Andrews, Trustee Of Property Of v Brock Buildings (Kessingland) Ltd [1996] APP.L.R. 11/21

CA on appeal from QBD (HHJ Bowsher QC) before The Master of the Rolls, Aldous LJ; Brooke LJ. 21st November 1996.

LORD JUSTICE ALDOUS:

The Appellant is the Trustee in Bankruptcy of Mr Alan Andrews. In 1989 Mr Andrews carried on business in Norfolk under the name Alan Andrews Plant Hire. He agreed to act as the subcontractor for groundworks of a contract won by the Respondents, Brock Builders (Kessingland) Ltd, to carry out work for Breckland District Council on the demolition and rebuilding of a number of houses at Mundford. The subcontract proceeded under the terms of the 1980 edition, Domestic Subcontract Dom/1. It contained an arbitration clause requiring all disputes to be referred to arbitration.

During the week ending 13 January 1980, Mr Andrews started work. As the work progressed the Respondents made five monthly interim payments totalling £40,357. On 11 April 1990, the Respondents wrote to Mr Andrews complaining about delay. There was delay, but the surveyors acting for Mr Andrews wrote back alleging that the delay was caused by the Respondents. Further correspondence took place between the parties with the Respondents complaining about delay and the surveyors acting for Mr Andrews complaining about the actions and inaction of the Respondents. The disputes were not resolved and by letter dated 14 June 1990 the Respondents wrote terminating the subcontract. Mr Andrews' surveyors then claimed on his behalf about £70,000 which included payment for the value of work, the value of materials left on site and a sum for loss of profit. The Respondents refused to pay. Attempts to negotiate a settlement failed.

On 5 April 1991 a creditor of Mr Andrews served a bankruptcy petition on him based on a debt of £7,805-54p. That petition was heard on 31 October 1991 and a bankruptcy order was made with the result that Mr Ash of the accountants Lovewell Blake was appointed as Mr Andrews' Trustee. The claims of Mr Andrews' creditors who have submitted proof of debt total £105,929-17p. including £70,000 claimed by the Respondents. On 12 December 1994 the Appellant made an application for legal aid which was subsequently granted with a nil contribution and on 19 June 1995 he issued a specially endorsed writ in the Queens Bench Division claiming loss and damages for breach of the subcontract amounting to about £60,000. As yet no defence has been served, but it is clear that the Respondents deny the allegations made in the Statement of Claim and if the proceedings continue, they will counter-claim for about £70,000.

On 15 September 1995 the Respondents applied by summons for an order that all further proceedings be stayed pursuant to section 4 of the Arbitration Act 1950 as the proceedings related to matters agreed by the parties to be referred to arbitration.

Section 4 provides: "If any party to an arbitration agreement commences any legal proceedings in any court against any other party to the agreement ... in respect of any matter agreed to be referred, any party to those proceedings may ... apply to that court to stay the proceedings, and that court will a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the 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."

As there was no dispute that the subject of the matter of the action was a matter that had been agreed by the parties to be referred to arbitration, the Court first had to decide whether there was, to adopt the double negative in the section, no sufficient reason why the matter should not be referred to arbitration. If there was no sufficient reason, then the Court had to go on and exercise the discretion given by the section and decide whether in all the circumstances of the case the proceedings should be stayed. When exercising that discretion the Court had to have in mind the strong bias adopted in the authorities in favour of enforcing the agreement.

The parties filed evidence by way of affidavit from which it became clear that the issues between the parties relating to the subcontract were real and substantial. The case for a stay was, on its face, simple. There was an arbitration clause in the agreement and there was no reason why a stay of proceedings should not be granted. The Appellant's reasons for resisting the stay were encapsulated in these sentences in paragraphs 16 and 17 of the affidavit of Mr Nicholson, the solicitor acting for the Trustee: *"If the Defendant had not wrongfully terminated Andrews' employment it is unlikely that he would have been made bankrupt. The Plaintiff currently has the benefit of a Legal Aid Certificate which enables him to fund these proceedings but he is unable to fund arbitration proceedings. The effect of granting a stay of the present proceedings will be to stifle the Plaintiff's claim."*

