CIV.APP.10/88

IN THE COURT OF APPEAL OF SIERRA LEONE

CORAM:

HON. MR. JUSTICE E.C. THOMPSON-DAVIS - JUSTICE OF APPEAL

HON. MR. JUSTICE M.O. TAJU-DEEN - JUSTICE OF APPEAL

HON. MR. JUSTICE M.O. ADOPHY - JUSTICE OF APPEAL

BETWEEN:-

A. P. MOLIER - APPELLANT

AND

HADSON-TAYLOR & CO. - RESPONDENTS

WRIGHT & JUSU-SHERIFF FOR THE APPELLANT

DR. ADE RENNER-THOMAS FOR THE RESPONDENTS.

RULING DELIVERED ON THE 4TH DAY OF JULY, 1991

THOMPSON-DAVIS, J.A.: This appeal is from a decision of His Lordship Mr. Justice S.A. Ademosu of November 6, 1987. He had ruled against the Appellants herein on a Motion brought by them before this Court for the following orders:-

1. That all subsequent proceedings in this matter be stayed on the grounds that the Plaintiff/Respondent and the first and second Defendants/Appellants have agreed that all disputes arising out of the Bills of Lading No. COOE 00085 and COOE 0075 are to be determined in England according to English Law to the exclusion of the Courts of any other country.

2. That all subsequent proceedings in this matter against the 3rd and 4th Defendants be stayed on the grounds that there is no action maintainable in law against the said third and fourth Defendants herein.

3. Further or consequential orders.

4. Costs.

The Learned Trial Judge having carefully considered the various contentions raised before him by both sides dismissed the application for stay and ordered that "the action be continued in this jurisdiction."

The action ordered to be continued concerned two vessels - The MAERK BELLA and The MAERSK BRAVO which had been chartered to carry goods from Cotonou, Benin, to Freetown, Sierra Leone. The issue between the Parties was whether the Plaintiff had suffered loss and damage resulting from the failure of the Defendants delivering the goods within a reasonable time. But the primary issue before this Court, and that lies at the heart of the present appeal is whether the contract of carriage between the plaintiffs and the Defendants is governed by the Bills of Lading and nothing else.

Clause 27 of the Bill of Lading reads:

> "The contract evidenced by this Bill of Lading shall be governed by English Law; and any dispute thereunder shall be determined in England according to English Law to the exclusion of the jurisdiction of the Courts of any other country."

The question now is will such an Exclusive Jurisdiction Clause in a Bill of Lading in fact go to oust the jurisdiction of the Courts in every other Country no matter what the facts are, the costs involved or any other holding contraints? A court called upon to consider an application for stay pursuant to an Exclusive jurisdiction clause must of necessity consider the varying advantages and disadvantages to the parties involved in having their case heard in one jurisdiction or another; for instance the costs of taking witnesses from one country to another, this upkeep, the costs of litigation in one jurisdiction compared to another, any judicial disadvantage likely to be suffered by any of the parties, the possibility of the period of limitation affecting the claims, any foreign exchange contraints likely to be suffered by one party or another. The court

will also say in most cases that the case should be tried by the form with which it has the most connection."

But certain legal principles have guided the courts in such applications made to them. These principles were summerised in the judgment of Lord Justice Brandon in the El-Amria 1981 2 Lloyds Rep.119 at P.123. And what he had to say was endorsed by Lord Justice Kerr in The Spiliada (No.2) 1984 2 Lloyds Rep. 154 at page 155 as an authoritative statement of the law on the subject.

"(1) Where Plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendant apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the Plaintiffs.

(4) In exercising its discretion the court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to (4) the following matters, where they arise, may properly be regarded?

(a) In what country the evideice on the issues of fact is situated, or more readily avoidable, and the effect of that on the relative convenience and expense of trial as between the English and Foreign Courts.

(b) Whether the law of the Foreign Court applies and if so, whether it differs from English Law in any material respects.

(c) With what country either party is connected and how closely.

(d) Whether the defendants genuinely desire trial in the Foreign Country or are only seeking procedural advantage.

(e) Whether the Plaintiffs would be prejudiced by having to sue in the Foreign Court because they would (i) be deprived of security for their claims (ii) be unable to enforced any judgment obtained (iii) be faced with a time ban not applicable in England or (iv) for political racial, religious or other reasons be unlikely to get a fair trial."

