

JERSEY / JUDGMENT

Emans v Jumpertz [2001]

JRC 112 (18 May 2001)

[2001] JRC 112

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judgment

the deputy bailiff: 1. This is an application by the Fourth, Fifth, Seventh and Fourteenth Defendants ("the Applicants") to stay proceedings brought against them by the Plaintiff on the grounds that the matter in dispute should be dealt with by arbitration. Factual

Background

2. At all material times the Plaintiff and the sixteen Defendants were partners in a business known as Theron Business Consultancy. The partnership was governed by a partnership agreement dated 25th February 1998. The Plaintiff was the managing partner. 3. The Plaintiff claims that in February/March 2000 he was purportedly removed, first as managing partner and then as a partner, and was subsequently classified as a 'Bad Leaver' within the meaning of the partnership agreement. He alleges that such removal was unlawful and of no effect and, indeed, gave him grounds to dissolve the partnership because of the Defendants' conduct. He also claims damages. Alternatively, even if his removal as a partner was valid, he claims that he should be treated as a 'Good Leaver' within the meaning of the partnership agreement rather than as a Bad Leaver. 4. On 24th March 2000 Messrs. Mourant du Feu & Jeune, acting on behalf of the Plaintiff, sent a long letter to all the remaining partners disputing the validity of their actions and making a claim for damages and other relief. The letter went on to say that if proposals were not forthcoming within fourteen days, proceedings would be issued. 5. Clause 25 of the partnership agreement was as follows:- "25. LAW AND JURISDICTION 25.1 This Agreement shall be governed by Jersey law. 25.2 The Parties submit to the exclusive jurisdictions of the Courts of Jersey as regards any matter or claim relating to this Agreement and the Parties agree that any judgment or order of the Courts of Jersey made in this respect shall be conclusive and binding on them and may be enforced in the courts of any other jurisdiction." 6. Accordingly on 20th October 2000 the Plaintiff issued an Order of Justice before this Court seeking the relief referred to above. The Order of Justice runs to some 62 pages but it is not necessary, for the purposes of this application, to go into any more detail. 7. The Order of Justice has so far only been served on the Applicants. The other Defendants have yet to be served. The Applicants placed the matter on the Pending List on 5th January 2001 and on 25th January they issued a summons

to stay the proceedings on the grounds that the dispute should be referred to arbitration. The parties' submissions 8. The application is based on Clause 26 of the partnership agreement which reads as follows:- "26. ARBITRATION 26.1 This clause shall apply to any Partner including any Partner who is no longer a Partner ("the Former Partner") who has a dispute arising directly from the Partnership or arising out of or in connection with this Agreement provided notice of the dispute is given in writing to the Shareholders' Committee within six months of leaving the Partnership. 26.2 Within six months of the date of this Agreement, the Shareholders' Committee shall elect an arbitrator ("the Arbitrator"). The Arbitrator shall be elected for a period of three years. At the end of the three years or if the Arbitrator dies or is unable to continue to act, another Arbitrator shall be elected in accordance with the provisions of this clause. 26.3 The exclusive forum for the arbitration shall be London." 9. The Applicants' case is simple. They say that this is an agreement to arbitrate and the Court should stay the proceedings so that the arbitration can take place. Although the Royal Court has held that it has an inherent jurisdiction to stay proceedings where the parties have agreed to arbitrate (see GKN (Jersey) Limited -v- Resources Recovery Board

[1982] JJ359), statute has now intervened. Article 6 of the Arbitration (Jersey) Law 1998 (as amended by Article 2 of the Arbitration (Amendment) (Jersey) Law 1999) provides as follows:- "If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time before the expiration of a period of three weeks from the date upon which the action was placed on the pending list or en preuве apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not any fact in dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings." 10. "Arbitration agreement", when used in Article 6, is defined in Article 1(2) of the Law as meaning "... an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of settlement by arbitration." The Applicants therefore argue that they are entitled to a mandatory stay. 11. The Plaintiff, on the other hand, argues that Clause 26 does not amount to an arbitration agreement and that there are no "... matters agreed to be referred ..." to arbitration as required by Article 6 of the Law. Mr Wilson says that, if clause 26 is a general arbitration clause, clauses 25 and 26 of the partnership agreement are mutually exclusive. Clause 25 confers exclusive jurisdiction on the courts of Jersey as regards any matter or claim relating to the agreement. That is clear and unambiguous, says Mr Wilson. Having conferred exclusive jurisdiction on the Jersey courts, the parties cannot then confer jurisdiction on an arbitration tribunal. 12. Furthermore, he says, clause 26 just does not make sense. Paragraph 1 merely states when the clause is to apply. It does not say anything about what the clause actually provides. Paragraph 2 merely

