Ahmad Al-Naimi (t/a Buildmaster Construction Services) v. Islamic Press Agency Inc [2000] APP.L.R. 01/28

CA on Appeal from High Court of Justice TCC (HHJ Bowsher QC) before Waller LJ; Chadwick LJ. 28th January 2000.

JUDGMENT : Lord Justice Waller:

1. This is an appeal from the decision of His Honour Judge Bowsher QC in the Technology and Construction Court of 2 October 1998 whereby he stayed the claimant's action under section 9 of the Arbitration Act 1996. In so doing he refused to decide whether the matters the subject matter of the action were covered by the arbitration agreement relied on by the defendants. The appeal raises a point as to the proper approach of the court to an application under section 9 of the 1996 Act particularly in the light of the change in the law brought about by the same Act as to an arbitrator's powers to decide his own jurisdiction.

2. The claimant carries on business as a building contractor. The defendant occupies a large property at East Burnham in Buckinghamshire which in 1996 it wished to convert into offices and accommodation. The defendant retained as its advisor Mr Kassim of ASK Planning who has sworn the affidavits in this matter on behalf of the defendant.

3. On 12 July 1996 the claimant entered into a building contract with the defendant in the form JCT Agreement for Minor Building Works 1980 Edition to carry out certain works under the supervision of ASK Planning as Contract Administrator.

4. The works were described as the alteration and refurbishment of the so-called "Block B", of Crown House, and were shown and described in drawings, a Specification and a Supplementary Priced Schedule. The supplementary priced schedule stated that it should be read with certain documents including the drawings, and listed the items of work. It provided that "The list forms part of the contract and represents the formally priced work by the Contractor up to and including all first fixes and some second fix." The price for the works identified was £141,750.

   By Article 4 it was agreed so far as material as follows :-- "If any dispute or difference as to the construction of this Agreement or any matter or thing of whatsoever nature arising thereunder or in connection therewith ... shall arise between the Employer or the Architect/the Contract Administrator on his behalf and the Contractor either during the progress or after the completion or abandonment of the Works or after the determination of the employment of the Contractor it shall be and is hereby referred to arbitration in accordance with clause 9."

5. It is common ground that the claimant carried out further works other than those identified in the schedule and as part of what is described as "the second fix". It is the claimant's case that those works were carried out under a separate contract made orally, which did not contain any of the terms of the JCT form including the Arbitration Clause. It is on that basis that he has brought this action as opposed to commencing arbitration.

6. It is right to say that when matters began to go sour as between the parties, those conducting the correspondence on the part of the claimant pursued the matter as if there were simply one contract relying on JCT terms as applying to the works asserted now to have been concluded under the separate oral contract. It seems likely that it would have been a matter of indifference to the claimant as to whether the matter went to arbitration, or was the subject of proceedings in court, but for the fact that he could not get Legal Aid to conduct the arbitration. It is convenient at the outset to put the question of legal aid on one side. Section 31 of the Legal Aid Act 1988 provides:--

   "(1) Except as expressly provided by this Act or regulations under it –

   (a) ...

   (b) the rights conferred by this Act on a person receiving advice, assistance or representation under it shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised."

7 Thus, as was common ground before us, it is the duty of the court to resolve any issue as between the parties without regard to the fact that one of them is legally aided; (see in the Arbitration context albeit in the context of the 1950 Act this principle was confirmed in ***Edwin Jones v Thyssen (Great Britain) Ltd*** (1991) 57 BLR 116).

Approach to application for stay under section 9

8. The judge in this case was dealing with the matter under the Rules of the Supreme Court. It is by those rules which this court must judge whether the judge erred in the exercise of his discretion. If this court was to be of the view that he did err, then this court should act under the new CPR although I am doubtful whether in the context of an application under section 9 the approach will be very different.

9. Under the old rules, and in the context of a dispute as to whether there was a contract, and in particular a contract that contained an arbitration clause, His Honour Judge Humphrey Lloyd QC considered how the court should approach a section 9 application ***in Birse Construction Ltd v St David Ltd*** [1999] BLR 194. His decision was reversed on appeal (see Transcript Friday 5 November 1999), but I do not understand his suggestions as to approach, save conceivably on one aspect, to have been criticised. The reversal resulted (a) from the fact that the parties had failed to make clear to him, that they were not agreed that he should decide the question whether there was an arbitration agreement on the affidavit evidence alone, and (b) because the majority thought that without that agreement, it would be an illegitimate exercise of discretion in that case, to decide to determine, and then to determine the question whether there was a contract upon affidavit evidence, which showed a genuine dispute of relevant fact; (see Pill LJ at page 4 and Aldous LJ at page 7). His approach must of course be read with that last point in mind.

