Hydro Agri Espana SA v Charles M Willie & Co (Shipping) Ltd [1998] Int.Com.L.R. 02/18

CA on appeal from Admiralty (Mr Justice Clarke) before Evans LJ; Pill LJ; Thorpe LJ. 18th February 1998.

LORD JUSTICE EVANS:

1. This is an appeal against a judgment of Mr Justice Clarke in the Admiralty Court given on 1st May 1997. He refused to set aside the renewal of a writ which had been ordered by the Admiralty Registrar on 21st August 1996.

2. The judge directed himself in accordance with the House of Lords judgment in ***The Myrto*** [1987] AC 597, and in particular he quoted the passage at p.622, where Lord Brandon said:
"Category (2) cases are where the application for extension is made at a time when the writ is still valid but the relevant period of limitation has expired. Category (3) cases are where the application for extension is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired."

3. Mr Justice Clarke also quoted further from Lord Brandon's speech, and I can limit myself to the following sentence:
"... I think that the new rule should be interpreted as requiring 'good reason' and no more."

4. The rule referred to is RSC O.6,r.8, and in particular r.8(1), (2) and, I think, 2(A) also.

5. The learned judge held that the "good reason" in the present case was the fact that the plaintiffs were also claimants in arbitration proceedings in Norway, where the defendants, as respondents in the arbitration, were challenging the jurisdiction of the arbitrators in Norway. In the result, the challenge to the jurisdiction of the arbitrators was successful; so the question whether the plaintiffs can proceed in this country and in this action is of some, and perhaps vital, importance to them. There is, however, also a writ in rem, which may provide the plaintiffs with an alternative method of bringing a claim before the court.

6. Mr Justice Clarke gave judgment in proceedings concerned with the writ in rem as recently as Friday last, 13th February. We have seen a copy of his judgment but, save for one point which is referred to because it bears directly on the issues raised by the appellants in the present appeal, we have not been directly concerned with it.

7. I should now quote the short passage from the learned judge's 40-page judgment of 1st May 1997 which deals with this particular matter. It is a short extract from a long judgment because this was only one of a very large number of points, mostly technical, which were raised for decision by him on that occasion, and I shall limit myself to the relevant passage. At p.30C-G of his judgment he said:
"However, I have reached the conclusion that there was good reason. It is true that but for the issue of the writ the plaintiffs' rights would have been extinguished. However, they had issued a writ. They were pursuing their claim in Norway where the defendants were disputing the jurisdiction of the arbitrators. It was sensible not to want to pursue two parallel proceedings at once. The court was told that the defendants were disputing the jurisdiction. It is true that it was not told the defendants were saying that if the arbitrators had no jurisdiction the claim was time barred. However, I do not think that that information was really relevant to the exercise of the court's discretion given that this action had been commenced in time. As I have already stated, it would have been better if the defendants had been told about the writs, but there is no sensible suggestion that it would have made any significant difference. It is likely that the parties would have agreed some kind of stay of this action until the jurisdiction of the Norwegian tribunal was established."

8. I will state the history of the matter shortly because it is unnecessary to do more than that for present purposes. I should, however, first comment on the fact that, unfortunately, this appears to be one of those cases (and I hope that they are now rarer than they once were) where both parties seem, at different stages and for whatever reasons, to have used every procedural device open to them, with the inevitable result that the merits of the plaintiffs' claim have not yet been considered by any tribunal, whether arbitrators or a court, and the costs involved in the two jurisdictions, Norway and England, may well already exceed the sum of £47,000 which is claimed as damages. The plaintiffs' solicitors admittedly held the cards close to their chest, and it was that fact as much as anything which made it necessary for them to seek renewal of the writ.

9. Lord Justice Phillips gave leave to appeal to the defendants on this issue, but refused it in relation to other issues, adding this comment:
"I strongly deprecate the expenditure of substantial and disproportionate costs on technical interlocutory points in relation to a small cargo claim that appears bona fide. This interlocutory battle is the kind of activity that brings commercial litigation into disrepute."

