Palmers Corrosion Control Ltd v Tyne Dock Engineering Ltd [1997] APP.L.R. 11/20

CA on appeal from QBD (HHJ Faulks) before Staughton LJ; Hirst LJ; Potter LJ. 20th November, 1997

LORD JUSTICE STAUGHTON: Lord Justice Hirst will give the first judgment.

LORD JUSTICE HIRST:

1. This is an appeal by the defendant, Tyne Dock Engineering Limited, against the order of Judge Faulks sitting as an Official Referee in Newcastle on 21st November 1996, whereby he ordered that the third party, Celtic Tankers PLC (hereafter called "Celtic") be granted a stay of the third party proceedings in this action, pursuant to section 4 of the Arbitration Act 1950 , which as is common ground governs the present case, since the application was made before 31st January 1997, i.e. before the new Arbitration Act 1996 came into force.

2. The dispute relates to the blasting and painting of the internal cargo tanks of a medium sized petroleum tanker called Celtic Terrier. The vessel is owned by Celtic and managed by the other third party in the action, Campbell Maritime Limited.

3. In July 1995 Tyne Dock Engineering Limited and Celtic entered into an agreement (which I will call the "head agreement") to carry out cargo tank blasting and epoxy re-coating works on the vessel. The head agreement contained the following key provisions which also appeared in the subcontract, to which I am about to refer.
   (1) The shot blasting must be carried out to a standard called SA2.5 [which I do not need to read out, all I need say is that it appears at page 41 of the bundle.]
   (2) The surfaces requiring blasting would be free of hard scale, be clean, free of oil and dry when presented.
   (3) Should mechanical scaling be necessary or the surface require double blasting due to heavy scale or surface contamination, this was to be regarded as an extra.

4. There then was a time provision as to the period within which the work would be completed.

5. The agreement also contained an arbitration clause which is of fundamental importance as far as this present appeal is concerned.

6. It was always understood between Tyne Dock Engineering Limited and Celtic that Tyne Dock Engineering Limited would provide the dockyard where they carry out their activities as ship repairers in South Shields, but that Tyne Dock Engineering Limited would not itself perform the blasting and painting work to the vessel, as it does not have the appropriate expertise in that field, and that, instead of Tyne Dock Engineering Limited themselves doing that work, the work should be subcontracted and for that purpose the nominated sub-contractors were the plaintiff, Palmers Corrosion Control Limited (hereafter "Palmers").

7. Consequently a subcontract was entered into between Palmers and Tyne Dock Engineering Limited, under which Palmers agreed to perform the work to the same specification, and for all present purposes the obligations under the subcontract mirrored the obligations under the contract.

8. Both Tyne Dock Engineering Limited's and Palmers' standard terms contained an arbitration clause, and though there is a dispute between them, which for present purposes is irrelevant, as to which the two sets of terms were applicable, there is no doubt that there was a provision for arbitration in the subcontract also.

The dispute

9. It is not necessary into go to any detail on the dispute. There are 12 steel tanks arranged in pairs on each side of the vessel which were to be blasted by Palmers. By August 1995 Celtic had rejected the first tanks presented by Palmers and throughout the course of the blasting process the work performed by Palmers was rejected by Celtic until Celtic considered that the SA 2.5 standard had been met, with the result that the entire process took considerably longer than had been envisaged.

10. Palmers claim that the steel was blasted to that standard and that the cause of the problem was the presence of soluble salts in the steel which caused the steel *"to turn",* i.e. start to rust. This, they said, was in breach of the provision that the vessel was to be presented at the yard with tank surfaces which were clean and free from hard scale and oil and other contaminants. Celtic for their part dispute these allegations and contend that the presence of salts in the steel was not the cause for the need of additional shot blasting; but that was necessitated by the fact that the original blasting was insufficiently thorough: that salts are present in all steel and hence cannot be described as contaminants, and that the level of salts in the steel in the present case was no higher than normal and ought not to have caused a problem, if the defendant's de-humidification equipment had been operating properly.

