Crouch Mining Ltd v British Coal Corporation (t/a British Coal) [1996] APP.L.R. 11/18

CA on appeal from QBD, Official Referee's Business. Before Saville LJ; Brooke LJ; 18th November 1996.

LORD JUSTICE SAVILLE:

This is an application for leave to appeal. On 6th September of this year His Honour Judge Wilcox ordered that all proceedings in the action be stayed pursuant to section 4 of the Arbitration Act 1950 and himself refused leave to appeal. The plaintiffs in the proceedings now seek the leave I have mentioned in an action they have brought against British Coal Corporation and the Scottish Coal Company Limited.

The bare history of the matter is that in 1988 Crouch Mining entered into a contract for the extraction of coal with British Coal Corporation. Privatisation then followed in 1994, with the result that in all or virtually all cases the Scottish Coal Company Limited, the privatised concern, took over the rights and liabilities under the contract which had been made in 1988 with Crouch Mining Limited.

The arbitration clause in the original contract stipulated in effect that all disputes and differences arising between the parties with respect to any matter or thing arising out of or in connection with the contract could be referred to arbitration but that no arbitration would be started until the completion or alleged completion or abandonment of the works.

The plaintiffs now wish to bring proceedings in respect of matters which to a large extent are unarguably alleged liabilities of the Scottish Coal Company Limited, taking the liabilities over from British Coal Corporation, although the claim against British Coal Corporation is made on the basis that some rights arose which were not transferred to the Scottish Coal Company on privatisation. The detailed history of the contract and of the restructuring scheme following and as part of privatisation is set out in the judgment of His Honour Judge Wilcox. I do not propose to repeat them here but simply incorporate them as part of the judgment that I am giving.

The learned judge exercised the discretion given to him under section 4(1) of the Arbitration Act to order a stay. Mr. Norton QC, appearing for the applicant this morning, has therefore the task of seeking to persuade us that the judge erred in the exercise of that discretion.

So far as the Scottish Coal Company is concerned, Mr. Norton advanced a number of arguments. He accepted, as I understood it, the validity of the original arbitration clause in the contract as it was made in 1988, but he said that there was a substantial new change in the circumstances when that contract was taken over by the privatised company because, whereas British Coal Corporation had been accustomed as a matter of policy over many years to negotiate and settle claims during the course of the contract, the Scottish Coal Company had clearly adopted a different policy. Accordingly, there was now no prospect of negotiating claims until the completion of the works, which is apparently not going to be until the year 2004.

The second point that Mr. Norton raised was that, whereas in 1988 the plaintiffs, his clients, had contracted with a state corporation, so that any question of financial instability simply did not arise, there was now material to indicate that the new privatised company which had taken over the contract was not particularly financially stable and the indications were that this position would become worse as years went by, with the result that if his clients had to wait until the year 2004 for an arbitration to obtain the rights to which they say they are entitled, there was a real risk that the Scottish Coal Company would not be able to perform its obligations for financial reasons.

The third point Mr. Norton raised was that, under section 4(1) of the Arbitration Act 1950, it is incumbent upon a person seeking a stay to show that he is ready and willing to do all things necessary for the proper conduct of the arbitration. The point here was that, since some of these claims being advanced by Crouch Mining Limited depended on the recollection of witnesses, it would be well-nigh impossible to have a fair or just hearing in 2004. Accordingly, Mr. Norton submitted that, on a true construction of the Arbitration Act 1950, the phase "necessary to the proper conduct of the arbitration" meant necessary to the proper conduct of, as he put it, a just arbitration; and, since the respondents were not prepared to have an arbitration before the date agreed in the contract, they were not ready and willing within the meaning of the Act.

The fourth point was a submission that, under section 13 of the Unfair Contract Terms Act, the provision in the contract that there would be no reference to arbitration until the completion of the works was open to attack on the grounds of unreasonableness within the meaning of the Unfair Contract Terms Act and was not taken out by section 13(2) of that Act, which provides that an agreement in writing to submit present or future differences to arbitration is not to be treated under this part of the Act as excluding or restricting any liability.

