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ROYAL COURT 95.

19th July, 1993

Before the Judicial Greffier

Between:	**Joseph Ernest Tirel**	**Plaintiff**
And:	**Malcolm Leslie Sinel and Alice Sinel, his wife**	**Defendants**

Application by the Plaintiff for the dispute between the parties to be referred to an arbitrator to be appointed in accordance with the terms of the contract between the parties and for the action to be stayed until twenty-one days after the date of publication of the final award of the arbitrator so appointed.

Mr. N.P.E. Le Gresley for the Plaintiff.
Advocate P.S. Landick for the Defendants.

JUDGMENT

JUDICIAL GREFFIER: This action relates to a dispute over an account rendered for certain building works.

It is common ground that the agreement was set out in writing and included Article 4 to the following effect -

"If any dispute or difference concerning this Contract shall arise between the Employer or the Architect on his behalf and the Contractor such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an

arbitrator, a person to be appointed on the request of either party by the President or a Vice-President for the time being of the Royal Institute of British Architects/Royal Institution of Chartered Surveyors."

The Plaintiff is seeking payment of the sum of £9,595.16.

Notwithstanding the arbitration clause in the agreement, the Plaintiff commenced proceedings by a summons which was returnable before the Royal Court on 13th July, 1990.

On 30th August, 1991, I heard two summonses. One was brought by the Defendants seeking to strike out the action upon the basis that the Plaintiff failed to file any Particulars of Claim and the other was brought by the Plaintiff seeking an Order that the action be stayed pending the reference of the dispute to an arbitrator appointed in accordance with the terms of the contract. On 30th August, 1991, I heard argument on behalf of both parties. I dismissed the application for a stay and for reference of the proceedings to an arbitrator appointed in accordance with the terms of the contract.

The main reason for my dismissing this application was the fact that I was not satisfied that it was normally open to a Plaintiff, who had commenced an action, to then seek to have his own action stayed pending reference to an arbitrator. At that time, it appeared to me that the position in relation to contracts in relation to which there was an agreement to refer to an arbitrator was as follows:-

(1) notwithstanding the agreement, an action could still be brought before the Court by an aggrieved party upon the basis that the jurisdiction of the Court could not be ousted by the agreement;

(2) it was then open to the Defendant in the proceedings to bring an application, at an early stage, seeking a stay of the action so that the Plaintiff was effectively forced to go to arbitration as the only means of enforcing his claim; and

(3) if the Defendant did not take this course of action then the proceedings could proceed to trial.

All the authorities which I looked at at the earlier hearing pre-supposed that it would be the Defendant who would seek a stay and not the Plaintiff, who had effectively chosen the jurisdiction in which he wanted the matter to be tried.

However, when the hearing took place on 30th August, 1991, I was aware that there was also a dispute between the parties as to whether the tendering by the Defendants and paying in by the Plaintiff of a cheque had extinguished the balance of the

Plaintiff's claim. I was of the opinion that that issue would, in any event, need to be tried by the Royal Court. Subsequently, that issue has been determined in favour of the Plaintiff.

The summons before me at the hearing on 6th July, 1993, was in virtually identical terms to the original summons. However, the Plaintiff indicated that the previous position had changed in two further ways. At the time of the first hearing, the Defendants had not yet pleaded, because no Statement of Claim had been filed, and wished to reserve their position as to what they would plead in relation to the arbitration agreement and I believed that it was right to allow the Defendants to take this position. On 25th September, 1991, the Defendants filed an Answer to the Particulars of Claim and the last sentence of paragraph 4 of the Answer reads -

> *"In any event the Defendants aver that under the terms of the contract the Plaintiff's claim falls to be dealt with by way of arbitration."*

Further, on 9th April, 1992, Messrs. Ogier & Le Cornu, acting for the Defendants, wrote to Mr. N.P.E. Le Gresley, acting for the Plaintiff, giving reasons for them objecting to the Plaintiff's application for setting down. The second reason given was -