11. The claims are as follows. Palmers claim against Tyne Dock Engineering Limited a sum of about £680,000 plus VAT, which includes both the original contract price and a claim for payment for the additional work performed as a result of the rejection of the tanks. Tyne Dock Engineering Limited in their invoices to Celtic seek payment of the sum of approximately £940,000 on the same basis, including the additional costs invoiced to Tyne Dock Engineering Limited by Palmers. Celtic have refused to pay Tyne Dock Engineering Limited the full sum invoiced and have remitted only £628,000 odd, leaving an unpaid balance which is the amount claimed by Tyne Dock Engineering Limited against Celtic, together with a claim for an indemnity against Palmers' claims against them.

12. After some initial hesitation or reluctance on Palmers' side, Tyne Dock Engineering Limited and Palmers agreed that the proceedings as between them (that is the subcontract claim) should be brought in the Official Referee's Court rather than in arbitration proceedings: this was on the basis, as explained by Tyne Dock Engineering Limited in the affidavit evidence sworn on their behalf, that this would enable Celtic to be joined as a third party, thus

ensuring that all the various claims were resolved in one set of proceedings, it being manifest that all the issues between all the parties turn on the same facts, and that as between all parties the same or substantially the same evidence will need to be considered and the same arguments (for instance as to what is a contaminant in the context of this case) addressed and determined.

13. However, when the third party proceedings were issued in the action Celtic objected to being joined in court proceedings and sought a stay pursuant to the arbitration clause in the head contract. In upholding Celtic's application the judge stated as follows:

"It seems to me that if the matter were to go off to arbitration the arbitrator would have to decide, first of all, on the validity of Palmers' (the sub-contractor's) claim. If he found that that claim was valid then it would follow, as night follows day, that Celtic Tankers would be liable to Palmers.

If he found that Palmers' claim was invalid the Tyne Dock would not have a third party claim against Celtic Tankers so that, whether or not Palmers agree to tripartite arbitration, effectively what would take place would be an adjudication of the entire issue.

All three parties are run by businessmen. They will no doubt be guided by commercial considerations. I find it unbelievable that after such an arbitration at which Palmers' work-force will no doubt have to give evidence and be cross-examined about what they did do and what they did not do, that Palmers (if they lose) are going to go on and risk further costs by continuing this present litigation.

The issue at present is whether or not I should grant a stay of Third Party Proceedings. On the authority of ***Bulk Oil*** *I take the view that I should favour a stay, since there was a stay in the agreement between Tyne Dock and Celtic Tankers, unless the person objecting to such a stay can point to potential injustice and, in that regard, I am entitled to bear in mind if the person objecting to the stay has himself been responsible for the potential difficult situation.*

It seems to me in this case, since the arbitration provision between Tyne Dock and Celtic was Tyne Dock's own provision, that it ill behoves them now to complain of the potential effects of their own clause being implemented.

For the reasons that I have already given, it seems to me highly unlikely that there would ever be two sets of proceeding and, in the circumstances, I do not think that there is much potential risk of injustice. Bearing in mind that it is Tyne Dock's own clause which they are now persuading me not to invoke, I do not think that there should be a stay and that all matters should be tried together in the Official Referee proceedings."

14. On behalf of Tyne Dock Engineering Limited Mr Lerego QC in his submissions before us this morning has focused particularly on the great importance, as he would put it, of avoiding any risk of injustice through there being a multiplicity of proceedings and therefore a risk of inconsistent findings.

15. He criticises the judge in two respects. First, he says the judge gave wholly insufficient weight to the critical importance of the avoidance of injustice in the manner which I have just described.

16. Secondly, he says the judge went wrong when he held in effect that there never would be a second lot of proceedings because Palmers would abide by the outcome of the arbitration which he seemed to assume would come on first.

17. In short Mr Lerego's submission was that if the third party proceedings are to be stayed there will be two sets of proceedings dealing with the same issues, with a real risk of inconsistent findings and hence a real risk of substantial injustice.

18. Furthermore, the two sets of proceedings would inevitably involve more costs, and more delay, with the possibility of witnesses having to give their evidence twice over.

