting his admission that there would be difficulties encountered in enforcing an award of costs. Further proceedings would have to be taken to recover costs in the event that the applicant succeeds; these further proceedings might take 2 to 3 years and at best about a year, and they might raise their own difficulties were other defences to be put forward. Counsel reminded me that the Brussels Convention (Convention

of Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels, September 27th, 1968; O.J. 1978, L. 304/77)) does not extend to Gibraltar.

Counsel then proceeded to look at the factors which the court has to bear in mind in the exercise of its discretion and he referred to *Sir Lindsay Parkinson & Co. Ltd.* v. *Triplan Ltd.* (5) in this regard. He acknowledged that this case referred to a situation governed by the Companies Act, but that nevertheless the matters mentioned therein were a useful guide. It is relevant, he submits, that in the actual case before this court, the respondent does not allege that the application is made oppressively to stifle a genuine claim, nor that the respondent's impecuniosity has been caused by the applicant, nor that security would be unduly burdensome, to wit their offer of £½m. security forthwith, while appreciating that the offer is made under certain conditions.

Counsel went on to consider the discriminatory nature of this application in relation to European law in anticipation of the respondent's submission that art. 7 of the E.E.C. Treaty (now art. 6 of the E.C. Treaty, as amended) is applicable and submitted that the case of *Fitzgerald* v. *Williams* (3) does not apply, once again because Gibraltar is not a party to the Brussels Convention.

For the respondent, Mr. Elliott confirmed that the respondent accepted jurisdiction for this matter only for reasons of speed and efficiency as the respondent perceived that the applicant was dragging its feet. Mr. Elliott further conceded that there is no dispute that this application for security is properly made under O.23, r.1(1)(a) and that under it the test is whether it is "just to do so." But if O.23, r.1(1)(a) is put aside then the court would have no jurisdiction. He draws my attention to art. 6 of the E.C. Treaty. This applies to Gibraltar by virtue of s.3 of the European Communities Ordinance.

Article 6 of the E.C. Treaty, as far as is relevant, reads: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

Section 3(1) of the European Communities Ordinance reads:

> "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in Gibraltar, shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable community right' and similar expressions shall be read as referring to one to which this subsection applies."

Mr. Elliott submits that the distinction suggested between the different situations in the United Kingdom and Gibraltar as regards the Brussels

Convention in relation to the *Fitzgerald* case as it affects the instant case is not sound, because it is art. 6 which is important and whatever the distinction between the United Kingdom and Gibraltar in so far as the Convention affects the matter, the *Fitzgerald* decision is in point and applies to Gibraltar. The central point was made by Bingham, M.R. where he said ([1996] Q.B. at 675):

> "The answer compelled by the Mund case in my view is: the English court should never exercise its discretion under the rule to order security to be given by an individual plaintiff who is a national of and resident in another member state party to the Convention, at any rate in the absence of very cogent evidence of substantial difficulty in enforcing a judgment in that other member state."

As I understand Mr. Elliott, he submitted that the logical consequence of that judgment is that where E.C. countries are concerned, the situation is as if no O.23, r.1(1)(a) existed and therefore the court has no jurisdiction to order security.

In the alternative, if the court were against him on his submission under art. 6 of the E.C. Treaty and held that O.23 applied and therefore the court had a discretion, then that discretion could be approached in two ways in this case. First, by way of cl. 41.7 and, secondly, by way of cl. 41.9 of the arbitration agreement. I have already set out cl. 41.7. Clause 41.9 reads: "Arbitration shall be conducted in accordance with the rules of the International Chamber of Commerce." It is submitted further that this is truly an international arbitration and therefore to deal with this matter in the same manner as a domestic court does its own matters is mistaken and he submits that this court should take the latter route and move away from the more domestic connotation which the first approach yields. The parties have willingly undertaken to enter into an arbitration process in the manner agreed in cl. 41.9 of the arbitration agreement. Therefore this application has to be dealt with under cl. 41.9 and security can be ordered only if there are exceptional circumstances. In the instant case, the case of *S.A. Coppée Lavalin N.V.* v. *Ken-Ren Chemicals & Fertilizers Ltd.* (2) applies and as was said there, the choice of the I.C.C. gives an unmistakable signal and the choice of the arbitration is an indication that the parties are looking for a relationship with a particular national court which is less closely coupled with the parties than would otherwise be the case (notwithstanding that Gibraltar law applies to the agreement). The court should attach significance to the fact that in the international arbitration community, security for costs is very much a minority measure. It is submitted that Lord Mustill's guidelines are acceptable and it is important to identify the kind of arbitration procedure which the parties have envisaged and, in particular, to have regard to the particular type of arbitration in the course of which the application is brought, because a consequence of the order for security is that it is followed by a stay of the very proceedings which the parties have agreed

