ELF Oil UK Ltd v Besktas Denizcilik VE Tasimacilik Sanayi VE Ticaret AS [2001] Int.Com.L.R. 05/17

CA on appeal from Commercial Court (Mr Justice Toulson) before Mance LJ. 17th May 2001.

LORD JUSTICE MANCE:

1. This is a renewed application for permission to appeal in two sets of proceedings, the first brought by two Elf companies, Elf Oil UK Ltd United and Elf Trading SA, as bill of lading holders against ship owners ("Besiktas") in respect of cargo damage, and the second by Somarelf SA as charterers against the same ship-owners, Besiktas, in respect of the same damage to the same cargo.

2. The potential causes of action accrued on completion of discharge on 3rd December 1998. The ship owners were made aware of allegations of contamination of the cargo on 14th January 1999. They apparently appointed surveyors. They had further details of the claim later in the year, and on 19th November 1999 they offered, at least in respect of Elf's claims as bill of lading holders, though not in respect of any charterers' claims, an extension of time for proceedings until 1st June 1999, but the terms on which that offer was made were not accepted. So it was ineffective. It follows that it was incumbent on the claimants to issue any proceedings by midnight on 2nd December 1999, since it was a term of the charterparty that the Hague Rules time limit would apply. That term was also incorporated by reference into the bills of lading. With that term both sets of claimants did comply at the last minute, since the claim forms in these two sets of proceedings were issued on 1st December 1999.

3. The present issue arises from the fact that the claim forms were stamped with the words "*not for service out of the jurisdiction",* which meant that there was a four month period in which to serve them. They were not served within that four month period.

4. Applications for an extension of time for service were made on 1st June 2000. It came before Toulson J who granted it without the ship owners being party to the application. They then applied to the court to set aside Toulson J's orders for extensions of time in the two sets of proceedings, and those applications came before His Honour Judge Chambers QC, sitting as an additional judge of the Commercial Court on 15th December 2000. In a written judgment he set aside the orders made by Toulson J.

5. The result is that substantial claims, either by the bill of lading holders or, if the charterers remained owners of the contaminated gas/oil cargo, then by the charterers, put in value at considerably in excess of $1.5 million, cannot be pursued, at least against the ship-owners. Hence, the present application for permission to appeal against His Honour Judge Chambers' judgment. That application I refused on paper on 28th February 2001, but I have had the opportunity fully to reconsider the matter and have heard oral argument on it now from Mr. Gault, so that I approach the matter from the beginning once again.

6. The governing rule is CPR 7.6 which reads:

   "(2) The general rule is that an application to extend the time for service must be made -

   (a) within the period for serving the claim form specified by rule 7.5."

7. That is four months after issue in the case of a claim form to be served within the jurisdiction and six months where it is to be served outside the jurisdiction. The rule continues:

   "(b) where an order has been made under this rule, within the period for service specified by that order;

   (3) If the claimant applies for an order to extend the time for service of the claim form after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if -

   (a) the court has been unable to serve a claim form (that is in the present case inapplicable), or

   (b) the claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and

   (c) in either case, the claimant has acted promptly in making the application.

   (4) An application for an order extending the time for service -

   (a) must be supported by evidence; and

   (b) may be made without notice."

8. His Honour Judge Chambers had to consider CPR 7.6(3)(b) and (c). He concluded that neither (b) nor (c) had been satisfied.

9. It is necessary to look at what transpired between the date of issue of the claim forms in the proceedings on 1st December 1999 and 1st June 2000 when application was made to extend the time for their service, and (I should add) for permission to serve the proceedings out of the jurisdiction on the ship-owners in Turkey, where they are in fact resident. So far as appears from the material available, nothing relevant occurred inter partes until 25th January 2000 when the claimants' solicitors, Shaw & Croft, wrote to the defendant ship- owners' Oslo P & I Club, Skuld, as follows:

   "We represent cargo interests in respect of a claim against [the owners] for damages ... in respect of the carriage of a cargo... on board the vessel 'AYBERK KALKAVAN' ... under a bill of lading dated 25th November 1998. Formal proceedings in England have been commenced by the issuing of a claim form on 01.12.99.

   The bill of lading incorporates the terms and conditions of the charterparty dated London, 16th November 1998, additional clause 37(2) of which provides for the appointment of an agent in England by the owners for receiving the service of process. We would suggest that in the interests of all parties concerned you appoint agents for service in England in accordance with the terms of the charterparty. In the event that you fail to make such an appointment

within seven days, we shall immediately take steps to serve upon you in Turkey, the additional costs of such service out of the jurisdiction being borne by yourselves.