19. In support of his argument as to the great importance of the avoidance of multiplicity of proceedings Mr Lerego cited two authorities, both in the Court of Appeal. The first is ***Taunton Collins v. Coromie*** [1964] 1 WLR 633, a decision of Lord Denning MR, Pearson and Salmon LJJ. This was in a building contract case where the first instance judge had refused a stay and was upheld in the Court of Appeal. Lord Denning put the matter in this way, at page 635: *"The matter is of considerable importance. There are a great number of contracts that the RIBA form, but that there is very little authority on this point. It seems to me most undesirable that there should be two proceedings in two separate tribunals - one before the official referee and the other before an arbitrator - to decide the same questions of fact. If the two proceedings should go on independently there might be inconsistent findings. The decision of the official referee might conflict with the decision of the arbitrator. There would be much extra cost involved in having two separate proceedings going on side by side; and there would be more delay. Furthermore ... if this action for the official referee went on by itself - between the building owner and the architect - without the builders being there, there would be many procedural difficulties. For instance, there would be manoeuvres as to who should call the builders, and so forth. All in all, the undesirability of two separate proceedings is such that I should have thought it was a very proper exercise of discretion for the official referee to say that he would not stay the claim against the builders. Everything should be dealt with in one proceeding before the official referee."*

20. Then Pearson LJ on page 637 said: *"In this case there is a conflict of two well-established and important principles. One is that parties should normally be held to their contractual agreements."*

21. Then he cites the arbitration clause which the parties had entered into, and proceeds: *"That is one principle. The other principle is that a multiplicity of proceedings is highly undesirable for the reasons which have been given. It is obvious that there may be different decisions on the same question and a great confusion may arise."*

22. Then he goes on to cite factors which had already been canvassed by Lord Denning. Salmon LJ agreed.

23. The second case relied upon is ***Berkshire Senior Citizens Housing Association Limited v. Fitt (McCarthy E) Limited and National Westminster Bank (Trustees of the Estate of Anthony Cripps, Decd.)*** [1979] 15 Build.L.R. 27. In that case the first instance judge had granted a stay. That was reversed in the Court of Appeal with Goff LJ giving the leading judgment. Having cited Pearson LJ in ***Taunton-Collins*** he then went on at page 33 to point out how very undesirable the potential risk of conflicting decisions was. He put it in the very strongest terms, as did Sir David Cairns in his judgment starting at page 35 and Roskill LJ at page 36, the latter saying and I quote: *"It seems to me, therefore, that with the greatest respect ... [to the first instance judge] he approached this problem on a wrong basis and he does not seem (having approached it on a wrong basis) to have asked himself the critical question: If the proceedings are stayed as against the first defendants who alone sought a stay, is the result going to be a multiplicity of proceedings with a risk of conflicting decisions so as to bring this case within the principles stated in the* ***Taunton-Collins*** *case?"*

24. Mr Leregо submitted, founding himself strongly on those last words of Roskill LJ, and in particular the reference to *"the principles"* laid down in the ***Taunton-Collins*** case, that the avoidance of multiplicity of proceedings had become elevated to a principle of law, which would entitle him without more ado to succeed on this appeal. If that was pitching it too high, then he moved the standard down a notch or two and submitted that it was a consideration of paramount importance, which should only be overridden in the very rarest of cases.

25. On behalf of Celtic Mr Simon Croall submitted that although the Court has a discretion under section 4 to refuse a stay, there is a strong presumption in favour of a stay. In support of that submission he cites the decision of Kerr J, as he then was, in ***Bulk Oil (Zug) AG v. Trans-Asiatic Oil Ltd SA [***1973] 1 Lloyds Rep 129 at page 135, in a passage which was also referred to by the judge in his judgment where Kerr LJ said: *"Where there are disputes under two related agreements of which only one contained an arbitration clause the Court will exercise its discretion to allow both disputes to proceed to litigation together if ... a stay of the litigation relating to one of the disputes would be liable to cause substantial injustice to the party which wants them to be litigated together. In this connection the Court will take into consideration whether or not the party seeking to litigate both disputes together is in some way responsible for the dilemma in which he finds himself."*