to. Counsel submits that in the circumstances of this case, where the I.C.C. Rules apply and, in particular, having regard to the provisions of art. 8(5) of the I.C.C. Rules, it is only in exceptional circumstances that security for costs should be given.

As to the court's exercise of its discretion, counsel points out that residence outside the jurisdiction is a pre-condition only and not itself a reason to order security. This was said by Lord Slynn in the *Ken-Ren* case. The court should not look into the merits of the matter: see the case of *Porzelack K.G.* v. *Porzelack (UK) Ltd.* (6). Enforcement presents no difficulty having regard to the New York Convention. As to Intercon's ability to pay, there is no doubt that the applicant will get its costs if there is an award in its favour. To say that Intercon is impecunious is not right. To start with, this will depend on the decision of the arbitrators and secondly, even if it loses, there are a number of companies behind Intercon which are solvent and there is a legal liability on the part of each of the constituent companies to pay any such award even if they have not specifically agreed or bound themselves to do so. Motta, one of the constituent companies, has assets amounting to £580m. and it is unlikely to go under even though one of the minor constituents of Intercon has gone bankrupt. It is to be noted that in the *Ken-Ren* case, the Government of Kenya had no legal liability to pay and did not accept that it should pay the costs of the arbitration: this was a critical point. As far as the submission that further defences might be addressed, it is submitted that this is fanciful: after two years' preparation of Intercon's case, nothing further can possibly be brought up. As to time, counsel's submission was that at worst the evidence before the court is any period from 12 months to 2–3 years and time is not a difficulty but only an annoyance. If the applicant wants its costs straight away, the answer is that this is not a domestic arbitration but an international one and different considerations apply. If security is ordered, this will be most unusual. Security was ordered in the *Ken-Ren* case but that was a case of very exceptional circumstances.

Mr. Thomas replied and elaborated on his opening. On the art. 7 point, he drew my attention to the following passage from *Fitzgerald* v. *Williams* (3) ([1996] Q.B. at 671):

> "The question is whether they have rights in Community law which this court must respect by holding that it has no jurisdiction to make an order for security against them, or if it continues to have jurisdiction, by refraining from the exercise of its discretion to make an order against them."

He submits that in that case, the situation was that parties were resident in Member States which were parties to the Brussels Convention and, as the Convention does not apply to Gibraltar, it is clear that there is jurisdiction in this court to order security for costs and I should not refrain from the exercise of my discretion to make an order against Intercon. And, he submits, if the court is not with him then there are substantial difficulties

in enforcing an award of costs and so the jurisdiction remains even on the authority of *Mund & Fester* v. *Hatrex Intl. Transp.* (4), in which the European Court accepted that a presumption of difficulty in enforcing a judgment was not justified where a plaintiff who was a national of a Member State, a party to the Convention, was involved, the emphasis being on the Convention. There is cogent evidence of difficulties: (a) dispute among Portuguese lawyers; (b) further proceedings which will take time; and (c) other defences which may arise, and so this court has a discretion which the Court of Appeal retained. In so far as the court's discretion is concerned, the *Ken-Ren* case is quite distinguishable. There, the I.C.C. Rules applied and there was no connection with England. Here there is: the place of performance was Gibraltar, the law of Gibraltar applies to the contract and that is the unmistakeable signal here. And surely the particular type of arbitration in the course of which the application is sought is one as outlined by Lord Mustill, in which the approach of the national court to the grant of interim relief should be conditioned to an important extent by the degree to which the particular remedy encroaches on the agreement that the arbitrators shall be the sole judges of the merits; here one does not encroach on the merits of the arbitration and so a stay would not present or result in problems. Such were the submissions, as I understood them, of counsel.