10. I have quoted that as part of this judgment so that it may receive wider publicity than it otherwise would have done.

11. Notwithstanding that caution, the appeal was renewed on all available points until recently, but it is now confined to the one issue in respect of which Lord Justice Phillips gave leave, and it may be that that coincided with the arrival of Mr Kendrick QC on the scene. That is the only issue with which we are concerned.

12. Now for the history. The claim is for cargo damage. The nominal plaintiffs are the cargo owners. In fact, the claim is being pursued by their insurers, exercising subrogation rights, and the insurers are Norwegian. The nominal defendants are the company which signed the charterparty *"as agent for the owner"* of the vessel *"Celtic Commander"*, now renamed *"Fairway"*. They may or may not have been the true owners of the vessel. There is a considerable issue about that, which indeed has overshadowed the whole of these proceedings from the outset. If they are not the true owners, then it seems that their associated company, a Bermuda company, is. But whoever is

the true owner, in fact the owners' interests are represented by the P & I Club which it seems has acted on behalf of both companies throughout.

13. The voyage was from Belgium to Spain. The bill of lading was issued in Belgium. On discharge in Spain there was sea water damage said to amount to some £47,000. The one year time limit for proceedings in relation to that damage under the Hague Rules ran from 4th February 1994. The time limit was extended, on the judge's findings (that, like many other matters, was the subject of dispute), until 26th April 1996. Before that time, there were "without prejudice" negotiations, which were unsuccessful.

14. On 16th April 1996 the plaintiffs commenced arbitration proceedings in Norway. They did so by virtue of an arbitration clause, not in the bill of lading, but in the charterparty, which they contended was incorporated in the bill of lading by reason of the incorporation clause. To complete the history, in fact that allegation failed in Norway, not on the grounds which have found favour in English law that the words of incorporation were insufficient, but because there is a requirement in Norwegian law that the bill of lading shall have been signed by the receivers, which it appears this one was not.

15. As well as commencing that arbitration in Norway on 16th April, on 25th April 1996 the plaintiffs' solicitors issued two writs in the High Court in England: the first, a writ in rem, with which we are not concerned; the second, a writ in personam, with which we are concerned. That writ was not served on the defendants within the four months period of validity allowed for by the rules, and the defendants were not told, directly at least, of its existence.

16. In Norway the defendants challenged the jurisdiction of the arbitrators, and that resulted in a ruling in their favour on 5th November 1996. It is quite clear that substantial costs were incurred by both parties in connection with that abortive arbitration in Norway.

17. Meanwhile, in this country an extension or renewal of the writ became necessary on 26th August 1996, four months from the date of issue. That application was made, of course, after the relevant period of limitation had expired, but before the period for service of the writ had expired. It therefore was a category (2) case within Lord Brandon's classification. The application was supported by an affidavit, paragraphs 3 and 4 of which were quoted by the learned judge at p.29F of his judgment as follows:

> *"3. The plaintiff's claim in respect of the above damages is currently the subject of arbitration proceedings in Oslo, Norway, commenced on 16th April 1996. The respondents in these arbitration proceedings, Messrs Charles M Willie & Son (Shipping) Ltd (the defendants in this action) are, however, disputing the jurisdiction of the Norwegian arbitration panel. The Norwegian arbitrators are not expected to rule on their competence to hear the claim until the end of September. If Norwegian arbitration is not the proper jurisdiction, the claim will be brought in the High Court; if it is this action will not be pursued.*
>
> *4. The Writ of Summons in this action is due to expire on 25th August, before the Norwegian arbitrators rule on their competence. In the circumstances, I respectfully ask that the validity of the writ for service be extended for three months to allow for valid service in the event the Norwegian arbitrators rule that they are not competent to hear the claim."*

18. With regard to the plaintiffs' solicitors' failure either to serve the writ or to inform the defendants of its issue, the learned judge said at p.27:

