Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN ADMIRALTY

Suit No. A. 18 of 1976

CITADELLE LINE S.A.

vs.

THE OWNERS OF MOTOR VESSEL
"TEXANA" otherwise called "TEXACANA"

November 25, 26, 1976,
January 26, 1977

Emile George, Q.C., for applicants (defendants)

W. B. Frankson, for respondents (plaintiffs).

CAREY, J. :

At the completion of the hearing of this motion in November last, I ordered that there be a stay of proceedings, that the vessel be released and the matter referred to arbitration. There were consequential orders as to costs. I then intimated that I would put my reasons in writing, and give them thereafter. I now proceed to give effect to this undertaking.

The motor vessel, "Texana" otherwise called "Texacana" (referred to hereafter as the ship), was, on the 13th September, 1976, lying in the port of Kingston. The plaintiffs obtained a warrant for its arrest on the ground that they had performed certain services in pursuance of a written agreement (with which I shall deal at a later stage of this judgment) between themselves on the one hand and the owners of the ship on the other hand. They had also on that date, filed a writ which was endorsed as follows:

> " The Plaintiff's claim is against the Defendants as owners of the Motor Vessel "TEXANA" otherwise called "TEXACANA" for services rendered and expenses incurred in relation to the said motor vessel in the months of May to September 1976 inclusive pursuant to a Contract of Agency between the Plaintiff and Defendants, and the said claim is for the sum of U.S.$134,834.41 equivalent to J$121,394.92. "

On 5th November, the defendants filed this motion asking for an order to set aside the warrant that had been issued, for a stay of further proceedings in the action filed, and that the ship be released without terms. They relied on the Arbitration Clauses (Protocol) Act, and in the alternative, the Arbitration Act, to support the prayer for a stay and the release of the

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ship.

It was argued by Mr. George on behalf of the defendants i.e. the applicants, that the court was without jurisdiction to issue the warrant, for the action itself was not maintainable as there was not privity of contract between the parties. Alternatively,even if it were held that there was privity of contract, the action as framed was "in personam" in which case the warrant could not issue. It was also argued that conceding these two factors in favour of the plaintiffs, the proceedings ought to be stayed pursuant to the clause in the agreement allowing for arbitration in the circumstances that had arisen in this matter. The court's jurisdiction to order the stay, it was claimed, was founded on either of the two enactments to which reference has earlier been made.

Before dealing with these arguments, I propose to give sufficient of the background history as appeared from the affidavits and documents exhibited so that these arguments may be better appreciated.

On the 29th April, 1976, Citadelle S.A. entered into what was described as a "Ship Management Contract" with the then owners of the ship, Intercontinental Trading Corporation. The contract, which was expressed to be for a period of five years, required Citadelle to perform a goodly number of diverse acts in relation to the ship. For example, under the contract, Citadelle undertook to provide marine and engine superintendence, officers and crew, stores of all sorts and obtain cargo. In consideration for performing these duties and providing these services, Citadelle were entitled to 50% of the profits. The owners were, however, guaranteed U.S.$5,000.00 monthly as minimum profit, whether the ship made a profit or not. Included in the contract was an arbitration clause. The contract was stated to be governed by United States Law. It also provided that the owners had the right at their sole option and without Citadelle's consent to sell the ship to a firm called United Stateswide Construction Companies Incorporated. A gentleman called Mr. Leo Bacher was president of both these organisations, viz, Intercontinental Trading Corporation and United Stateswide Construction Companies Incorporated.

Sometime between the execution of this agreement and the filing of the writ in this court, ownership of the ship changed hands, as indeed the contract contemplated. On September 2, the plaintiffs intimated to the

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owners, the defendants, that they considered the contract breached, and demanded that the dispute be referred to arbitration. The owners responded by a telex message to the effect that the contract was cancelled, and noted that the only contract which existed between them was the "Ship Management Contract" of April 29, 1976. The defendants asserted in the affidavit of Mr. Leo O. Bacher that they were willing to refer the matter to arbitration.