Applying the judgment of the Master of the Rolls in *Fitzgerald*, I ask myself (i) does O.23, r.1(1)(a) fall within the scope of the Treaty provisions? The answer in Gibraltar must be "Yes"; and (ii) do arts. 6 and 220 of the E.C. Treaty confer rights directly enforceable in Member States following legislative implementation of the Convention? The Master of the Rolls answers the question in the affirmative but Gibraltar is not a party to the Convention and so it seems to me that what follows from *Mund & Fester* (4) and *Fitzgerald* (3) does not necessarily bind me as the situation is radically different. And my reaction to the question in the first instance is that the answer is "No." However, on further consideration, it is right to point out that notwithstanding that the Convention is not in force in Gibraltar, the answer might be in the affirmative, as indeed the trial judge held in *Berkeley Admin. Inc.* v. *McClelland* (1). The judge was overruled by the Court of Appeal, which concluded that O.23, r.1(1)(a) related to residence and not to nationality. So I consider this aspect.

The judgment of the Master of the Rolls in *Fitzgerald* is a strong and pursuasive precedent which in my opinion I should follow. English practice and procedure are followed in this court unless they are repugnant to any Ordinance or rules and the *Fitzgerald* case as I understand it is something more. It was dealing with E.C. law. It was reviewing previous cases which had rested their judgments on the conclusion that O.23, r.1(1)(a) related to residence and not to nationality and thus did not discriminate on the grounds of nationality so as to contravene art. 7 (now art. 6) of the E.C. Treaty. The effect of *Mund &*

Fester v. *Hatrex Intl. Transp*. (4) and *Fitzgerald* (3) is that in England, O.23, r.1(1)(a) entailed a covert form of discrimination. It is a matter of law. Is there any reason why the Gibraltar courts should not follow suit in law and practice? I do not think so. The judge in the *Berkeley* case (1), as I said before, appears to have been of that view irrespective of the Convention and ruled that he had no jurisdiction to order security. So the answer to question (ii) is "Yes." Nevertheless, the Court of Appeal in *Fitzgerald* did not strike out O.23, r.1(1)(a). The Master of the Rolls considered certain propositions and the differences between O.23, r.1(1)(a) and para. 917(2) of the German Code of Criminal Procedure and said ([1996] Q.B. at 675):

> "The rule differs from para. 917 in two important respects: first, it contains no explicit presumption that a judgment will be more difficult to enforce abroad; secondly, it does not impose an obligation on the court to make an order where the condition for making an order is satisfied but confers a discretion. Since, however, if the foregoing reasoning is correct, a plaintiff suing in England who is a national of and resident in another member state party to the Convention has a Community right which a national court must protect not to be the subject of discrimination on grounds of nationality, it is necessary to ask whether any modification of English law or practice is called for to protect that right. The answer is compelled by the Mund case in my view: the English court should never exercise its discretion under the rule to order security to be given by an individual plaintiff who is a national of and resident in another member state party to the Convention, at any rate in the absence of very cogent evidence of substantial difficulty in enforcing a judgment in that other member state."

I see no reason why I should not follow that judgment. There is a discretion: the discretion should never be exercised where the plaintiff is a national of and resident in a Convention country, save where there is cogent evidence of substantial difficulty in enforcing a judgment. In the present case, there are two differences of note from the *Fitzgerald* case: (a) the Convention does not apply to Gibraltar; and (b) the allegation that there will be substantial difficulty in enforcing a judgment in that other Member State.

I am of the opinion that the plaintiff has shown that there will be difficulty in enforcing the judgment. I do not think that a year's wait can be tolerable even for an international arbitration and in my discretion I will order security for costs.

[The learned judge then considered the quantum of the security to be given and made a ruling accordingly.]

Security ordered.