We look forward to hearing from you in due course."

10. That letter was written under the heading AYBERK KALKAVAN c/p 16.11.98, a clear reference to the charter-party. It commenced, "*we represent cargo interests*", a phrase which may be taken in the recipient Skuld's mind to have echoed previous communications in November 1999, in which agents for the Elf companies and Somarelf had written to Skuld referring to the two Elf companies and to Somarelf as *"cargo interests"* pursuing a claim against ship owners. The second paragraph of the letter of 25th January 2000 reads, it is true, at first glance more consistently with a claim being pursued solely under a bill of lading, but not unequivocally so. Against the background of the previous correspondence, I have some sympathy with the view that the letter of 25th January 2000 is wide enough to embrace both the bill of lading claims and the alternative charterparty claim. That is so despite the fact that it only refers to the issue of a single claim form on 1st December 1999. It would have been possible for the bill of lading holders' and the charterers' claims to have been combined in a single claim form and, as far as Skuld were concerned, there is nothing to show that they had any idea that what happened on 1st December 1999 was that two claim forms were issued. I can, for present purposes, therefore pass over any distinction, such as the judge drew, between the bill of lading and charterers' claims.

11. The fact remains, as the judge pointed out, that, after the issue of the claim forms on 1st December 1999, nothing was done between the two sides by the claimants until 25th January 2000. That, it seems to me, creates a difficulty at the outset, when one comes to consider whether the claimants have taken all reasonable steps to serve the claim form but have been unable to do so. However, I will accept that in some circumstances, especially if there is no reason to believe that there will be any problem in service, a delay of one and a half months or nearly two months would not be unreasonable.

12. The letter was accompanied by a threat that if no appointment was made within seven days of English solicitors to accept service, steps would immediately be taken to serve out of the jurisdiction in Turkey. Unfortunately, that proved to be more huff than puff. After further correspondence which I need not read, an answer was received from the ship-owners' side, through solicitors, by fax dated 16th February, which made it clear that no English solicitors were going to be appointed at that stage to accept service. The letter said:

"It will, accordingly, be for you to apply to the court to obtain leave to serve directly on our clients, if you consider that you can achieve that in the light of our above observations."

13. They were observations that the bill of lading did not incorporate the service provision in the charterparty:

"We leave the matter in your hands. If you do apply to court, would you please let us know the outcome of that application. If you are not to obtain leave then, presumably, you would consider alternative avenues of claim against our clients, presumably in Turkey. If you were to succeed, we would also appreciate your letting us know. Although we would reserve our clients right to challenge the granting of any such leave, it may well be the case that our clients would look favourably on instructing us at that stage to accept service of the proceedings which you had obtained to serve out (without prejudice) with a view to avoiding the costs of service outside of the jurisdiction in Turkey."

14. As I said, the claimants' reaction to that proved that their earlier letter contained an element of huff. Although the reply to the letter of 16th February on 18th February was that there would be an application for leave to serve out of the jurisdiction, no such application was made until 1st June. What is known about the interim period is that advice was sought from a Turkish lawyer and obtained on 22nd March, to the effect that it would take three months to effect service in Turkey, and only on 15th May 2000 did the claimants' lawyers obtain instructions to apply for an extension of time for service. All this is difficult to follow until one takes into account a fact which was not revealed to Toulson J but was revealed to His Honour Judge Chambers, namely that the claimants' solicitors were under the illusion that they already had six months in which to serve the proceedings. Since no permission had been obtained to serve the claim forms out of the jurisdiction and these were marked *"for service within the jurisdiction",* that was an illusion. If it had been true the period for service would have expired, not at the end of March but at the end of May. That would explain the application made immediately after the end of that period on 1st June 2000. Unfortunately, it cannot be suggested, and has not been suggested, that that was a reasonable or a relevant error. The claimants' compliance or non-compliance with the requirements in subparagraphs (b) and (c) in CPR 7.6(3) must be judged on the basis that the steps had to be taken to serve the claim form within the period of four months of its validity ending 31st March, and that they had to act promptly in applying for an extension, having regard to that period.