10, I find that what he had to say about the approach to a section 9 application very helpful, and both Counsel before us suggested that it provided useful guidance. It is particularly helpful to note his attitude to the situation in which what is in dispute is not whether a clause exists at all but as to precisely what is covered by that clause. I will set out the relevant passage in full:--

"It is common ground that the following courses are open to me:

1. To determine, on the affidavit evidence that has been filed, that an arbitration agreement was made between the parties, in which case the proceedings will be stayed in accordance with section 9 of the 1996 Act since article 5 and clause 41 of the JCT Conditions contain an arbitration agreement;

2. To stay the proceedings but on the basis that the arbitrator will decide the question of whether or not there is an arbitration agreement since section 30 of the Arbitration Act 1996 provides –

(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to –

(a) whether there is a valid arbitration agreement,

...

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

Sub section (2) is a reference to provisions such as section 67 which states –

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court --

(a) challenging any award or the arbitral tribunal as to its substantive jurisdiction; ...

3. Not to decide the question immediately but to order an issue to be tried. RSC Order 73, rule 6(2) provides –

Where a question arises as to whether an arbitration agreement has been concluded or as to whether the dispute which is the subject matter of the proceedings falls within the terms of such agreement, the court may determine that question or give directions for its determination, in which case it may order the proceedings to be stayed pending the determination of that question.

4. To decide that there is no arbitration agreement and to dismiss the application to stay.

Mr Darling for the plaintiff contended that there should be no stay of the proceedings unless the court was satisfied that there was clearly an arbitration agreement. I do not consider that the position is that clear cut. The circumstances of the application must be taken into account. I accept that if it is clear on the evidence that a contract did or did not exist then the court should so decide for it cannot be right either to direct an issue pursuant to Order 73, rule 6(2) or to leave the "dispute" to be determined by an arbitral tribunal. The dominant factors must be the interests of the parties and the avoidance of unnecessary delay or expense. Where the rights and obligations of the parties are clear the court should enforce them. Unless the parties otherwise agree section 30 of the Arbitration Act 1996 now permits an arbitral tribunal to decide questions of jurisdiction where it might not previously have been competent to do so. It is not mandatory and, contrary to a suggestion made by Mr Palmer, the existence of the power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed. The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal. Indeed RSC Order 73, rule 6 in making express provision for a decision as to whether there is an arbitration agreement suggests that normally a court would first have to be satisfied that there is an arbitration agreement before acting under section 9 (and that a dispute about such a matter falls outside section 9). There will however be cases where it would be right to defer the decision, particularly, for example, if the determination of whether or not a contract was made also embraces the determination of the scope of the contract and its ingredients. In some cases it would be better for the court to act under Ord 73 r6; in other cases it may be appropriate to leave the matter to be decided by an arbitrator. The latter course is likely to be adopted only where the court considers that it is virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement. One of the matters that a court is bound to take into account is the likelihood of the challenge to an award on jurisdiction under section 67 or, under section 69, on some important point of law connected to the existence of the agreement for which leave to appeal might be given (if it is plainly discernible at that early stage), eg its proper law, since it cannot be in the interests of the parties to have to return to the court to get a definitive answer to a question which could and should be decided by the court before the arbitrator embarks upon the meat of the reference. Such a course would mean that the arbitral proceedings would not be conducted without unnecessary delay or expense. On the other hand the court must bear in mind that it must not act so as to deprive the party of the benefit of the contract that it has made whereby disputes are to be referred to arbitration. The recent case of ***Azov Shipping Co v Baltic Shipping Co*** *[1999] 1 Lloyd's Rep 68 (which was not cited to me) supports the approach that the court ought to decide questions relating to the existence or the terms of the arbitration agreement for there may otherwise be a real danger that there will be two hearings: the first before the arbitrator under section 30 of the Arbitration Act 1996 and the second before the court on a challenge under section 67."*

11. I would entirely support the above approach in relation to an application under Order 73 rule 6(2) subject only to the point ultimately made by the Court of Appeal. If the court decides that it is the court which should determine whether the matters the subject of the action are the subject of an arbitration clause, unless the parties were agreed that the matter should be resolved on affidavit, then, if there is a triable issue, directions should be

given for trying that issue. It may be helpful to add that the equivalent of Order 72 rule 6(2) now appears in the CPR Part 49.6 in almost identical terms, and it would seem that the approach should thus be the same. It is right to point out that under the CPR the court has a wider discretion to rule what evidence it needs to decide any particular point (see Part 32.1). However, it seems unlikely, in the absence of agreement that issues should be tried on witness statements alone, that a court, which (a) formed the view that there were triable issues relating to facts material to the jurisdiction question; (b) had an application before it to cross-examine the makers of those statements; and (c) had decided that the court should resolve the matter as opposed to an arbitrator, would do other than direct a trial of the issue.

