MURPHY (J) - Lib

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Finlay C.J.
Griffin J.
Hederman J.

THE SUPREME COURT

(328-84)

BETWEEN/

JOSEPH MURPHY STRUCTURAL ENGINEERS LIMITED

Plaintiffs

and

MANITOWOC (U.K.) LIMITED, CRANE TEST AND INSPECTION LIMITED, GENERAL ELECTRICAL TECHNICAL SERVICES COMPANY INCORPORATED TRADING IN IRELAND AS ATLANTIC PLANT CONSTRUCTION COMPANY AND BY ORDER OF THE HIGH COURT GREENHAM (PLANT HIRE) LIMITED

Defendants

JUDGMENT delivered on the 30th day of July 1985 by

GRIFFIN J. New Lits.

This appeal is taken by Greenham (Plant Hire) Limited ("Greenham") against an order of the High Court dated the 12th of November 1984 joining Greenham as a co-defendant in proceedings taken by Joseph Murphy Structural Engineers Limited ("Murphy") against the first, second and third defendants for damages for negligence and breach of contract and giving liberty to Murphy to issue a Plenary Summons concurrent with the Plenary Summons against the said defendants. It is contended on behalf of Greenham that, having regard to the facts

of the case, to the course proceedings have taken in the High Court and in the High Court of Justice in England, and to the law applicable to the case, the learned High Court Judge was incorrect in exercising his discretion in favour of Murphy in determining that it would be more convenient to try the dispute between Murphy and Greenham in the High Court, and that the issues between Murphy and all other parties could then be determined at the one trial.

The facts

Murphy carries on the business of structural engineering contractors and in the year 1981 was engaged in carrying out a contract with the Electricity Supply Board ("E.S.B.") for the erection of certain structural steel works at a new power station at Moneypoint, Kilrush in the County of Clare. For the purpose of carrying out their contract with the E.S.B., the E.S.B. supplied to Murphy a Manitowoc 4100WV series crane. During the year 1981 it became necessary to convert this crane to what is known as a tower rig configuration and the E.S.B. instructed Murphy to procure the equipment necessary for the said conversion. In July 1981 Murphy contracted with Greenham, who are hirers of plant and equipment,

to hire to them a jib suitable for use with this particular crane. This jib was delivered to the site at Moneypoint in the beginning of October 1981. Greenham arranged with Manitowoc (U.K.) Limited ("Manitowoc"), an associate company of the manufacturers, that one of Manitowoc's service engineers, who was an expert in that field, would oversee the assembly, commissioning and testing of the crane and tower configuration and ensure that the crane was properly and safely erected. The erection and assembly of the tower rig configuration was carried out by Murphy's employees under the supervision of Manitowoc's service engineer.

When the rig was erected, it was necessary to have the crane tested and inspected by an expert to ensure that it had been properly erected and assembled and that the necessary certificate pursuant to the Construction (Safety, Health & Welfare) Regulations 1979 could be issued. For this purpose, Greenham engaged Crane Test and Inspection Limited ("Crane Test"), a firm of experts, and an employee of Crane Test tested and inspected the crane and gib during the month of October 1981 and issued the necessary certificates on the 30th of October 1981.

The crane was at all times driven and operated by a driver

supplied by the third-named defendant company ("Atlantic"), a nominated sub-contractor by the E.S.B., and Murphy alleges that Atlantic represented and warranted that drivers supplied by it to Murphy were qualified expert crane operators capable of safely operating and supervising cranes.

On the morning of the 14th December 1981 the crane was blown over and fell to the ground in very heavy winds and it was very extensively damaged. In consequence, Murphy suffered damage in having to replace the tower equipment, in replacing equipment originally supplied by the E.S.B., and consequential loss, alleged by them in total to exceed £300,000 sterling. It is claimed on behalf of Murphy that the loss and damage suffered by it was caused or alternatively contributed to by negligence and breach of contract on the part of Manitowoc, or alternatively Crane Test, or alternatively Atlantic, or alternatively Greenham.