establishes the mechanism for appointing an arbitrator. It says nothing about when an arbitration will take place. Paragraph 3 is the only paragraph which could be said to be the substantive part of the clause but it does not actually say that there will be an arbitration. It merely says that the arbitration shall be in London. This is the first mention of arbitration in the text of the clause itself and immediately raises the question "what arbitration?". 13. He goes on to submit that clause 26 is intended merely to give the disgruntled partner an option. Such a partner may serve a notice in accordance with clause 26.1 giving notice of the dispute and expressing a wish to refer the matter to arbitration. If he does so, then clause 26 provides that the parties can discuss and negotiate with a view to referring the matter to arbitration if they all agree to do so. Clause 26 is therefore merely an agreement to agree. Initially Mr Wilson argued that Clause 26.3 provided that, if there was agreement for an arbitration, it had to be held in London. However, when it was pointed out to him that, if the rest of clause 26 was merely an agreement to agree, it would be open to the parties to agree to arbitrate anywhere, he modified his stance and contended that clause 26.3 was merely an indication that any arbitration agreed upon could be held in London if the parties so agreed. Mr Wilson submitted that his construction was the only sensible way in which clause 26 could be reconciled with clause 25. 14. Mr Thompson, for the Applicants, accepted that clause 26 was not well drawn. We would add that that appears to be something of an understatement. Nevertheless, he argued, its intention was clear. It was an arbitration clause. He referred the Court to the following passage from Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (Second Edition) at page 184:- "3. Certainty As regards the third question, it must be shown that the terms of the agreement to arbitrate are sufficiently certain to be enforceable. Allegations of uncertainty may arise in various ways. (a) Inconsistent clauses In the first place, it may happen that the contractual documents contain two or more apparently inconsistent provisions as to arbitration. In such a situation, the court will usually try to save the submission to arbitration, either by effecting a reconciliation between the clauses, or by construing one clause as applicable to the exclusion of the others. Sometimes, however, the conflict will be so acute that the Court can make no sense of the arbitration provisions, read as a whole. In such a case, the underlying contract will not be void for uncertainty, but will be enforced as if it contained no provision for arbitration. (b) Abbreviated clauses A similar question will arise, where the parties have agreed upon a term as to arbitration, but it is said that the term is too uncertain to be enforced. The courts will lean against frustrating the intention of the parties, and will try to give the clause a meaning. It is thus no objection that the clause is terse. Thus, 'Arbitration to be settled in London' is sufficiently clear to be enforced, and indeed it has been said that the single word 'Arbitration' will suffice." Elsewhere Mustill points out that the document must be clear enough to show that the parties did indeed intend to incorporate an agreement to arbitrate. 15. As to the question of inconsistent clauses, Mr Thompson argued that clause 26 could be reconciled with the existence of clause 25. Clause 26.1 required a notice to be given within six months of the person leaving the partnership. If no such notice was given, the arbitration provisions of clause 26 could