It is of some significance that when the plaintiffs and defendants had reason to communicate with each other as regards the alleged breach of the contract, correspondence was sent and responded to by the owners as "Intercontinental Trading Corporation and United Stateswide Corporation Companies Incorporated." These organisations were the corporate personality of that Proteus-like Mr. Leo Bacher. For completion, it might be noted that the ship is of Panamanian registration. The plaintiffs are a Panamanian Company; the owners a United States Company.

The first question which falls to be considered is whether there was a want of jurisdiction in the court to issue the warrant of arrest. The Rules of the Supreme Court in its Admiralty jurisdiction, permit a warrant to issue in actions "in rem." An action "in rem" lies in addition to claims falling under the court's ancient jurisdiction, e.g. in the case of claims for the possession of a ship, or ownership of a ship or a share therein viz, sec. 1(1)(a) to (c) and(s) to other claims as set out in sec. 1(1)(d) to (r) of the Administration of Justice Act 1956 which forms part of the laws of Jamaica by virtue of Constitutional Provisions. See Admiralty Jurisdiction Order in Council 1962. The action in this case is within the ambit of sec. 1(1)(h) which reads (so far as is material) as follows:

> "any claim arising out of any agreement relating ..... to the use or hire of a ship ..... "

By reason of sec. 3(4) of the Administration of Justice Act 1956 to which my attention was called by Mr. Frankson, the admiralty jurisdiction of the Supreme Court may be invoked by an action "in rem" in respect of the claims under sec. 1(1)(d) to (r). Section 3(4) is in the following form:

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" In the case of any such claim as is mentioned in paragraphs (d) to (r) of subsection (1) of section one of this Act being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court of Jamaica may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against -

(a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or

(b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid. "

It was not suggested that these conditions were not fulfilled. Seeing then that the action was one "in rem" neither the lawfulness of the issue of the warrant nor the court's jurisdiction can, in my judgment, be impugned. Arguments, therefore, as to whether the defendants had a maritime lien and were general or special agents were irrelevant for the purpose of conferring jurisdiction to issue the warrant. An action "in rem" lay whether or not the defendants were special or general agents. The warrant could be issued once the ship was in Jamaican waters.

It was also faintly suggested that at all events, the action was not maintainable because the defendants were not privy to the contract. This argument wore an air of unreality when the present owners of the ship by their conduct treated the "Ship Management Contract" as extant. Indeed, by the affidavit of Mr. Bacher, up to the time of the commencement of the action in September, 1976, the owners "remained ready and willing to do all things requisite to enable all the matters in dispute as aforesaid to be determined by arbitration in accordance with the provisions of the said agreement." The defendants in their telex response to the plaintiffs, affirmed that the only contract in existence was the "Ship Management Contract" of April 26. Mr. Frankson's argument that the defendants' conduct estopped them from denying the existence of a valid and enforceable agreement between the parties was therefore eminently right. Moreover, a true construction of the agreement tends to suggest that when the agreement was executed, Intercontinental Trading Corporation were acting as undisclosed principals of United Stateswide Construction Companies Incorporated, the present owners. In that event, privity existed so that the action in its present form, was clearly maintainable. Mr. George did not rely very

strongly on this point which it has been demonstrated was quite without merit and no more need be said about it. In the result, I came to the conclusion that the court was not without jurisdiction to issue the warrant of arrest nor indeed was the warrant unlawfully obtained. I therefore decline to set aside the warrant.

The main thrust of Mr. George's argument was that on the assumption that the action was one "in rem" and privity did exist, then all further proceedings should be stayed pursuant to the Arbitration Clauses (Protocol) Act sec. 2, on the basis that the parties had by agreement accepted reference to arbitration in the event of dispute. Mr. Frankson contended that before the court could apply its undoubted power to grant a stay under the Act, the countries of the parties concerned had to be shown as having ratified the Protocol. Although the defendants had suggested in their affidavit that they believed this was the fact, the court could, itself, ascertain whether this belief was warranted. Reference to Halsbury's Laws of England (4th Edition) Volume 2, page 286, para. 556 shows that neither Panama nor the United States ratified the Protocol. In my view, this Act is inapplicable for the reason that it has not been shown that either of the countries of the parties to the contract have ratified the protocol, which would be a condition precedent to the exercise of the court's jurisdiction under the Act.