The summons was decided by HH Judge Bowsher QC. In his judgment of 8 December 1994 he concluded that a stay was appropriate. He held that, on the authorities cited to him, he needed to be satisfied that there was a reasonable probability that the Plaintiff would succeed. He said: *"On the evidence I have seen there are genuine triable issues. I cannot even guess as to who is likely to win. Some issues are likely to be won by the Defendant and some by the Plaintiff because that is what usually happens but I do not know who will be the overall winner. ... In this case there are genuine triable issues therefore one could say that there were reasonable grounds. I cannot possibly say that there is a reasonable probability. In my view, in order to persuade me not to order a stay there must be some reasonable probability. In expressing that view, I rely on the judgment of Griffiths LJ in* ***Goodman v Winchester & Alton Railway*** *[1985] 1 WLR 141."*

The Judge went on: *"It is a very hard thing to say but on the authorities I have to say this, the parties have agreed an arbitration clause and the Plaintiff has not made out a case to persuade me to refuse a stay."*

Against that judgment, the Appellant appeals. He contends, first, that the Judge applied the wrong standard of proof. He should have considered whether the evidence established a triable issue, alternatively whether the Plaintiff had a reasonable prospect of success. Second, adopting the appropriate standard of proof, he should have concluded that the plight of Mr Andrews, resulting in his inability to proceed properly with an arbitration, was the fault of the Respondents. Thus a sufficient reason for a stay had been established. Third, the Court should refuse the stay in the exercise of its discretion.

The Respondents' Notice under Order 59 Rule 6(l)(b) is one of the least informative Notices we have seen. However, the Respondents submitted that the Judge was right for the reasons he gave, the alleged breaches of contract did not affect Mr Andrews' ability to prosecute arbitration proceedings and also because of the effect of s.3l(l) of the Legal Aid Act l988. That section precluded from consideration the fact that the Plaintiff could not receive legal aid for arbitration and had legal aid in these proceedings. That being so, the Appellant's case should be rejected because it was based upon his ability to litigate with legal aid but the availability of legal aid may not be taken into account.

Section 4 of the Arbitration Act indicates that effect should be given to an agreement to refer disputes to arbitration unless there be a sufficient reason for refusing a stay. What amounts to a sufficient reason in any case will depend upon the facts of each particular case, but guidance can be obtained from the authorities as to certain circumstances which should be accepted as sufficient and those which should not be. For instance, "*the mere fact of a Plaintiff's poverty which would have rendered it financially impossible for him to go to arbitration, was not per se a sufficient ground upon which the court could refuse a stay.*" [Sir Gordon Willmer in ***Fakes v Taylor Woodrow Construction Ltd*** (l973) 1 QB 436 at 446F relying upon ***Smith v Pearl Assurance Co Ltd*** (l939) 1 All ER 95, and per Lawton LJ in ***Goodman v Winchester Railway and Alton Railway Plc*** (1985) 1 WLR l4l at l45A). However if a breach of the agreement by a Defendant results in the Plaintiff being unable to prosecute arbitration proceedings that can amount to a sufficient reason to refuse a stay (see the *Fakes'* case). We therefore turn to consider issues raised on the appeal.

The standard of proof

In the present case the first matter for decision is whether a Plaintiff, when seeking to rebut a Defendant's application for a stay, need establish on the balance of probabilities that it was the Defendant's breach of contract that caused his inability to arbitrate, or is it sufficient that there is a triable issue, alternatively a real prospect of success or, as the Judge held, does he have to show a real probability that it was the Defendants' breach that caused his difficulties? The Appellant submitted that it was sufficient to show a triable issue, alternatively a real prospect of success. The Respondents supported the Judge.