Reading "Sierra Leone" instead of England in the above-mentioned passage, the Plaintiffs/Respondents must show "strong cause" why proceedings should continue in this country in violation of the expressed exclusive jurisdiction clause, where such "strong cause" is shown the discretion of the court will be exercised in his favour; and a stay of proceeding will not be ordered.

I shall now go on to apply the facts of the case to these above-mentioned guiding principles if I may, and draw the necessary conclusions.

(a) In what country is the evidence on the issue of facts situated or more readily available?

In their statement of claim the Plaintiffs say that as a consequence of the delayed delivery of the good; the market for the said goods fell, additional Customs Duty had to be paid and the Plaintiffs lost substantially the whole benefit expecting under the said contract.

In his Ruling on the point the learned trial judge had this to say ".....the evidence as to the prevailing market price of the goods shipped at the time when they should have arrived and the price obtainable when they eventually arrived must necessarily come from witnesses in Sierra Leone, and not unlikely from those based in Freetown and engaged in the trade. The same goes for the evidence as to the Custom duty paid and why. "His Lordship went on "..... As to the cause of the delay, I am of the opinion that the evidence on this point can only come from the defendants. The defence must, I think be based on the facts within the knowledge of the defendants and which facts the plaintiff may not be in a position to rebutt."

He continued....." "The Defendants have agents in Sierra Leone and they do business here ....." I do agree with the learned Judge that the issues of fact in this case are situated in this Country as opposed to England. There is hardly any issue of fact emanating from England, the port of loading, nor the port of discharge is in England, witnesses to these issues are mainly to come from this Country, and in any case as the Defendants/Applicants have themselves stated evidence can be taken on commission in Sierra Leone without oral testimony. In answer to the question (a) above. There is no doubt whatsoever that Sierra Leone is that Country.

(b) Whether the law of the foreign Court applies and if so whether it differs from English law in any material respects.

The law of Sierra Leone is identical in most material respect to the law of England and, accordingly this factor is neutral.

(c) With what Country either party is connected, and how closely.

(i) The Respondents are based in Freetown Sierra Leone.

(ii) The Applicants are based in Denmark - Oppenhagen.

(iii) The Port of loading is Cotonou - Benin.

(iv) The Port of Discharge is Freetown - Sierra Leone.

(v) The vessels are run by Maersk Line and managed by A.P. Moller in Copenhagen - Denmark.

(vi) The officers of the vessels are German Nationals.

(vii) The Applicants have local Agents - Sierra Leone National Shipping Com. Ltd.

(viii) The Insurers of the Applicants are West of England P & I Club with which the Respondents have no dispute. They are based in England.

(ix) The vessels of Maersk Line are frequent visitor to this country.

In dealing with this factor I would ask myself this question: Is this dispute a matter which properly belongs to thisCourts of Sierra Leone? Here are Sierra Leonean Importers who when they took delivery of the goods

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im Sierra Leone had to pay additional customs duty and as a consequence of the delay in delivery the market for the goods fell. The vessel is frequent visitor to this country. The ship-owners have their local agents in Sierra Leone. It seems to me and there is no doubt in my mind that such a dispute is one that properly belongs to the jurisdiction of the Courts of this country.

But the question still remains whether the Courts have a discretion to stay an action when the contract is expressed to be governed by English Law and that any dispute thereunder is to be determined according to English Law. What is so English about the issues of facts raised in the case? If anything the English element in the dispute seems to be to be insignificant. The dispute is between the Dutch Shipowners and Sierra Leone Importers, it depends on evidence here as to the market value of the goods which arrived here in Freetown, and the nature and cause of the delay of the goods here in Freetown. The affidavits of the Solicitors for the appellants leaves in my mind, just as it did in the Judge's mind, the impression that the Dutch Owners want to give unnecessary hardship for the the Respondents.

In this regard I would like to adopt the dictum of Lord Denning in the Fehmarn 1958 1 WIR Page 162:

> "I do not regard the choice of law in the contract as decisive. I prefer to look to see with what country is the dispute most closely connected."

I think that the dispute in question is more closely connected with Sierra Leone than England.

(d) Whether the defendants genuinely desire trial in the foreign Country or are only seeking procedural advantage.

Both Counsel have raised contentions for and against the genuiness of having the matter heard in England. Dr. Renner-Thomas contended that the applicants do not genuinely desire a trial in England but have moved the Court below for a stay of proceedings solely for the purpose of obtaining a procedural advantage. He pointed out that even after the

Defendants had obtained an injunction in England they have come here requesting a stay in Freetown.