The applicants also relied on sec. 5 of the Arbitration Act which enacts as follows:

> " If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings apply to the Court to stay the proceedings, and the Court or a Judge thereof, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings. "

This Act, however, has territorial limitations and is concerned with arbitration under Jamaican laws. Sec. 24 provides as follows:

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> " This Act shall apply to every arbitration under any law passed before or after the commencement of this Act, as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the law regulating the arbitration, or with any rules or procedure authorised or recognised by the law. "

Plainly, therefore, this Act also did not avail the applicants, nor allow the court to order a stay of the proceedings or order a reference to arbitration.

But the court, in my judgment, was not powerless to act in the circumstances of this case. The defendants by this motion have prayed for a stay and desire that the matter be referred for arbitration; the plaintiffs had themselves at an earlier stage, demanded a reference to an arbitrator. It does seem curious that the plaintiffs themselves should now be resiling from the position and making a complete volte-face. Since both parties have at one time or another sought arbitration, how did they provide for this? They included an arbitration clause. The construction of this clause is to be based on the proper law of the contract. What then is the proper law of the contract? The parties themselves have provided the answer in their contract. Clause 10 LAW:

> " This contract shall be governed by United States Law in the event of dispute, controversy or disagreement. "

The affidavits of Law with which I have been kindly furnished, and which have proved of great assistance, show that the relevant legislation is a Convention of the Recognition and Enforcement of Foreign Arbitral Awards, to be found in Title 9 United States Code. Article II of this Convention provides as follows:

> " 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
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> 2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbirtation agreement, signed by the parties or contained in an exchange of letters or telegrams.
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> 3. The court of a Contracting State when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. "

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This Convention as part of United States domestic law, is applicable to this contract.

It may be noted that Panama is not a signator to this Convention but this is not a material factor in view of paragraph 3 of this Article. There was a sharp conflict in relation to the validity of the arbitration clause between the affidavits of law submitted by the respective sides. Mr. James L. Wheeler, an attorney of some eminence, deposed on behalf of the defendants, that the arbitration clause in the "Ship Management Contract" is valid and enforceable under United States Law. He based his conclusion on two leading cases in the United States jurisdiction, viz, McCreary Tire & Rubber Company v. CEAT and Incontrade Incorporated v. Oilborn International, S.A. which, he affirmed, interpreted the Convention as requiring mandatory reference to arbitration where the parties to the agreement had included such a provision therein. On the other hand, the joint affidavit of Messrs. Werner Scholtz and Arthur L. Newell, two equally distinguished attorneys, acting on behalf of the plaintiffs, were of opinion that the arbitration clause was neither valid nor enforceable. They arrived at this conclusion on the footing that as the defendants had expressly cancelled and repudiated the contract, they were estopped from asserting the vigour of the arbitration clause. By that conduct, i.e. the cancelling or repudiating of the contract, the party in breach had waived his rights to arbitration. This then became a question of fact being foreign law for my determination.

I must confess that I find myself quite unable to accept the conclusion expressed by Messrs. Scholtz and Newell. An arbitration clause is a bilateral submission of the parties. Its terms are therefore important. In this context I would hold that the clause was very wide in its terms.

12 ARBITRATION:

> " Should any dispute arise between ....., the matter in dispute shall be referred to a single arbitrator. "

The dispute in this case is in respect of alleged breaches of contract under the "Ship Management Contract." It is not that any of the parties are denying the existence of the contract or that it is void for illegality. The failure to pay for services performed in pursuance of the agreement, is the nature and extent of dispute which has arisen. That is clearly within the ambit of the clause. Although certain United States decisions

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were referred to in the affidavit of the plaintiffs' attorneys, regretably, the authorities themselves were not exhibited. Since it is the plaintiffs who are asserting this view of the law, there is an onus on them to establish this as a fact.