The course of proceedings

Greenham were not paid the hire charges by Murphy (a sum in excess of £25,000 sterling) and required to replace the jib which was damaged beyond repair in the sum of more than £90,000 sterling and

instituted proceedings against Murphy in the High Court of Justice in England to recover the cost of the hire and of replacing the damaged jib. Murphy instituted proceedings in the High Court against Manitowoc, Crane Test and Atlantic and subsequently applied to the High Court for leave to join Greenham as defendants. Murphy has also defended the action in the High Court of Justice in England and has counterclaimed in that action for all the loss and damage suffered by it arising from the damage suffered when the crane was blown over. As, in my view, the dates on which the various steps were taken by the parties in the actions here and in England are of considerable importance in this case, it is necessary to set out the sequence in which the different steps were taken by the parties.

On the 12th February 1982, the Managing Director of Murphy wrote to Greenham indicating that it was holding Greenham responsible for all losses and expenses incurred in connection with the accident at Moneypoint. On the 21st May 1982, Murphy's solicitors also wrote to Greenham alleging that the overturning of the crane was due to the negligence and breach of contract of Greenham and also stated that it was their intention to institute proceedings against

Atlantic and Manitowoc. Greenham's English solicitors replied on the 26th May 1982 naming solicitors in Dublin who would act for Greenham in connection with any proceedings taken against their client Any liability to Murphy was denied in that letter. On the 31st May 1982, Murphy's solicitors wrote to Greenham's Dublin solicitors enquiring whether they had instructions to accept service of proceedings on behalf of Greenham, and a reply dated the 23rd June 1982 written to Murphy's solicitors acknowledged the letter and stated that having had a meeting with their English solicitors they hoped to be in a position to reply more fully in the near future. No further letter was sent by Greenham's Dublin solicitors prior to the institution of proceedings in England by Greenhams on the 9th August 1982, and by letter dated the 23rd August 1982 sent by registered post to Murphy, Greenham's Dublin solicitors served these proceedings on Murphy. By letter of the 10th September 1982 Murphy's solicitors understandably expressed surprise, to put it mildly, at the course adopted by their colleagues, and stated that they were taking their clients' instructions. No further step was taken within this jurisdiction for a considerable time thereafter.

The dates of the relevant steps taken by the parties subsequent to August 1982 were as follows:-

29th November 1982 - Statement of Claim delivered by Greenham in the English action.

11th January 1984 - Plenary Summons issued in the High Court on behalf of Murphy against Manitowoc, Crane Test and Atlantic as defendants.

20th February 1984 - Order of the High Court giving liberty to Murphy to issue and serve a concurrent summons against Manitowoc and Crane Test.

15th March 1984 - concurrent summons issued in the High Court in respect of Manitowoc and Crane Test.

4th May 1984 - defence and counterclaim delivered in the English action on behalf of Murphy.

31st May 1984 - Statement of Claim delivered on behalf of Murphy in the Irish action.

7th June 1984 - Notice of Motion for 25th June 1984 by Murphy seeking liberty to join Greenham in the Irish action and liberty to issue a concurrent summons against Greenham.

July 1984 - Manitowoc joined in the English action.

13th July 1984 - Reply and defence to counterclaim in the English action delivered on behalf of Greenham.

12th October 1984 - Motion dated the 7th June 1984 heard in the High Court, judgment being reserved.

12th November 1984 - Order of the High Court giving liberty to Murphy to issue a concurrent summons to that issued on the 11th January 1984 joining Greenham as defendants in the Irish action.

12th December 1984 - Notice of Appeal to this Court by Greenham against the Order of the High Court.

A concurrent summons was issued by the plaintiff on the 12th November 1984 pursuant to the order of the High Court made on the same date. The order was passed and perfected on the 22nd November 1984. The claim sought to be made against Greenham in the Irish action is identical with that made by Murphy against Greenham in the defence and counterclaim delivered in the English action. The English action has been specially fixed for a date early in February 1986.

The law

The parties are agreed that in an application such as that brought by the plaintiff in this case the same principles apply as in the case of an application to stay proceedings brought in this jurisdiction or to enjoin proceedings brought in a foreign country. It has long been established that the Courts have an inherent jurisdiction to stay or strike out an action or to restrain by injunction the institution or continuance of proceedings in a foreign court whenever it is necessary to prevent injustice; see e.g. McHenry v. Lewis (1882) 22 Ch. Div. 397. The most common ground on which a court may be asked to stay an action here or to restrain an action in a foreign country is that simultaneous actions

are pending in this country and abroad between the same parties and involving the same or similar issues, and this is so whether the plaintiff in this jurisdiction is the defendant abroad, or vice versa. In England, the inherent jurisdiction has been re-enforced by a statute passed in 1925, but the same principles are applied to cases decided since then as were applied in the earlier cases.