In ***the Fakes' case*** Lord Dennning MR said at page 442E *"So here also, if Mr Fakes' insolvency arose by reason of Taylor Woodrow's breach, it would be a denial of justice to require him now to go to arbitration - which he cannot afford - instead of proceedings in the courts - where he can get legal aid. Mr Lloyd was inclined to accept this proposition, but he said there must be a strong prima facie case that the insolvency was caused by the breach. I think it is sufficient if there are reasonable grounds for believing that Mr Fakes' assertions may be correct or there is a triable issue about it. On the materials before us, I think there are reasonable grounds. At any rate there is an issue fit to be tried. It can only be tried if he is allowed to continue this action. I would therefore hold that the action should not be stayed."*

Sir Gordon Willmer said at page 447D: *"It has been urged by Mr Lloyd on behalf of the defendants that at least the plaintiff ought to be able to show a strong prima facie case before such an allegation can be relied on to prevent the application of the ordinary rule. For my part, I think that is putting it rather to high. Clearly the court must examine the charges of breach of contract which are made, and clearly, if the court can readily see that they are manifestly trumped-up charges, it would have to disregard them. But it seems to me that if the court, after examining the charges, comes to the conclusion that there is some reasonable probability that the charges, or some of them, may be well-founded, that is sufficient at the present stage of this litigation. This is not altogether an unusual task for the Court to have to undertake at the interlocutory stage. .... But the approach of the Court in such cases was that which I have just suggested, namely, looking at the whole background of the case, to ask whether there is some reasonable probability that the charges may be true*."

Megaw LJ dissented. He accepted the submission of Mr Lloyd, rejected by the majority, that a prima facie case was necessary.

The majority of the court in ***Fakes' case*** rejected the standard of a strong prima facie case. Lord Denning MR was prepared to accept as sufficient that there was a triable issue, whereas Sir Gordon Willmer required some reasonable probability that a charge may be well-founded.

Although the issue did not arise directly for consideration in *Goodman*, Griffiths LJ referred to the reasons given by Sir Gordon Willmer in ***Fakes' case*** for refusing a stay. He concluded: *"The matter therefore being evenly balanced, there is not sufficient material here in my view to take the necessary step and say that this is an exceptional case because on the balance of probability on the evidence as it is now poised, it was the wrongful breach by the defendant that caused the plight of the plaintiff*." It would seem that he adopted the normal civil standard of proof.

The authorities do not demonstrate a consistent approach. It was therefore not surprising that Mr Cramsie, who appeared for the Appellant, submitted that this Court should adopt the lowest standard of proof and Mr Smyth, who appeared for the Respondents, urged the normal civil standard of proof. We see the force in that latter submission, based as it was upon the submission that when the parties have agreed a particuar way of dispute resolution, a Court should not endorse a deviation without clear evidence to support the grounds put forward. However to adopt that standard would require a Court to carry out a mini-trial to decide whether the Plaintiff's claim was probably going to succeed. That we believe would be wrong. We therefore do not believe that to be the appropriate standard. We would also reject the test of - a serious issue to be tried - as being too low and adopt the test suggested by Sir Gordon Willmer which he expressed as "*some reasonable probability that the charges may be well-founded*." Taking those words as a whole we believe that the test proposed, which we believe to be the correct one, is that the Plaintiff must show a reasonable prospect of success. The Judge relying on the words of Griffiths LJ in *Goodman* understood that a Plaintiff had to establish a reasonable probability of success. Although that was understandable, we believe his approach was wrong. It is therefore necessary to look again at the facts and, if appropriate exercise the discretion given by section 4 of the Act.

Application of the standard of proof to the facts

The Judge held that there were genuine triable issues between the parties. He expected, basing himself on his considerable experience in these matters, that the Appellant would win in part and lose in part, but he did not attempt to resolve the disputes between them. Essentially we agree. It is clear on the evidence that there is a real dispute as to whether Mr Andrews was in breach of contract in a way entitling the Respondents to terminate the subcontract and also who was to blame for what. We conclude that the Appellant has a real prospect of success in the action. In fact, Mr Smyth did not press us to conclude to the contrary. He submitted that upon the evidence the Appellant had not established to the required standard of proof that the alleged breaches of contract caused the Appellant's inability to arbitrate.

The Respondents drew attention in their evidence to the fact that judgments against Mr Andrews in January 1990 for £3,495 and in May 1990 for £7,092-73p were never paid despite the fact that Mr Andrews had received interim payments under the subcontract up to 11 May of £21,000. The sums proved in the bankruptcy were about £36,000 excluding the Respondents' claim. Thus together with the judgment debts Mr Andrews owed just over £46,000 excluding the Respondents' claim. That had to be weighed against his claim for about £30,000 for work done and materials used on the subcontract and about £33,000 for loss of profit. That claim for loss of profit was not particularised and could not be taken as an accurate estimate of loss without supporting evidence.