So far as British Coal Corporation was concerned, Mr. Norton's argument was that, notwithstanding privatisation, there were certain claims which the plaintiffs wished to pursue and the liability for which had not been transferred to the Scottish Coal Company Limited. In those circumstances Mr. Norton's submission was that there is no arbitration clause available to British Coal Corporation and that therefore the proceedings, at least against that Corporation, should be allowed to continue.

These were all points that were addressed to His Honour Judge Wilcox and, with one tiny qualification, I can say at once that in my view not only is it not possible to demonstrate any error in the approach, reasoning or conclusion of His Honour Judge Wilcox, but also that I respectfully agree with and adopt that reasoning and that conclusion. The only slight qualification is that in the course of his judgment the judge set out, at pages 5 and 6 of the transcript, the arbitration clause as though it were one clause with a number of subparagraphs in it. Mr. Norton has drawn our attention to the fact that, the way the clause was negotiated, it did not end up as a clause in the form in which it appears in the judgment. That is perfectly true, but to my mind it makes not the slightest different to the conclusion of the judge. The negotiations

between the parties in 1994 produced a variation of the original arbitration agreement, and did so, as it would appear, in stages. But the result was, at the end of the day, an agreement in relation to arbitration in precisely the terms in which the judge sets them out in his judgment, albeit not in the form of numbered or lettered paragraphs. The fact that that agreement was not in the form of such numbered or lettered paragraphs seems to me to be entirely beside the point.

The upshot of that, therefore, is that, for the reasons the judge gave, I would conclude that none of the arguments advanced by Mr. Norton this morning has any chance whatever of success before the full court, and it follows that this application must be refused.

I would make two further short observations, however. It is today the case, whether one is looking at section 4(1) of the Arbitration Act 1950 or indeed the 1975 Act, that arbitration agreements are not to be looked at as some optional method of dispute resolution which can be put on one side if they appear to be disadvantageous to the one party or another with the benefit of hindsight. What the parties do, in the sort of arbitration clause we have before us today, is to agree on this alternative form of dispute resolution; that is to say, they have agreed that their disputes will be resolved by private arbitration rather than in the courts. There must therefore be exceptionally trenchant reasons for overriding that agreement, which I repeat is not simply an optional method of proceeding.

The second point is this. It is the case that considerable doubt is now cast on the validity of section 4(1) of the Arbitration Act on the grounds that, since it provides a discretion in the case of UK nationals but it does not apply to non-UK nationals (where the New York Convention provisions are applicable), it is discriminatory and contrary to the Treaty of Rome because it gives other EC nationals less access to our national courts than UK nationals. It not necessary to deal with that point today since the application for leave to appeal from the refusal of the stay means that there is no discrimination of that nature at all.

There is one final point that I should mention just perhaps as a matter of general interest. In the course of the next two or three weeks the Departmental Advisory Committee of the Department of Trade and Industry hope to publish, and, indeed, the Government hope to put in place, a statutory instrument dealing with transitional provisions relating to the new Arbitration Act. The new Arbitration Act is planned to come into operation at the end of January 1997. The transitional provisions at the moment are designed so that any application which is made before the beginning of the Act will be dealt with on the basis of the existing law. That, however, has not been the subject of a final decision by the Government, but for general interest purposes I can indicate that it seems at the moment that that is the way the Government is minded to go.

Leaving aside those general points, for the reasons I have given I would refuse this application.

LORD JUSTICE BROOKE: I agree.

Order: application dismissed with costs.

MR. P. NORTON QC (instructed by Messrs. Ashurst Morris Crisp, London EC2) appeared on behalf of the Applicant Plaintiff.
MR. D. LLOYD JONES (instructed by Messrs. Nabarro Nathanson, Sheffield) appeared on behalf of the Respondent First Defendant.
MR. T. ELLIOTT QC (instructed by Messrs. Lawrence Graham, London WC2) appeared on behalf of the Respondent Second Defendant.