AGROMAN (GIBRALTAR) LIMITED v. GIBRALTAR HOMES LIMITED

SUPREME COURT (Schofield, C.J.): February 21st, 1997

Conflict of Laws—parallel foreign proceedings—injunction against foreign proceedings—court may restrain party from bringing foreign proceedings even if no proceedings in Gibraltar, but discretion rarely used and with considerable caution—no injunction if proposed action not unconscionable or oppressive, even if, e.g. risk of duplicating Gibraltar arbitration proceedings—normally left to foreign court to control own procedure, if has power to make appropriate orders

The plaintiff sought to restrain the defendant from enforcing a guarantee under a building contract pending the outcome of arbitration.

The parties entered into a building contract under which the plaintiff, the contractor, gave a number of retention guarantees to the defendant, the employer, instead of the defendant's retaining moneys in respect of each phase of the construction work. Disputes arose between the parties which were referred to arbitration, but the defendant nevertheless threatened to call upon the guarantees. The plaintiff then obtained interlocutory injunctions from the Supreme Court (Schofield, C.J.) to restrain the defendant from doing so pending the outcome of the arbitration proceedings.

The plaintiff's obligations under the building contract were also guaranteed by the plaintiff's parent company, that guarantee being expressed to be subject to English law. The defendant also threatened to call on this guarantee and the plaintiff's parent company made the present applications to the Supreme Court for (a) leave for it to be joined as a party to the present proceedings; and (b) an interlocutory injunction restraining the defendant from calling on the guarantee pending the outcome of the arbitration.

It submitted that (a) for the defendant to call successfully on the guarantee, it would have to initiate proceedings in England, in which it would have to prove matters that were the subject of the arbitration proceedings: this would be an unnecessary duplication of expenses and would risk the possibility that the English court and the arbitrator would make inconsistent findings; and (b) this situation should be avoided as far as possible and, as a matter of policy, the court should therefore restrain the defendant from taking this action.

The defendant submitted in reply that (a) the issues raised in proceedings in England would not be identical to those before the arbitrator and it would be unconscionable to prevent it from raising these

matters in pursuit of its rights under the guarantee; and (b) making the order sought would effectively amount to restraining the defendant from bringing proceedings in England, which would not be appropriate in the present case; moreover, it would be for the English court to make such an order if it were necessary to avoid unnecessary duplication of proceedings and since there was no reason why the English court would be unable to deal effectively with this matter, the Gibraltar court should not interfere.

Held, dismissing the applications:

Although there was nothing wrong in principle with granting an injunction to restrain a party from bringing proceedings in a foreign jurisdiction even though there were no proceedings in Gibraltar, the court's discretion to do so should be exercised with very considerable caution and only in a rare case. It should normally be left to the foreign court to control its own procedure and in this case there was nothing to prevent the English court from issuing an injunction pending the outcome of the arbitration—and it would be for the plaintiff's parent company to make the submissions before the English court which it had made here. For this reason and because it would not be unconscionable or oppressive for the parent company to pursue its rights under the guarantee, which might in any case not be the same as the rights in issue in the arbitration, the injunction would not be granted (page 61, line 12 – page 62, line 3).

Cases cited:

(1) *Airbus Industrie GIE* v. *Patel*, [1997] 2 Lloyd's Rep. 8; [1997] CLC 197; (1996), 140 Sol. Jo. (L.B.) 214, distinguished.

(2) *British Airways Bd.* v. *Laker Airways Ltd.*, [1985] A.C. 58; [1984] 3 All E.R. 39; [1984] 1 LMCLQ 563; [1985] E.C.C. 49; (1984), 128 Sol. Jo. 531, considered.

(3) *McAlpine (Alfred) Constr. Ltd.* v. *Unex Corp. Ltd.* (1994), 70 BLR 26; 38 Con LR 63, considered.

J.P. Wadsworth, Q.C. and *J.S. Canepa* for the plaintiff;
A.V. Stagnetto, Q.C. and *G.C. Stagnetto* for the defendant.