> *"Unfortunately, the defendants were not informed of the issue of the English writs. Herbert Smith and Vogt agreed between themselves not to serve the writ pending the decision of the Norwegian arbitrators. That was, in my judgment, an unfortunate decision. Mr Picken [counsel for the defendants] submits that there was no reason why the writ in this action should not have been served. He says that the parties would then have made an agreement deferring service of a statement of claim until the issue of jurisdiction had been resolved in Norway. It is quite true that the writ could have been served on the defendants. It would certainly have been better, in my judgment, if the plaintiffs had put their cards on the table and explained to the defendants what they were doing."*

19. I should also refer at this stage to a letter quoted by the learned judge which was written by Vogt & Co, Norwegian lawyers acting for the plaintiffs, to the defendants' P & I Club, Sphere Drake, on 22nd May. They asked Sphere Drake to appoint an arbitrator on behalf of their members and concluded:

> *"Finally, please be advised that you are not correct in assuming that our client's claim may be time barred. The claim is not time barred, regardless of whether the arbitration clause has been validly incorporated or not."*

20. The learned judge continued:

> *"Although it may not have been appreciated by Sphere Drake at the time, so far as I can see that assertion must be a reference (albeit an oblique reference) to the fact that time had been preserved elsewhere. I have already indicated that in my view it would have been much better if Vogt had spelled the matter out. It does appear to me that commercial disputes and litigation should be conducted not as secretly but as openly as possible."*

21. At this point I should quote a paragraph from Mr Justice Clarke's more recent judgment dealing with the in rem action, where he made a further finding or comment on that same letter. Having referred to the passage in his earlier judgment which I have just read, he continued:

> *"Miss Healy submits that it would have been appreciated by anyone who read that letter and who gave thought to it, that a writ must have been issued elsewhere. Mr Picken submits that is not necessarily so although, in my judgment, Miss Healy is right. The only basis upon which Vogt could honestly have made that statement was that time had been preserved elsewhere."*

22. The inference is that *"elsewhere"* could only mean the United Kingdom.

23. I come now to the submissions which we have heard on the sole issue which is before us, namely whether the court should accede to the defendants' application to have the renewal of the writ set aside. Mr Kendrick QC, for the appellants, submits that the "*good reason"* which was identified by the judge is not a good reason within the rule, that is to say O.6,r.8, as amplified by Lord Brandon's speech in The Myrto . He says that there is no reason why the plaintiffs should not have served the writ during the four months period. They could have done so. There was no question of difficulty in effecting service, the defendants being a company incorporated in England and Wales and having their registered office, I think, in Cardiff. But the plaintiffs' solicitors simply chose not to do so. The only explanation given to the judge as a reason for not serving the writ was that arbitration proceedings were pending in Norway.

24. Mr Kendrick submits that failing to serve or at least to notify the defendants of the existence of the writ in those circumstances was contrary, first, to the general practice of London solicitors in Commercial and Admiralty cases such as this, in a situation which is by no means uncommon. In fact, problems as to jurisdiction arise very frequently, either because there are competing foreign jurisdictions or because there is competition between arbitration and court proceedings or, as is the case here, where both features are present.

25. Mr Kendrick also submits that the plaintiffs' solicitors' action was contrary to a note in the Annual Practice, subparagraph (10) at page 56:
"Where a plaintiff is faced with the sort of difficulty categorised [above] or for any other reason wishes to delay the action the proper and prudent course is to serve the writ and apply to the defendant for an extension of time to serve the statement of claim or, failing agreement with the defendant, to apply to the court."

26. In short, Mr Kendrick submits that failing to serve the writ merely because arbitration proceedings were pending in Norway was either no reason at all or, alternatively, was not a good reason. At the very best, he submits, the plaintiffs were holding their cards close to their chest, which is not what good practice requires the parties to do and which is specifically discouraged in these courts, most recently by Lord Woolf's Access to Justice Report.