> *"the contract between our clients falls to be dealt with by arbitration and this point should be dealt with as a preliminary issue."*

Mr. Le Gresley submitted that the Defendants were now saying that under the terms of the contract the dispute should be arbitrated and that by bringing the present summons he was merely agreeing with them. Advocate Landick, on behalf of the Defendants, asked me to understand the pleading and the letter of 9th April, 1992 in a different way. He submitted that all that the pleading and the letter were saying was that the Defendants had a defence to the bringing of this action, where there was an arbitration clause, namely that the matter should have been taken to arbitration rather than litigated. He also indicated that his clients were not saying that they wanted to go to arbitration but merely that they could not be sued. Advocate Landick submitted that as an alternative to seeking a stay on the proceedings pending arbitration, a Defendant could simply seek to have the action dismissed upon the basis that it ought to have been arbitrated and not litigated. Advocate Landick submitted that the action ought to continue so that that point could be determined. If it were determined in favour of his clients then that would end the present action but if it were determined against his clients then his clients could still subsequently decide whether or not they wanted the matter to go to arbitration.

As this is not an application to strike out the final sentence of paragraph 4 of the Answer, I decided that it would not be right for me to seek to adjudicate, as part of this hearing, on the question as to whether or not the second option of simply defending the action exists. It seems to me that that is an issue which will have to be determined at some stage, in any event. It also seems to me that it ought to be determined at an early stage as a further preliminary issue.

However, I am still left with the question as to what is the appropriate manner in which the actual dispute between the parties to the contract, as opposed to the question as to whether or not the Plaintiff could properly sue, should be determined.

I am of the opinion that the Defendants' position in this matter is untenable. They have pleaded that the action under the contract falls to be dealt with by way of arbitration. The Plaintiff now agrees with them that arbitration is the most suitable way in which to deal with the matter. The Defendants contend that they can say that the matter ought to go to arbitration for the purposes of defending this action without saying that the matter ought to go to arbitration for the purposes of actually dealing with the resolution of the dispute. I am firmly of the opinion that they cannot do this. Either they must say that the matter be dealt with by arbitration or they must accept that it be dealt with by litigation. They cannot be permitted to say, for one purpose, that it should be dealt with by arbitration and then later, for another purpose, that it should be dealt with by way of litigation. In my view, the Defendants have taken up the position that the matter falls to be dealt with by way of arbitration and they are bound by that position for all of the purposes of the action.

Both counsel addressed me at some length on principles in relation to the staying of actions so that the dispute could be arbitrated pursuant to an agreement to arbitrate. I do not propose to review these areas of law because this application can be decided without so doing. The Defendants are on the Court record as saying that the matter ought to be arbitrated and the Plaintiff agrees. This is a relatively small building dispute and such matters are normally dealt with more conveniently by an arbitrator rather than before the Court. Furthermore the matter of the tendering of the cheque has been disposed of.

I am therefore going to order as follows:-

(a) that the preliminary issue as to whether or not the Plaintiff were entitled to commence proceedings notwithstanding the terms of the arbitration agreement be determined first by the Royal Court;

(b) that if that issue be determined in favour of the Plaintiff then the action be stayed in order that it may be dealt with by arbitration pursuant to the agreement; and

(c) that the costs of and incidental to this summons be costs in the cause of the preliminary issue set out in (a) above.

In conclusion I would say that if the preliminary issue were to be determined in favour of the Defendants then clearly the Plaintiff could, in any event, proceed with arbitration.

Authorities

Cleveland Bridge -v- Sogex (1982) J.J. 101.

G.K.N. -v- R.R.B. (1982) J.J. 359.

Russell on Arbitration (20th Ed'n): Chapter 11.

Selab Securities Ltd -v- Orthez Holdings Ltd (24th November, 1988) Jersey Unreported.

Bush -v- Bush (20th March, 1992) Jersey Unreported.

Benest -v- Langlois (24th February, 1992) Jersey Unreported.

In the Matter of the Representation of Allied Irish Banks (C.I.) Ltd (1987-88) J.L.R. 157.