12. The only other point I would make so far as the above approach is concerned is that it must not be overlooked that the court has an inherent power to stay proceedings. I would in fact accept that on a proper construction of section 9 it can be said with force that a court should be satisfied (a) that there is an arbitration clause and (b) that the subject of the action is within that clause, before the court can grant a stay under that section. But a stay under the inherent jurisdiction may in fact be sensible in a situation where the court cannot be sure of those matters but can see that good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first. If, for example, the court thinks that it would take a trial with oral evidence to decide whether matters the subject of the action were actually within the scope of an arbitration clause, but that it was likely that on detailed inquiry the subject matter of the action will be found to be covered by the arbitration clause; and particularly if an arbitration was bound to take place in relation to some issues between the parties, and where having explored the details necessary to found jurisdiction, it would only be a short step to deciding the real issues, it will often be sensible for the court not to try and resolve that question itself but leave it to the arbitrator.

13. It is true that since the matter goes to jurisdiction there is a risk that the matter might come back to the court under section 67, but since costs and time are, in the example given, going to be expended on matters that relate to jurisdiction and once the tribunal who hears that evidence will be in a strong position to move quickly on to resolve the main issues-- the risk will often be worth taking. This seems to me in accordance with the spirit of the 1996 Act and in particular sections 30, and 32(2).

14. That as it seems to me was the view that Judge Bowsher took in this case, and but for one factor, I would not in any way criticise his decision. The one factor is that the parties had agreed that the issue whether the arbitration clause applied to the matters the subject of the action should be determined by the court on the affidavit evidence.

15. I of course accept that there may be situations when despite that agreement the court may simply feel that it cannot resolve the issue without hearing the witnesses. But it also seems to me that the court should be looking for the most economical way of deciding what is after all, a dispute about where the real disputes should be resolved. On an application under section 9 a court is bound to have to consider the affidavit evidence, and to spend time in so doing. There is bound to be argument about the strength or otherwise of the case as to whether the arbitration clause covers the subject matter of the action in considering what course to take. It thus also seems to me that in the interest of good litigation management and the saving of costs, the court should see whether it can resolve that point on the affidavit evidence. Certainly it should try and do so if both parties are agreed that they would like the matter resolved on the affidavits. I would add that in addition, if the parties do not come agreed, as in the instant case, depending on how important any factual disputes appear to be to the ultimate resolution of the disputes as to jurisdiction, it may be worth exploring whether they would agree, or even in some circumstances where the disputes on fact seem immaterial, using the powers under CPR 32.1.

16 On the application before Judge Bowsher both sides wanted the judge to resolve the matter on the affidavits. Before us in the Court of Appeal once again both sides wanted the court to resolve the matter on the affidavits. Thus it was that there came a request from neither side to cross examine any deponent on their affidavit. It seems to me that if it is the wish of both parties that a point on jurisdiction should be resolved on the affidavits, it must be in their interest for the court to try and do so in order that further time and money is not spent either before the arbitrator fighting about jurisdiction with a possible reference back to the court at some later stage, or by directing a trial of the issue.

17 In my view in this case it is possible to resolve the question of jurisdiction on the affidavits, and I would thus say that Judge Bowsher was wrong not to grasp that nettle. The factual disputes are in reality very small, and it is possible to form a clear conclusion as to what would be likely to be the position if a full trial of the jurisdiction issue were ordered.

18. The common ground is as follows. The claimant originally quoted with others for the works to carried out to Crown House Block B. The quotes were for first and second fix works, but tenderers were told that they should quote separately for the second fix because decisions had not yet been taken as to the choice of materials for the second fix. Thus the quotes for the second fix were simply to give indications as to the prices from the different tenderers. In his quote the claimant did quote for certain finishing items in the second fix. The defendants originally contracted with one of the other tenderers, and that contract excluded second fix and finishes. That contract was terminated and a contract was then signed with the claimant. This contract was not limited to first fix. The contract was dated 12 July 1996 and under it the appellant agreed to carry out certain works described as "first fix and part second fix."