SCHOFIELD, C.J.: The parties entered into a contract on April 20th, 1990 for the construction by the plaintiff ("Agroman") of 778 low-cost housing units at Westside, Gibraltar. In accordance with the terms of that contract, three performance bonds, one in respect of each of three phases of the project, were deposited by Agroman. In due course, Agroman deposited with the defendant ("GHL") three retention guarantees to replace those bonds. GHL has released the performance bonds deposited in respect of the first two phases of the work but failed to release the bond in respect of the third phase. None the less, GHL has undertaken not to call on that bond.

The three retention guarantees, which replaced the usual requirement for GHL to hold back retention moneys in respect of each phase of the work carried out, were issued by Banco Español de Credito S.A. Disputes have arisen between the parties which, in accordance with the terms of the contract between them, have been referred to arbitration. Be that as it may, GHL threatened to call on the retention guarantees and this suit was filed by Agroman seeking orders from this court preventing GHL from so doing pending the outcome of the arbitration. On June 6th, 1996, I made orders of an interlocutory nature restraining GHL from calling on the three guarantees pending the outcome of the arbitration proceedings or further order.

Agroman is a subsidiary company of Agroman Empresa Constructora S.A. ("AEC"), a company registered in Spain. On July 13th, 1989, AEC issued a parent-company guarantee ("the guarantee") to cover all of Agroman's obligations under the contract executed between the parties on April 20th, 1990. The guarantee is expressly stated to be subject to the laws of England and Wales. GHL has threatened to call on the guarantee which will, says Agroman, open issues before the English courts on the guarantee which are identical to those raised in the arbitration. It is Agroman's case that any call on the guarantee should await the outcome of the arbitration proceedings.

There are two summonses now before me. AEC is not a party to these proceedings, so it has issued a summons pursuant to O.15, r.6(2) of the Rules of the Supreme Court seeking leave to be joined in the proceedings. AEC also seeks interlocutory orders restraining GHL from calling on the guarantee pending the outcome of the arbitration, and consequential orders for leave to re-amend the originating summons in this action to encompass the questions arising on the call on the guarantee. These applications stand or fall together.

AEC's case is that the guarantee is a conditional guarantee. Clause 1 of the document sets out that condition and is the only clause which needs to be recited:

> "If [Agroman] (unless relieved from performance by any clause of the contract or by statute or by the decision of any tribunal of competent jurisdiction) in any respect fails to perform and observe the contract or commits any breach of its obligations thereunder the guarantor will assume all the company's obligations under the contract or at the employer's option indemnify the employer against all losses, damages, costs and expenses which may be incurred by the employer by reason of any default on the part of the company in performing and observing the agreements and provisions on their part contained in the contract."

It is therefore, contends AEC, necessary for GHL to show that Agroman has failed to perform or observe the contract or has committed a breach of its obligations thereunder before it can call on the guarantee. This GHL

has not sought to do and, indeed, for it to mount a successful call on the guarantee in the English courts, it would have to prove those matters which are in issue in the arbitration proceedings. For GHL to mount proceedings in England would involve a duplication of proceedings and a risk of inconsistent findings in the English courts and in the arbitration proceedings. For these reasons, AEC seeks to be brought into these proceedings and to restrain GHL from calling on the guarantee until the arbitration award is made.

A similar situation to the one facing this court occurred in the English case of *McAlpine (Alfred) Constr. Ltd.* v. *Unex Corp. Ltd.* (3). The plaintiff, McAlpine, was employed by Panatown Ltd. to construct an office building and multi-storey car park. The defendant, Unex, entered into a parent-company guarantee which was in similar terms to the guarantee entered into by AEC in this case. Disputes arose between McAlpine and Panatown which were referred to arbitration but before the conclusion of the arbitration proceedings, McAlpine sought to enforce the parent-company guarantee by commencing proceedings before the official referee. Unex applied for a stay of the action. The official referee refused the stay and the matter reached the Court of Appeal.