27. As to the suggested inconvenience or possible distraction which service might have caused, Mr Kendrick submits that the learned judge was wrong about this. The plaintiffs could serve the writ and seek an extension of time from the defendants. If time for service of a statement of claim was refused, the plaintiffs could apply to the court either for such an extension or to have their own proceedings stayed. He submits that in those circumstances the cards would be face up on the table and the action could recommence, if necessary, as soon as the arbitration situation was resolved.

28. Mr Kendrick also submitted that a further explanation might be foreshadowed by Miss Healy's skeleton argument for the purposes of this appeal. In paragraph 16 of her skeleton the suggestion is made that:
"... service as opposed to mere issuance of a ´protective' writ might have prejudiced the plaintiffs' claim in the Norwegian arbitration proceedings ..."

She continues:
"In circumstances where the defendants were challenging the arbitrators' jurisdiction to determine the claim the plaintiffs might reasonably have feared that service as opposed to mere issuance of the writ would be said by the defendants to constitute repudiation of the arbitration agreement if, contrary to the defendants' case in Norway, such an agreement existed."

29. There is no evidence from Norwegian lawyers or elsewhere to support the suggestions which are there made in the skeleton argument. What can be said is that those contentions would have no merit under English law. It would be entirely possible to serve the writ on a "*without prejudice*" basis. The reasons for doing so could be explained and that could not conceivably affect the plaintiffs' right, if any, to continue with the reference to arbitration.

30. Finally, Mr Kendrick submits that, although the learned judge exercised a discretionary power, the defendants do not challenge the exercise of discretion as such. They submit that the plaintiffs were required as a matter of law to show a good reason for renewal and that they had failed to do so. Therefore, the renewal was not permitted by the rule.

31. Miss Healy, in submissions which, if I may say so, have been thorough and helpful, said this. First, she relied upon two Court of Appeal judgments since ***The Myrto .*** The first is the judgment of Waite LJ in ***Lewis v Harewood*** [1997] PIQR 58. The second is a judgment given by Hutchison LJ in ***Binning Bros Ltd (in liquidation) v Thomas Eggar Verrall Bowles (a firm)*** [1998] 1 All ER 409. She submits, in the light of those judgments, that the learned judge's order was essentially made in the exercise of his discretion and it was an exercise with which the Court of Appeal should not interfere unless the case came within the narrow parameters of the general rule expressed, for example, in Jones v Jones [1970] 2 QB 576 in a different context. She submits that no question of principle can be said to be involved here.

32. Next, she disputes what Mr Kendrick described as "*the usual practice*". She said that neither she nor Herbert Smith, her instructing solicitors, knew of it from their own experience and that, so far as they were concerned, she has told us, they did comply with normal practice in issuing but not serving the writ and not notifying the defendants of its existence. She submitted that the note in the White Book, which I have already read, does not apply in circumstances such as those of the present case.

33. She submits primarily that the pending arbitration in Norway was a good reason or at least what she called a *"putative good reason";* that is to say, the learned judge's decision that the existence of the proceedings was not outweighed by other factors was a matter of discretion and should stand.

34. She next submitted that there was no prejudice to the defendants by reason of the renewal. In this context she relied upon the letter dated 22nd May, to which I have referred, and the perhaps conflicting findings made about that letter by Mr Justice Clarke in the two judgments which I have read.

35. My comment would be this. On any view, the reference in that letter to the existence of the present proceedings was cryptic. The question is, why was no specific reference made, as it could have been? In my judgment, it is unnecessary to speculate whether the plaintiffs' solicitors were apprehensive as to the possible effects in Norway of either serving the writ or of disclosing its existence to the defendants. If they were so worried, then, on the evidence before us, it was wholly unnecessary for them to do so. It cannot be suggested, even on the most broad interpretation of that letter, that the plaintiffs, through their solicitors or otherwise, ever did inform the defendants expressly of the existence of the writ, and it is that failure which lies close to the heart of Mr Kendrick's submissions.