15. On the facts which I have stated, those requirements pose obvious difficulties. Mr Gault urges that the rule must be given a liberal interpretation. He points out that by definition it applies after there has been a delay, at least of such a nature that the basic period for service has expired, and he submits that the delay which actually occurred must be taken in context. This was a cargo claim. It was presented early. It was known about and investigated by ship-owners at an early stage. The incorporated limit under the Hague Rules is frequently extended. The ship owners indicated a willingness to grant an extension here to the middle of 1999, although on conditions which were not accepted. In his skeleton he emphasizes the lacks of prejudice to the ship owners but before me orally he accepts that that really goes to discretion rather than jurisdiction.

16. It seems to me that the contextual matters on which he relies are of limited value in relation to the present issue which is essentially a procedural one, turning on the nature and reasonableness of the steps taken in relation to

service and the promptness of the application. Looking at the history of the matter, it was incumbent upon the claimants to start thinking about service at an early stage after issuing the claim forms. They had no particular reason to think that service would be easy. The ultimate reaction on 16th February 2000 to their proposal that solicitors be appointed within England was not unduly surprising, even if not a particularly co-operative attitude. It was not unusual. The claimants themselves recognized that they would have to raise the question of service with the defendants. They only raised it on 25th January 2000. Having raised it in terms to which no criticism can be directed, they failed to follow through their own indication that they would act immediately if service within England was not accepted. One can, I would be prepared to accept, disregard the period of ensuing correspondence up to 16th February, but once the 16th February answer was received it was unequivocal, and it was at the latest then incumbent on the claimants and their advisers to take steps to serve. It is no answer to say that there were no steps that could be taken so long as the writ remained endorsed with the words "not for service out of the jurisdiction". What was incumbent upon them was to take reasonable steps to serve the claim form. That, as the claimants themselves recognized, meant that either they had to get consent to its being served on solicitors in the jurisdiction or, failing that, they had to apply for permission to serve it out of the jurisdiction. Had they applied for such permission on 16th February, then no doubt they would have got it. The period for service would have become six months expiring at the end of May; and the period from the middle of February to the end of May is nearly three and a half months, which is more than the three month period which the claimants' solicitors were on 22nd March advised that it would take to effect service in Turkey. The fact that they were only advised on 22nd March 2000 creates another problem, on the face of it. They should have addressed the question of how long it would take to serve in Turkey long before 22nd March. Even if they had only addressed it after 16th February, and even if it had not been possible at that stage to obtain ex parte an immediate order for permission to serve out of the jurisdiction, and even if it proved to take longer than three months to effect service in Turkey under any order obtained, still the matter would have looked different from the way it looks now. It seems to me that it is material that it was only on 15th May 2000 that instructions were obtained to apply for an extension of time for service. That is probably in the context of the misunderstanding about the expiry date of the writ. That was, however, far too late a time to start seeking an extension of time for service.

17. It seems to me, therefore, that the judge was absolutely right. The claimants failed to take all reasonable steps to serve the claim form. First, in my view, they delayed in writing the letter of 20th January. That should have been written earlier. Even if one disregards that, after the unequivocal response of 16th February they failed to take any reasonable steps to get permission to serve out of the jurisdiction or to serve the claim form; and, bearing in mind that there is no excuse for the misapprehension about the date on which the period for service expired, they failed to act promptly in making the application after the expiry of the four month period.

18. Those conclusions are fatal to both these applications. They make it unnecessary to consider the separate topic of non-disclosure. I see no real prospect of either of these applicants succeeding in establishing any different position on an appeal. It is not suggested that there is any other compelling reason for an appeal. I have formed a clear view. It seems to me that the applications must fail.

19. As far as the issue of non-disclosure is concerned, it is apparent that Toulson J's orders were induced by a regrettable non-disclosure of the true reasons for the delay. What His Honour Judge Chambers said about that was that, had he known the true circumstances, the judge could not have made the order that he did because he would have had no discretion to do so, and that "*It must follow that on these grounds as well the original order must be set aside.*" Accordingly, it seems to me that His Honour Judge Chambers was not setting aside Toulson J's order because of the non-disclosure but rather because, as a matter of discretion, it was not an order that the judge could or would have made had he known the true facts, and it was an order which was made on an ex parte basis and was properly being reviewed before His Honour Judge Chambers. I can well see that, if His Honour Judge Chambers had concluded that it should be set aside in any event, even if, as a matter of discretion, an extension would have been justified, that would have been a draconian conclusion which might have merited review in this court as being disproportionate. However, His Honour Judge Chambers did not decide that aspect of the case on that basis. That point does not arise. For the reasons I have given, the applications will be dismissed.

Order: Application refused.

MR. S. GAULT (instructed by Messrs Shaw & Croft, London, EC3) appeared on behalf of the Applicant.