This passage from the judgment of Evans, L.J. sets out, I think, the position which arises in the case before me (70 BLR at 32):

> "There is no arbitration clause in the Parent Company Guarantee and Mr. Christopher Thomas Q.C. for Unex, as I understand his submissions, does not suggest that there is any binding arbitration agreement between these two parties, McAlpine and Unex. Nor does he suggest that obtaining an award against Panatown is a condition precedent to McAlpine's right to bring proceedings against Unex under the guarantee. If that was the case, no such award having been obtained, then McAlpine would have no cause of action against Unex, and the action could be struck out on that ground. His submission is that the action, which is properly brought, should be stayed until such time as the arbitrator's awards have determined the contractual liabilities, if any, of Panatown under the construction contract.
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> From a practical point of view, the submission has much to commend it. If the application fails and the action proceeds to trial, then after a doubtless long and expensive hearing the court will be required to decide issues which are substantially the same as those which McAlpine and Panatown have referred to arbitration. The costs will be duplicated and there is a risk of inconsistent results. That is a deplorable situation which, if it arises frequently in practice, is no doubt dealt with by the good sense of the parties; but it may be that the situation is infrequent, because usually the terms of the parent company (or other third party) guarantee are worded

simultaneously both against the contractor, under the building contract, and under the guarantee. But if that is permissible in a particular case, and the contractor takes advantage of it, then the wording of the guarantee is responsible for the situation in which the guarantor finds himself."

He went on (*ibid*., at 38–39):

"There is no suggestion that the contract of guarantee is not binding upon Unex in accordance with its terms, whatever the legal effect of those terms may be.

In these circumstances, if Unex as defendants in these proceedings were formally to admit their liability under the guarantee for the amount of any award made against Panatown, then they would be in a position to raise the question whether the court should, in the exercise of its discretion, permit the same issues to be raised and decided in these proceedings as in arbitration references between what are in substance the same parties. It is clearly undesirable that there would be such a duplication of proceedings, to say nothing of the risk of inconsistent results, unless special reasons are shown in the circumstances of a particular case. The costs of adapting and reproducing what would essentially be the same pleadings, lists of documents and other formal documents would be wholly unnecessary, and there could well be a risk that, by seeking to fight or defend themselves on two fronts, the parties would not be able to concentrate on either front, as they should be able to do.

In short, ample discretionary grounds appear to exist for ordering a stay or court proceedings against a guarantor or surety which would duplicate a pending reference to arbitration between the contractor and the employer or principal debtor, unless the circumstances justify both sets of proceedings in a particular case. Here, McAlpine suggests that issuing the writ against Unex was justified by its failure to obtain Panatown's agreement to arbitration of the second round of claims which have now become the subject matter of the second reference. Whether or not that is so, there appears to be no justification for proceeding with the action—assuming the admission of liability which I have mentioned as a possibility above—at the same time as the references to arbitration, and if there is none, then the action is objectionable as bringing unwarranted pressure to bear on the defendants and respondents, Unex and Panatown, and as taking up the time and resources of the court at the expense of other litigants.

Ground of Appeal No. 7 does not invite this court to exercise its discretionary power to order a stay of the proceedings, and there are some references in the evidence to matters or issues which might be relevant to such an exercise, for example, the extent to which

sub-contractors might be joined as additional parties either to the arbitration reference or to this action. But the defendants have not made or offered the formal admission of liability, under the guarantee, which would enable them to say that the only issues raised in this action go to the amount of Panatown's liability, if any, which are identical with the issues that are currently before the arbitrator for him to decide. Nor is there evidence from McAlpine which is specifically directed to the situation which will arise, if any such admission is made. Whilst dismissing the appeal, therefore, I would not for my part seek to discourage a further application based upon an admission of liability, as I have suggested, save to the extent that no formal application, other than a draft consent order, will be necessary if the plaintiffs do not seek to pursue thereafter both the action and the arbitration references at the same time.

If, on the other hand, Unex are unwilling to make admissions which will require them to pay the amount of an award against Panatown, if the award is unpaid, then they are no longer in a position where they can assert that their liability under the guarantee is co-extensive with that of Panatown under the construction contract."