36. I would approach the matter in this way. Both the judgments in the Court of Appeal to which we have been referred, those of Waite LJ and Hutchison LJ, were concerned with the application of O.6,r.8 on the basis set out by Lord Brandon in ***The Myrto*** . Neither of them has qualified or sought to qualify Lord Brandon's two basic propositions with regard to category (2) and category (3) cases, which were these: (i) the plaintiffs must show good reason why the writ should be renewed; and (ii) each case depends upon its particular facts.

37. In ***Lewis v Harewood*** Waite LJ emphasised this two-stage approach, and he went on to observe that the fact that it is a two-stage approach does not mean that the evidence must be divided into two separate watertight compartments. Evidence which is relevant to what he called the "good reason issue" may also be relevant to the exercise of discretion, and vice versa. But it does not follow, in my judgment, that all of the evidence is relevant to both of those issues; nor, as Miss Healy submits, if this is what she submits, that as a result there is but one overall exercise of discretion which cannot be challenged except on familiar and limited grounds.

38. The "*good reason issue*", which was how Waite LJ described it, can be considered by the Court of Appeal independently of the exercise of discretion, and that is precisely what the court did in Binning Bros . Hutchison LJ referred to it as the "*necessary first step*" (at p.415D) and said in terms that, unless that first step could be taken, no question of discretion arose.

39. I would just add this on a more general basis. Before the judgment in ***The Myrto*** there were a number of authorities, not easily reconcilable with each other, which tended to suggest that the plaintiff must show what were called "*exceptional grounds"*. Another view, which appeared to have been embraced by the Court of Appeal in ***the Myrto*** , was that there could be no renewal except in cases where there was difficulty in the process of effecting service. The importance of Lord Brandon's speech was (i) that no such narrow gateway exists: the rule and its history, which he examined in detail, mean that good reason must be shown, but no more; and (ii) that issue, like the exercise of discretion, depends on all the circumstances of the individual case. I would deplore any attempt to reintroduce any more refined analysis than this or to multiply the authorities. I do not think that either Waite LJ or Hutchison LJ intended to cast any doubt upon the operation of the basic rules, as stated in the ***The Myrto*** .

40. What then is a "*good reason*" or, as Miss Healy would say, a "*putative good reason*" (which I would accept as a valid description if that means only that the court's discretion may be exercised against the plaintiff when other factors are taken into account, even though what might otherwise be a good reason, if it stood alone, is shown to exist)? I would hold that the court has to establish what the reason was; that is to say, the reason why the writ has not been served or will not be served before its validity expires. Then the court has to consider whether or not that is, or is capable of being, a good reason. So, for example, a plaintiff's solicitor who issues the writ then become responsible for serving it within the four months period. If he fails to do so through neglect, such as forgetfulness or oversight, then it is unlikely that the inquiry need proceed any further. That could not be a good reason if it stood alone.

41. The most common reason for seeking renewal is that, despite reasonable efforts, service has not been possible, or will not be possible or practicable within the time limit. That is not the present case. This case belongs to a third category: no practical difficulty in service; no forgetfulness or oversight; but a conscious decision not to serve the writ, coupled apparently with a decision not to inform the defendants or to seek an extension of time for service of the writ with their consent. That was the reason why renewal became necessary here.

42. What were the reasons for that decision? These are not entirely clear. But what is clear is that no special reasons are given, except the fact of pending arbitration proceedings in Norway. The rest is speculation. I would hold that that of itself is not a good reason, nor is it capable of itself of being a good reason. Too much is left unexplained. Why not tell the defendants? Why make a cryptic reference, rather than an express reference? Why hold your cards close to your chest? Why take no account of the fact that costs are being incurred by both parties in Norway which effectively would or might be thrown away, if a judgment on the merits was possible and inevitable in London in any event?

43. The reason seems to be that the plaintiffs' insurers preferred arbitration in Norway to litigation in England if it was available to them. They thought that it was available, but in that belief they were wrong. It was only then

that they turned to litigation here. But I would hold that the litigation here must be conducted in accordance with our rules.