Upon that evidence the Respondents submitted that the Court should conclude that Mr Andrews would have been made bankrupt even if the subcontract had been completed and he had been paid the agreed price. They submitted that it did not appear from the evidence that the Respondents' alleged breaches were the reason why Mr Andrews could not afford to arbitrate. Thus there was nothing exceptional in this case and there was no sufficient reason for to grant a stay. It followed that this case fell within the guidance given in *Fakes'* case that the mere fact of the Plaintiff's poverty, which rendered it financially impossible for him to go to arbitration, was not per se a sufficient ground on which the Court would refuse an application for a stay.

We believe that the submission of the Respondents has merit. In the *Fakes'* case the majority of the Court decided that it was right to accept for the purpose of the dispute before the Court that the Defendants' breaches of contract induced the Plaintiff's poverty and subsequent insolvency. That amounted to an exceptional circumstance and was a sufficient ground to refuse a stay as the cause of the inability to arbitrate was due to the Defendants' actions. In the present case the highest it was put by the Appellant was in the affidavit of Mr Nicholson - *"If the Defendant had not wrongfully terminated Mr Andrews' employment it is unlikely he would have been made bankrupt*."

There was no evidence that even if he had not been made bankrupt he would have had funds to conduct arbitration proceedings. It may be that Mr Andrews could have avoided bankruptcy if there had been no breaches of contract as alleged, but the evidence does not suggest that those breaches induced a position that he could not afford to arbitrate. It would seem from the evidence that the arbitration expenses would, even if the contract had not been determined, have had to be paid at the expense of and no doubt with the consent of his creditors. Thus any inability of Mr Andrews to got to arbitration does not appear to have been caused by the actions or inactions of the Respondents.

It follows, even if it be accepted, that the Appellant has a sufficient prospect of success in the action, he has not established that an exceptional circumstance arises such as to provide a sufficient reason for refusing a stay. We would therefore dismiss the appeal on that ground.

Discretion

Section 4 of the Arbitration Act gives to the Court a discretion to grant a stay. It by no means follows that even if we had come to the conclusion that there was a reason why the dispute should not be referred to arbitration, namely that the inability of Mr Andrews to carry on arbitration proceedings had been caused by the wrongful acts of the Respondent, it would not have been right to grant a stay. That would have been only one of the factors to be taken into account. In the present case Mr Andrews was unable to pay his debts during the period when the contract was being carried out. After it was terminated, the Surveyor acting on his behalf made it clear that failure to resolve the dispute between the parties would mean that Mr Andrews would instigate arbitration proceedings. We have no doubt that was his intention. It was not until the Appellant became involved and legal aid was obtained that the position changed. In essence the action is being used to recover money owed by Mr Andrews to his creditors. If the claim is a good one then it can be referred to arbitration and funded by the creditors who will be the recipients of the damages. Taking those matters into account we would have exercised our discretion so as to grant a stay.

Generally

Since the hearing, we have become aware of a case to be heard in the Court of Appeal in which it is alleged that section 4(1) of the Arbitration Act 1950 should be disapplied in a non-domestic context as being contrary to the Treaty of Rome. No submission to that effect was made in this case and as the dispute involved British parties, we have not felt it necessary to burden the parties with a further hearing at which the validity of the section could be argued.

For the reasons we have already given, we are not satisfied that the Appellant has established, to the required standard of proof, that his alleged inability to obtain redress by arbitration may have been due to breaches of contract by the Defendant. In those circumstances, we can see no reason why the Appellant should not be held to the bargain that Mr Andrews made with the result that a stay should be granted and the matter referred to arbitration. That is the conclusion reached by the Judge. We therefore would dismiss this appeal.

MR S CRAMSIE (Instructed by Nicholsons, Lowestoft, NR32 1PP) appeared on behalf of the Appellant.
MR C SMYTH (MR O THOMAS on 21.11.96) (Instructed by Hobbs Durrant, Lowestoft NR32 1NL) appeared on behalf of the Respondent