The exercise of this inherent jurisdiction is discretionary. No Irish cases were cited in argument. In England, the generally accepted statement of the principle on which the Court acts was (until 1974) that of Scott L.J. in St. Pierre v. South American Stores Limited 1936 1 K.B. 382, 398. There he said:-

> "(1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused.
>
> (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. In both, the burden of

proof is on the defendant."

In The Atlantic Star 1974 A.C. 436 a majority of the House of Lords held that although the criterion for staying proceedings was whether the continuance of the action would be "vexatious" or "oppressive" to the defendant, those words were pointers rather than boundary marks, and should in future be interpreted more liberally; and that in considering whether a stay should be granted the court must take into account (1) any advantage to the plaintiff; and (2) any disadvantage to the defendant. That criterion applied even though Lord Reid said at p. 454 that he regarded "forum shopping" as undesirable.

In MacShannon v. Rockware Glass Limited 1978 A.C. 795 the matter was again considered by the House of Lords. Lord Diplock, Lord Salmon and Lord Frazer took the view that to justify a stay it is not necessary that the continuance of the action should be oppressive or vexatious and favoured the discontinuance of the use of the words "oppressive" or "vexatious". Lord Salmon (at p. 819) said:-

"To my mind, the real test of a stay or no stay

> depends upon what the Court in its discretion considers that justice demands."

Lord Frazer and Lord Keith were in agreement with that view. Lord Diplock restated the second part of the statement of Scott L.J. in the St. Pierre case as follows:-

> "(2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English Court",

and stated that the reference to burden of proof which follows those words should be omitted.

The effect of these decisions is that (1) a mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought, but (2) that a stay will be granted if (a) continuance of the proceedings will cause injustice to the

defendant and (b) a stay will not cause injustice to the plaintiff. That fundamental question can generally be answered by an application of Lord Diplock's restatement of the Rule stated by Scott L.J. in the St. Pierre case. I would accept that these are the principles which should properly be applied in this case.

I would accept that, on the facts of this case, as the accident to the crane occurred at Moneypoint, in so far as witnesses are concerned the balance of convenience would lie with Murphy. However, in the events that have happened, it would in my opinion be unjust to Greenham not to grant a stay of the proceedings in the High Court and there will be no injustice to Murphy, who has a forum, the jurisdiction of which he has accepted, which is competent to determine all the matters at issue between the parties. There was no evidence before the High Court, or this Court on appeal, that any application to stay the proceedings was made in the High Court in England and no adequate explanation - indeed no explanation - was offered to the High Court or to this Court as to why such an application was not made promptly. In the correspondence between the parties which took place in the early months of 1982 Murphy stated that it was the intention to institute proceedings in this jurisdiction. If an

application had been made to stay the English proceedings shortly after they were issued, it seems quite likely that such an application would have been granted having regard to the earlier correspondence. Instead of making such an aplication, Murphy accepted the jurisdiction of the English Court, and this is understandable as all the companies involved in this case, other than Murphy, are English companies and, as we were informed during the hearing of the appeal, Murphy is an associate company of the wellknown parent English company of the same name. No proceedings were instituted within this jurisdiction until January 1984, and even then those proceedings did not include Greenham. On the 4th May 1984 a defence and counterclaim in the English proceedings was delivered on behalf of Murphy claiming against Greenham the same relief as is sought against them in the proceedings in the High Court. A stay of the proceedings in the High Court would not deprive Murphy of a legitimate personal or juridical advantage. The action in England is ready for trial and has been specially fixed. Manitowoc are alredy joined in the action, and, if thought necessary, Crane Test and Atlantic may be joined as third parties in those proceedings.

In my judgment, in the events that have happened, and in particular in the absence of any adequate explanation for failure on behalf of Murphy to apply to have the English proceedings stayed, a matter to which no reference was made in the judgment of the learned High Court Judge, the discretion of the Court should have been exercised in favour of Greenham, and I would accordingly allow this appeal.

30. 7. 1985