Glidewell, L.J. had this to say (*ibid*., at 45):

"If Unex were willing, for the purposes of this action, to accept that if the arbitrator finds Panatown liable to make payment to McAlpine of a specified amount, Unex will then be liable to indemnify McAlpine against non-payment by Panatown to the extent of the sum so found by the arbitrator, I agree with Evans L.J. that there would then be a very strong case for staying the action. But unless and until Unex is willing to accept this effect of the arbitrator's decision, and continues to wish to raise in the action possible issues which do not arise in the arbitration, then in my judgment the court should not stay the action. I reach this conclusion on the balance of convenience, in which of course I include what I consider fairness as between the parties."

It will be seen, therefore, that the main, and possibly only hurdle to a stay being granted in the *McAlpine* case was the unwillingness of Unex to accept that if the arbitrator found Panatown liable to make payment to McAlpine of a specified amount, Unex would then be liable to indemnify McAlpine against non-payment by Panatown. To overcome that hurdle in this case, AEC has offered an undertaking to be bound by the findings of the arbitrator. In order to offer that undertaking, AEC seeks to intervene in these proceedings. There is an affidavit filed by Fernando Calbacho Losada, the General Secretary of AEC, who is authorized by AEC to give the relevant undertaking. Furthermore, counsel is authorized by AEC to give an undertaking on its behalf.

Of course AEC has to overcome another hurdle before it obtains the orders it seeks. This is not an application for a stay in the action to enforce the parent company guarantee. This is an application for an injunction to prevent the filing of an action in another jurisdiction for the enforcement of the guarantee and to prevent any further action being taken to enforce such guarantee on a temporary basis. So AEC has not only to satisfy me that I should grant an effective stay of enforcement of the guarantee: it also has to satisfy me that this is a proper case in which to grant an injunction to impose that stay. AEC's applications are in effect an anti-suit injunction, although the form of the injunction sought is not so framed.

There is nothing wrong in principle with this court's granting an injunction to restrain a party from bringing or continuing proceedings in a foreign jurisdiction notwithstanding that there are no substantive proceedings in Gibraltar (see, for example, *British Airways Bd*. v. *Laker Airways Ltd*. (2) ([1985] A.C. at 95, *per* Lord Scarman). Mr. Wadsworth, for AEC, cited the English Court of Appeal case of *Airbus Industrie GIE* v. *Patel* (1) as an example of the court's exercise of its discretion to grant such an injunction. However, that was an unusual case in which the Court of Appeal, in restraining the continuance of proceedings commenced in Texas, held that Texas was an inappropriate forum in which to commence proceedings but that the Texas courts do not pay regard to the principle of *forum conveniens*. It could not be left to the foreign court, therefore, to determine whether it should stay its own proceedings. The present case is unlike the *Airbus* case in this important respect. Whilst in *Airbus* the Texas court was not able to determine whether it was the appropriate forum and it was left to the English court to make that determination, in this case there is nothing to prevent the English court from hearing an application for a stay of its own proceedings if proceedings to enforce the guarantee are commenced. In the present case, the English court is entitled to determine for itself whether, if proceedings are commenced before it upon the guarantee, it should stay those proceedings pending the outcome of the arbitration proceedings.

I have to determine whether it is unconscionable (see *British Airways Bd*. v. *Laker Airways Ltd*. (2)) or oppressive (see *Airbus Industrie GIE* v. *Patel* (1)) for GHL to be permitted to pursue its rights under the parent-company guarantee. I am unable to say that it is. The rights under the guarantee and the rights of the parties in the arbitration proceedings are not necessarily co-extensive. Whilst it is tempting to seek to restrain a possible duplication of proceedings and a possible conflict of decisions, I do not consider that it is for this court to pre-empt a decision of an English court given the circumstances. All the authorities show that the jurisdiction to grant such an injunction should be exercised with very considerable caution and would only be very rarely exercised. It should normally be left to a foreign court to control its own proceedings and it

would be a rare case (such as *Airbus*) in which this court would interfere. If action is taken in the English courts upon the guarantee, it is open to AEC to make in that forum the arguments it has made to me.

The applications are dismissed with costs to GHL.

Applications dismissed.