26. Mr Croall recognised that Kerr J took into account the importance of the avoidance of multiplicity proceedings with a direct citation from ***Taunton-Collins*** on page 136. But he submitted that ***Bulk Oil*** is authority that a similar weight is to be given to what Kerr LJ described as a situation where the party seeking to avoid the stay is in some way responsible for the dilemma in which he finds himself. Mr Croall applied that in the present case, submitting that Tyne Dock Engineering Limited by electing to enter into the arbitration clause in their contract with Celtic had, in effect, placed themselves in the dilemma to which Kerr J refers, and created for themselves the problem of the possible conflict between two sets of proceedings, which they could have avoided by refusing to insert the arbitration clause into their contract with Celtic. That was a matter which weighed very strongly with the judge as we have seen.

27. Mr Croall sought to distinguish Mr Leregо's two Court of Appeal authorities on the footing that so far as ***Taunton-Collins*** is concerned, the Court of Appeal were upholding the exercise of the discretion which the first instance judge had exercised and therefore were not laying down any special new principles, and that in the ***Berkshire*** case they were exercising an entirely fresh discretion since the first instance judge had proceeded on the wrong basis.

28. At the conclusion of his argument he submitted that the judge had taken all the relevant considerations into account, so that there was no proper basis for the appellate court on well-established principles to upset his exercise of his judicial discretion on the correct principles: and that at the very heart of the case was the fact that the judge had not gone badly wrong, since he was entitled to pay regard to all the matters which he took into account, and that consequently there was serious error as justifying interference by the court.

29. By way of Cross Notice of Appeal, if I may summarize it very briefly (as Mr Croall himself did in his argument) Mr Croall suggested that litigation may be more prolonged, and more expensive than an arbitaration and will deprive his clients of a private tribunal, which is what they wanted when they signed the arbitration clause; it will also mean that there will not be a specialist arbitrator, which though not specifically required by the arbitration clause, would probably characterise the arbitrator who in practice would be appointed.

30. He also said, as a final throw (if I may call it that) that the position here was anomalous since normally the shipowner would be a foreign company in which case there would be compulsory arbitration under the Arbitration Act 1975 section 1. Let me say at once that I do not think there is anything at all in that submission. We have to treat this case as a Section 4 case. What might have been the position if his clients had been foreign owners is neither here nor there.

31. I therefore turn back to evaluate the rival argument on the main points. First of all, it seems to me that the ***Taunton-Collins*** case and the ***Berkshire*** case, while perhaps not going quite so far as to lay down the multiplicity of proceedings point as a rule of principle, do very clearly and positively establish that that is a paramount consideration. Here the risk is palpably present, and I do not think that Mr Croall was right in downgrading it to no more than an important factor to be equated, as he would have it, with the *"dilemma"* point.

32. Thus, although the judge did not say so in terms, he clearly had the risk of multiplicity in mind, as he appears to have assumed the arbitration would come on first, and that it followed that it was proper for him to infer that the

outcome of the arbitration would be accepted by Palmers, so there would never be a second set of proceedings with the result that the risk of multiplicity did not arise.

33. However reading the judge's judgment, it seems to me that did not give anything like sufficient weight to this consideration, in that he did not place it at the forefront of his analysis in approaching the exercise of his discretion. That in my judgment was an error of principle.

34. Secondly, despite Mr Croall's able submissions to the contrary, I do not think that the judge's inference that there never would be a second set of proceedings was one which he was entitled to draw, because it must be on the cards, to put it no higher, that if Celtic were successful in the arbitration, in which *ex hypothesi* Palmers would not be represented, the later would not meekly lie down and accept the result. It is by no means unlikely that if they were dissatisfied, they would want to take proceedings where they would be *dominus litis* and be able to call their own witnesses and present the arguments themselves. Moreover, as my Lord, Lord Justice Potter pointed out in the course of the argument, this particular factor would apply in any case of the present kind and is not some peculiar and special feature of this particular case.