19. In July and August the claimant and Mr Omar on behalf of the defendants went on what are termed "shopping trips" to select high quality items for the finishes i.e. the second fix. The claimant says he went on those so as to impress Mr Omar and in the hope that he would be asked to carry out the remaining second fix works. During August Mr Omar started to finalise his choices and, according to the claimant, he was asked at that stage to provide his prices for those items. The claimant accepts that he was then asked to do the second fix items. He concluded that it was Mr Kassim's intention that he should do the second fix works as and when it became possible in each part of the building (paragraph 11 of claimant's affidavit). The claimant required payment in advance in order to purchase the more expensive items and it was in that context that Mr Kassim produced an interim payment certificate dated 25 September 1996 which albeit it had the same job number as those certificates otherwise produced in relation to Crown House, and was otherwise in the JCT form of such certificates, referred to a "Second fix negotiated contract" and not to the 12 July 1996 Contract. The certificate was produced in response to an invoice dated 25/9/96 from the appellant which referred to "second face [sic]" (page 85), and the appellant produced a second invoice also referring to "second fase [sic]" for payment in advance. On 10 October 1996 Mr Kassim produced a further interim certificate again referring to "Second fix negotiated contract". The claimant does not suggest that a fresh negotiation of some completely new overall contract for the second fix was negotiated, but relies on the above documents as being consistent only with a separate "negotiated contract."

20. There have also been produced by the defendants some Architects instructions issued in accordance with the terms of the first contract but covering matters said to be the subject of the second fix. The claimant asserts that these were not received.

21. The claimant finally relies on a document by which Mr Kassim summarised for Mr Omar's benefit the payments due to the claimant distinguishing between the first fix contract and the *"second fix negotiated contract",* but that really does not take the claimant very far having regard to the fact that the *"final account"* issued to the claimant and signed by Mr Kassim purported to be issued in accordance with the JCT contract dated 12 July 1996 covered all the works carried out by the claimant at Crown House Block B. Not only did the claimant not object to that form of final account, but when his adviser Mr Turnbull for Bucknall Austin wrote making claims, he made those claims on the basis that there was simply one contract of 12 July 1996, and he copied that letter to the claimant himself [see the letter of 8 January 1997 page 147].

22. From 8 January for some four months all correspondence was conducted on the basis that there was one contract and indeed the detailed claim ultimately put in on 27 March 1997 was also put in on the basis of there being one contract.

23. Only just prior to these proceedings being launched was there a change of heart in a letter dated 6 May 1997 when Mr Turnbull asserted that re-examination of the contract documentation indicated that the JCT form only applied to the First Fix contract.

24. I accept that it is possible to divide the contract into two phases. The second phase was being negotiated item by item at the conclusion of the works on Crown House Block B, which explains the interim certificates issued for advance payments. But even those certificates are only consistent with the JCT form applying to the items, and the obvious and only realistic conclusion is that the claimant agreed to carry out the extra works as an extension of the original contract. Accordingly the terms of that contract, including the arbitration provision, applied to the remainder of the second fix, and thus to the works the subject of the present proceedings.

25. In my view this appeal ought to be dismissed but it ought to be made clear that the decision of the court is that the arbitration clause in the contract of 12 July 1996 covers the matters raised in the statement of claim and that that issue has accordingly been resolved in favour of the defendant.

Chadwick LJ:

26 The issue between the parties is whether the additional works -- that is to say the second-fix works over and above those described in the schedule to the JCT agreement dated 12 July 1986 -- carried out by the appellant at the respondent's property were carried out under the terms of that agreement or under a separate contract, made orally between them. It is common ground that if the additional works were carried out under the terms of the JCT agreement, then the underlying claim in the action is the subject of an arbitration agreement and the action must be stayed under section 9 of the Arbitration Act 1996; but that, if the additional works were carried out a separate oral contract, there is no basis for a stay of the action.

27 The judge declined to decide that issue. He took the view that that issue should, itself, be decided by arbitration. He said this:

> *13. Both counsel urged upon me that I should decide upon those contentions raised between the parties and that I should do so by reference to the affidavits and exhibits before me. Counsel for the plaintiff submitted that for the defendants to be entitled to a stay of the proceedings, the burden was on the defendants to show that there is a relevant arbitration clause: he further submitted that it is for the Court to decide whether the arbitration clause is relevant, and to do so the Court must decide the issues raised in the affidavits. I did not understand the defendants to dissent from those propositions.*
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> *14. If I were to embark upon the task of making such decisions, I would only do so after hearing oral evidence to enable me to decide on the conflicts in the documentary evidence. If that were my task, there would be no difficulty about adjourning this hearing for the deponents to be cross-examined on their affidavits.*

15. I am clear that I should not decide those disputes laid before me by counsel. Counsel are asking me to decide disputes concerning the construction of the agreement of 12 July 1996 and also to decide disputes as to "matter(s) ... arising thereunder or in connection therewith", namely, for example, whether certain items of work fell within the description of work the subject of the contract of 12 July, 1996 as properly construed. Those disputes are disputes which the parties have agreed shall be submitted to arbitration, and they are not therefore matters for me to decide.