Mr. Barthan Macaulay argued that there was a genuine desire on the part of the Applicants to have the matter heard in England, and pointed out that they have already incurred expenses in that direction thereb.

In considering these two points of view I have had to refer to the Speech of Lord Diplock in Mac Shannon v. Rockware Glass Ltd. (1978) A.C. 795 at p.812. In that speech Lord Diplock interpreted the majority speeches in the Atlantic Star (1975) 2 Lloyds' Rep.197 (1974) A.C.436 and laid down the following formular:

> "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 amendable in which justice can be done between the parties at substantially less inconvience or expense and (b) the stay must not deprive the plaintiff of a legislation personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court."

In his speech in The Castarho vs. Brown and Root (U.K.) Ltd. (1981) A.C. p.557, Lord Scarman made use of that formulation and said inter alia:

"Transposed into the context of the present case, this formulation means that to justify the grant of an injunction the defendant must show (a) that the English Court is a forum to whose jurisdiction they are amensable in which justice can be done at substantially less inconvience and expense, and (b) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction."

This approval to the issue has been overtaken by subsequent events. In The Spiliada Maritime Corporation v. Consular Ltd. (1986) 3 W.L.R. 972;

in it case was taken to state the principle of forum not convenience without reference to cases on injunction. It was held that the Court is concerned with the end of justice; that account must be taken not only of injustice to the Defendant if the Plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he cin not allowed to do so, the court will not therefore grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive the plaintiff.

The affidavits filed by both sides for laying claims to the points of view have been carefully examined and considered by me, and guided by the formula I have already referred to I would say that the Applicants have been able"to show that the English Court is a forum to whose jurisdiction they are amendable" but have failed to establish that that justice can be obtained at substantially less inconvenience and expense and that a stay of proceedings in the matter before these courts will not deprive the respondents of a legitimate personal or juridical advantage and the matter were allowed to proceed in England.

The learned judge directed himself properly and correctly as to the law applicable and without any doubt relying on the Mac Shannon's formulation.

(e) The relative convenience and expense of trial as between Sierra Leonean and English Courts.

I shall now turn my attention to the affidavit evidence deposed to by the parties in their endeavour to state their positions as far as this factor is concerned. The Applicants have relied on the following points:

1. Their real and substantial connection with England as they have a large fleet of ship flying the British Flag and owned by one of their companies.
2. Their Insurers West of England P & I Club are managed from London.

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3. That it would be more convenient and less expensive for them to call the officers of the Maersk Bella and Maersk Bravo both German Nationals to go to London to testify in the matter than to bring them here.

4. That because of the acute foreign exchange currency shortage the Plaintiffs/Respondents will not be able to remit any costs the Court might order them to be paid to them.

The Respondents on the other hand have deposed that

1. the acute shortage of foreign exchange will hamper them from taking their witnesses to London, thus prejudicing their position in the English Court.

2. The constraints in obtaining foreign exchange.

3. The costs of litigation to the Respondents if the action was heard in England.

4. That it would be cheaper in all the circumstances for both parties to litigate in Sierra Leone.

Learned Counsel for the parties have raised their various contentions and stuck firmly to them; I shall now go on to restate in a summary from the factors which have had a profound influence on me in arriving at the conclusion I am to give.

(a) That the case should be tried by the form with which it has most connection.

(b) That the cost of flying to and boarding witnesses in England.

(c) The costs of litigation in Sierra Leone compared to those in England.

(d) There is nothing before the court to show that the applicants will suffer any judicial disadvantage if the matter were to be heard and determined in the Sierra Leone Courts on the

other hand it appears that it is Plaintiff/Respondent who arellikely to be so disadvantaged by being out of time under the limitation period if the matter were heard im England.

(e) Foreign Exchange constraints are likely to be a strong factor working against the Plaintiff/Respondents; Para. 6 of the affidavit of Francess Claudia Wright of July 7, 1987 is confirmatory of this.

There are strong considerations of substantial weight on the Respondents' side, and in all the circumstances I have reached the clear conclusion that the Plaintiff on whom the burden lies, has on the whole established good cause why he should not be held to his agreement.

For all the foregoing reasons, I must conclude that the Plaintiffs/Respondents have shown a strong cause why the application for a stay ought to to be refused.

The refusal for a stay prayed in the lower court is affirmed and therefore the relief sought for from this Court is refused.

The Respondents shall have the taxed costs of this application.

(E.C. THOMPSON-DAVIES)
JUSTICE OF APPEAL.