35. I have therefore come to the conclusion, with all respect to the judge, that on those two grounds he erred in principle, thus allowing us to exercise our discretion afresh.

36. I have already stressed what to my mind is the paramount consideration here, namely the multiplicity of proceedings and the consequent risk of injustice through inconsistent findings. How does the other consideration, which weighed heavily with the judge and is strongly pressed by Mr Croall, fit into the picture, having regard to the Bulk Oil decision on which Mr Croall so strongly relies? I accept that this may be a factor but it does not seem to be a very strong one in relation to a standard arbitration clause containing standard terms and conditions, which is a perfectly normal feature of a contract of this kind. Also I think it is pertinent to point out that the weight to be given to it will depend upon the circumstances and in ***Bulk Oil*** it naturally weighed quite heavily with Kerr J because in that case the two sets of proceedings were respectively an English action and an arbitration in Geneva, whereas here we are dealing with a choice between court proceedings in England and a domestic arbitration. In my judgment it does not carry very heavy weight in the present circumstances.

37. So far as Mr Croall's other points are concerned -- specialist arbitrator, private hearing, more expense and greater delay -- even assuming they were valid, they seem to be heavily outweighed by the major consideration on which I have already laid such stress.

38. I would therefore, in the exercise of my discretion, refuse a stay because of the overwhelming importance of avoiding contradictory findings. For those reasons I would allow the appeal and dismiss Celtic's application for a stay.

LORD JUSTICE POTTER:

39. I agree. I consider that the preponderance of authority in cases of this kind weighs against an exercise of discretion in favour of a stay which may lead to a multiplicity of proceedings concerned with identical issues. The vice of such multiplicity is that it gives rise to (a) a duplication of the task of investigating and determining the issues and (b) a risk of inconsistent findings.

40. It seems to me that the judge did not apply his mind to (b) in any sense other than by paying lip service it. He was prepared to assume (a), in the sense that he accepted that duplication of the issues would be involved if the proceedings continued. But, having done so, he avoided giving any weight to (b) by making an assumption about what would be the likely conduct of the parties following a decision in the arbitration proceedings. In doing so, he did not advert to any peculiar feature of the case which led him to his view, save that he said the parties were run by businessmen who would be unlikely to risk further costs by continuing the litigation. It seems to me that a simliar view might equally well be expressed whenever a stay is applied in circumstances of this kind, thus neutering the presumption against the undesirability of duplicate proceedings to which the authorities give so much weight in relation to section 4 of the Arbitration Act 1950 . In my view the judge was in error in that respect.

41. For that reason, as well as the reasons already given by Lord Justice Hirst, I would allow the appeal.

LORD JUSTICE STAUGHTON:

42. I agree with both judgments. I would add only this: the judge seems to have thought that there was not in practice a risk of inconsistent conclusions in this case. I fear that there may be some corruption in the passage from his judgment which Lord Justice Hirst has read out. He was saying, I think, that if there was a stay of the third party proceedings then Palmers' claim against Tyne Dock Engineering Limited would be tried first, whether by arbitration or in a court of law. If Palmers' claim for £386,000 failed, there would be no cause for Tyne Dock Engineering Limited to claim anything from Celtic Tankers. So in that event there would be no risk of inconsistent results.

43. If, however, Palmers' claim against Tyne Dock Engineering Limited succeeded, Tyne Dock Engineering Limited would then claim an indemnity from Celtic Tankers, presumably again for £386,000. The judge evidently concluded that Celtic would meekly succumb to that claim and give in. I am bound to say that I think that may have been a sanguine conclusion. I do not think it would be proper for us to make that assumption. Accordingly I agree with the order proposed.

ORDER: Appeal allowed with costs. Stay of the third party proceedings removed. Leave to appeal refused.

MR M LEREGO QC and MR D DALE (Instructed by Messrs Wilkinson Maughan, Newcastle-Upon-Tyne NE 1XX) appeared on behalf of the Appellants
MR S CROALL (Instructed by Messrs Mills & Company, Newcastle-Upon-Tyne NE1 1LE) appeared on behalf of the Third Party/Respondents