28 For my part, I think that the judge is saying, in those paragraphs, that he should decline to decide the dispute raised on the affidavits because that is a dispute which must be referred to arbitration in accordance with the arbitration agreement. If so, then I would hold that he adopted a wrong approach. The correct approach, as it seems to me, is that set out by His Honour Judge Humphrey Lloyd QC in his judgment in ***Birse Construction Ltd v St David Ltd*** [1999] BLR 194, at pages 196-7, delivered after the judgment of His Honour Judge Bowsher QC in the present case. In a case where the issue is whether the underlying dispute is subject to an arbitration agreement at all the court has a choice whether to decide that issue itself, or to stay proceedings while that that issue is referred to arbitration. Judge Humphrey Lloyd's judgment in Birse contains, as it seems to me, a most useful analysis of the factors which should influence the court in making that choice. I agree with Lord Justice Waller that, if the court decides that the proceedings should be stayed so that the issue can be referred to arbitration, the better view is that it is acting under the inherent jurisdiction rather than under section 9 of the 1996 Act.

29. If the judge had a choice, then it was clearly material for him to take into account whether the issue was one which could be determined on affidavit evidence without oral evidence. I agree with Lord Justice Waller that it would be a rare case in which it could be appropriate for the court to resolve issues of fact on written evidence alone unless invited to take that course by both parties; although I would not rule out the possibility that such a case might arise. I agree, also, that the court must be entitled to decline an invitation (although made with the support of both parties) to embark on the task of resolving issues of fact without the advantage of oral evidence in a case where it thinks oral evidence is necessary. But, where both parties ask the court to decide the issue in a summary way, the court should, I think, meet that request if it properly can.

30 This, in my view, was such a case. I think that the judge was wrong to take the view that the issue between the parties was one which could not be decided without cross-examination on the affidavits. The documents pointed so clearly to the conclusion that there was, in this case, a single contract to be carried out in two phases -- rather than two distinct contracts -- that there was no realistic chance that the court would come to a different conclusion after hearing oral evidence.

31. To my mind, the documents which provide compelling evidence of the true nature of the arrangement are (i) the final account dated 18 November 1996 together with the letter from the Contract Administrator dated 26 November 1996, (ii) the payment certificate issued by the Contract Administrator on 26 November 1996, (iii) the letter dated 8 January 1997 from the appellant's Contract Advisers, Bucknall Austin, and (iv) the claim put in by Bucknall Austin on 27 March 1997 on behalf of the appellant. The assertion, in a subsequent letter from Bucknall Austin dated 6 May 1997 that "re-examination of the contract documentation appears to indicate that the terms of the JCT Agreement for Minor Building Works relate solely to the First Fix Contract and that no express terms were agreed in relation to the Second Contract" carries no conviction. It is inconsistent with the way in which the matter had been dealt with by the Contract Administrator (without objection from their client) in November 1996 and with the way in which they themselves had dealt with the matter in the five months since they were first instructed in January 1997. The true nature of the arrangement was that there was a single contract on the terms of the JCT Agreement of 12 July 1996, initially for fixed price works (the first phase), which was subsequently extended, as the appellant had always hoped and intended that it would be, to cover a second phase of works to be done on an on-cost basis.

32. For those reasons, and for the reasons given by Lord Justice Waller, I am satisfied that the arbitration agreement extends to the matters claimed in the action; and that, on that ground, the action ought to be stayed under section 9 of the Arbitration Act 1996. It follows that the appeal should be dismissed; but with the indication, proposed by Lord Justice Waller, that the issue left open by the judge has been decided by this Court in favour of the respondent.

Order: Appeal dismissed with costs; Section 18 order subject to confirmation of contribution; legal aid assessment. Order does not form part of approved judgment.

Michael Black Esq QC, Mr Rupert Higgins (instructed by Messrs Bowling & Co for the Claimant/Appellant).

John Randall Esq QC, Mr Piers Stansfield (instructed by Messrs Masons for the Defendant/Respondent).