44. The fact that if the defendants had been served with the writ or been told of its existence they might well have decided against incurring the costs of proceeding to challenge the jurisdiction of the arbitrators in Norway is to my mind, on any view, a relevant and important factor. It has to be said that the learned judge made no reference to it.

45. Miss Healy submits that it does not stand alone; that even if the writ had been served here, the defendants, given their subsequent taking of technical points, might have compelled the plaintiffs to continue if they could, or so far as they could, with their attempt to arbitrate in Norway, in the hope that fewer technical points might be available to the defendants as respondents there.

46. But be that as it may, on the face of it, at the time when the decision was taken not to serve this writ and not to notify the defendants of its existence, it was a factor which could be foreseen and which could be taken into account. The defendants were not given the opportunity to consider whether or not they should continue to incur costs in Norway. The plaintiffs must have decided that for their part they were prepared to incur further costs in Norway, even if those should turn out to have been unnecessary in the result. That seems to me to be conducting litigation in a way which is not in accordance with our rules and our present attitude to them.

47. I would hold, therefore, that the reason why the writ was not served is not clear and that, far from being a good reason, it was positively a bad reason, being contrary to the tenets to which I have referred.

48. I will add just this. First, the position could well have been different if there was, for example, evidence of advice from Norway that service of the writ here, or even telling the defendants about it, would have prejudiced the plaintiffs' position in the Norwegian arbitration. If there had been such evidence, then that would be relevant to the "good reason issue" as well as to the exercise of discretion generally. That evidence could perhaps be enough of its own to make the existence of proceedings in Norway a good reason as opposed to an insufficient reason. But without that evidence, I would hold that the mere existence of those proceedings does not and cannot amount to a good reason, in the circumstances of this case.

49. Secondly, as regards the practice which Mr Kendrick alleged and which appears to be referred to in the paragraph quoted from the White Book, that paragraph suggests that Mr Kendrick's submission is correct. The plaintiffs' solicitors do not seem to contradict him; they only say that they are unaware of the practice from their own experience. I would hope that one result of this part of this unfortunate congeries of litigation may be that the existence of such a practice will become more widely known than it is at the moment. It is sensible; it is open, and it is in accordance with the correct view as to how court proceedings should be conducted.

50. For these reasons I would allow the appeal.

LORD JUSTICE PILL:

51. The question what is a good reason for the purposes of RSC O.6,r.8 was considered by Lord Brandon in ***The Myrto*** [1987] AC 597. Lord Brandon stated at p.622:

"Whether there is or is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the judge who deals either with an ex parte application by a plaintiff for the grant of an extension, or with an inter partes application by a defendant to set aside an extension previously granted ex parte."

52. Miss Healy submits that the existence of the Norwegian proceedings was capable of constituting a good reason and that this court should respect the decision of the judge that it was. To adopt the language of Hutchison LJ in **Binning Bros v Verrall Bowles** [1998] 1 All ER 409 at p.415, there was a "potentially good reason for an extension".

53. I agree with Lord Justice Evans that the existence of other proceedings is not of itself a good reason for extending the validity of a writ. There may be cases where other proceedings exist and circumstances are present which are capable of constituting a good reason for an extension. On the evidence in this case, nothing is present which rendered the existence of Norwegian proceedings capable of constituting a good reason.

54. I, too, would allow this appeal.

LORD JUSTICE THORPE: I agree.

Order: appeal allowed; renewal of writ set aside and subsequent service set aside; the appellant defendants to have the costs of the appeal; no order as to the costs of the hearing before Mr Justice Clarke, but the plaintiffs to have their costs of the proceedings below prior to the hearing; leave to appeal to the House of Lords refused. [Not part of approved judgment]

MR D KENDRICK QC (instructed by Messrs More Fisher Brown, London E1) appeared on behalf of the Appellant Defendants.
MISS S HEALY (instructed by Messrs Herbert Smith, London EC2) appeared on behalf of the Respondent Plaintiffs.