These deponents asserted, correctly, as I think, that if the defendants were denying that privity of contract exists, such a denial would not give rise to any right to enforce any provision of the contract. This is in accord with our notions of the law of contract. Although the attorneys on behalf of the defendants did put this forward, in argument, there were, in reality no facts on which that argument could rest. I support my view of the legal position in this country by reference to Heyman & anor v. Darwins Ltd. /1942/ 1 All E.R. 337. It is enough to set out the head-note which reads:

> " The respondents contracted with the appellants, an American firm, whereby the latter were to act as their selling agents over a wide area. The agreement contained an arbitration clause in these terms: 'If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising hereout the same shall be referred for arbitration.....' A dispute arose between the parties and the appellants, having intimated to the respondents that their letters showed that they had repudiated the agreement, issued a writ against them claiming a declaration that the respondents had repudiated the agreement and damages under a number of heads. The respondents claimed that the action should be stayed pursuant to the Arbitration Act, 1889 s. 4, in order that the matters in dispute might be referred under the arbitration clause. The appellants contended that, the respondents having repudiated the agreement as a whole and the appellants, by the issue of the writ, having accepted that repudiation, the contract had ceased to exist for all purposes, and the respondents could not afterwards rely on the arbitration clause:-
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> HELD: the dispute between the parties was a dispute within the arbitration clause and the appellants' action ought to be stayed. Where there has been a total breach of a contract by one party so as to relieve the other of his obligations under it, an arbitration clause, if its terms are wide enough, still remains effective. This is so even where the injured party has accepted the repudiation, and, in such circumstances, either party may rely on the clause. "

An examination of the cases cited by Mr. Wheeler i.e. McCreary v. CEAT and Incontrade Incorporated v. Oilborn International S.A. supports the views of Messrs. Scholtz and Newell that the facts in the present case are distinguishable from the facts in those cases. It is also true that those cases were not concerned with a situation where any of the parties had sought to 'cancel' the contract. In my view, however, the repudiation

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seems to be immaterial.

As I understand the McCreary case, the courts in the United States will not permit any attempt to "bypass" the agreed upon method of settling disputes because it would be a violation of the agreement to submit underlying disputes to arbitration. In the Incontrade case, MacMahon J. sitting in a United States District Court held:

> " Moreover we recognize that especially in the area of international commerce, the ability of the parties to agree in advance to a forum in which they may resolve their dispute is essential.
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> Plaintiff and defendant have contracted that all disagreements arising out of the charter shall be submitted to the arbitration in London. Therefore in order to give full effect and enforcement to the forum and procedure agreed by the parties, we decline to exercise jurisdiction over this dispute. "

To decline to give effect to the clear agreement of the parties to arbitration would be to bypass the agreed upon method of settling disputes. The question of the construction of the contract is governed by its proper law, which is United States Law and I find as a fact that the law is as stated by Mr. Wheeler.

With respect to stay of proceedings, this court has an inherent jurisdiction to make such an order quite apart from the statutes on which at one time Mr. George was seeking to rely. An application for stay may arise, as it does in this case, where the parties have agreed to refer disputes to arbitration. The court will ordinarily grant such stay unless a strong case for not doing so, is shown. None has been shown to exist. It is the fortituous circumstance of the ship putting into the port of Kingston which has rendered this matter justiciable in this court. None of the persons involved is Jamaican or of Jamaican domicile nor as companies, are the parties registered in this country. The contract made in Louisiana, United States of America, on which the proceedings are based concerns a United States Company and a Panamanian Company and involves a ship of Panamanian registry. The Jamaican connection is indeed exiguous. Where the court grants a stay, it is also bound to grant a release since a release is a necessary consequence of a stay. See The Golden Trader [1974] 2 All E.R. 686. In that case, the stay was granted under the Protocol on Arbitration Clauses set out in Schedule I to the Arbitration Act 1950 (U.K.). But the reasoning, in my view, remains the same, whether a stay is granted under that Act, or under the court's inherent jurisdiction.

It is for these reasons that the orders, which have already been set out, were made.