not apply. The parties were then obliged to litigate before the courts of Jersey in accordance with clause 25.2. Furthermore clause 25.2 was a provision agreeing that it was the Jersey courts which should have the exclusive supervisory jurisdiction over the arbitration process. 16. As to the question of abbreviated clauses, he relied upon the examples given by Mustill in the passage referred to above. At the Court's request, the cases relied upon by Mustill were supplied after the conclusion of the hearing and the parties were invited to make further written submissions on those cases. This they did. Is clause 26 an arbitration agreement? 17. In our judgment clause 26 is an arbitration agreement within the meaning of the Law. It is clear that the Court does not require detailed provisions in order to find an arbitration agreement. It merely has to be satisfied of the intention of the parties and that there is sufficient certainty in the provision. 18. In *Tritonia Shipping Inc. -v- South Nelson Forest Products Corporation* (1966) 1 Lloyd's Rep. 114 a charter-party contained the following provision as clause 29 "Arbitration to be settled in London". The defendants argued that this was too vague and short to be intelligible. The Court of Appeal gave this argument short shrift. It held that the clause, brief as it was, could only have one meaning. It meant "any dispute under this charter party to be settled by arbitration in London". 19. In *Hobbs Padgett & Co. (Reinsurance) Limited -v- JC Kirkland Limited* (1969) 2 Lloyd's Rep. 547 there was an even shorter clause in an agreement between insurance brokers. Clause 16 of that agreement read "Suitable arbitration clause". The plaintiffs contended that clause 16 was meaningless and was therefore not a binding agreement to arbitrate. As in the present case, they submitted that it was merely an agreement to agree. The Court of Appeal dismissed this argument. Salmon LJ said at p549:- "It seems to me that 'Suitable Arbitration Clause' means that these parties have agreed that, if any dispute arises between them under the contract, including any dispute as to the meaning of the contract, that dispute should be referred to arbitration rather than to the Courts. If the parties cannot agree upon an arbitrator, then they can invoke the terms of the Arbitration Act 1950 and an arbitrator will be appointed by the Court." He went on to say at 550:- "The parties, by clause 16, have made it quite clear that their intention is that their differences should be arbitrated. I do not think that the word 'Suitable' adds to or detracts from the meaning of the clause. If the clause had read 'Arbitration Clause' there could have been no doubt that it would have been sufficiently precise to be given the meaning which, to my mind, any ordinary man would consider that it obviously bears." Similarly Edmund Davies LJ said on the same page:- "But, unless I misunderstood Mr Myers completely, he was forced to concede that had the clause simply read 'Arbitration Clause' then, since it is the duty of the Court to seek to attach meaning to all parts of an agreement concluded between the parties, not only would that two-word clause be capable of having a meaning attached to it, but there would be little or no difficulty in so doing." 20. The third case referred to in Mustill was *Transamerican Ocean Contractors Inc. -v- Transchemical Rotterdam BV* (1978) 1 Lloyd's Rep. 238. In that case the relevant provision of a charter party said "General average & arbitration to be settled according to the York-Antwerp Rules 1950 in London". The Court of Appeal held that this was an arbitration clause but that it related only to disputes concerning general average. A

dispute concerning demurrer therefore fell to be dealt with by the courts. 21. Clause 26 is fuller than the examples referred to above. It is headed "Arbitration". It then has three paragraphs, each of which deals with a separate matter. Paragraph 1 states when the clause is to be applicable. It is to be applicable to "any Partner including any Partner who is no longer a Partner who has a dispute arising directly from the Partnership or arising out of or in connection with this Agreement ...". That is very widely drawn. The second requirement, in order for the provisions of clause 26 to apply, is that notice of the dispute must be given in writing to the Shareholders' Committee within six months of a partner leaving the partnership. If the dispute is of a type falling within the description and if the notice is given, then clause 26 will apply. 22. Paragraph 2 spells out the mechanism for the appointment of an arbitrator. In effect there is to be a standing arbitrator for a three year period with provision for an appointment of a replacement thereafter. It is supportive of a general intention that the parties intended there to be an arbitration. Otherwise why appoint an arbitrator? 23. The only substantive provision is to be found at paragraph 3 which reads "The exclusive forum for the arbitration shall be London." (emphasis added). On Mr Wilson's argument paragraph 3 and paragraph 2 have no meaning or purpose. If clause 26 is merely an agreement to agree, there is no point in having a standing arbitrator because there would be no obligation on the parties to use him. All matters would be up for negotiation including the identity of the arbitrator. Similarly clause 26.3 would have no purpose. It is written in mandatory terms as emphasised above. Yet, if clause 26 is merely an agreement to agree, clause 26.3 cannot possibly be mandatory, as Mr Wilson was forced to concede during argument. If the parties are negotiating whether to arbitrate, they will clearly be able to negotiate on which forum they wish to use. There is no obligation on them to choose London. On Mr Wilson's analysis, the apparently mandatory terms of clause 26.3 mean nothing of the sort and are of no legal effect. 24. In our judgment the only possible interpretation of clause 26 is that it is an arbitration clause. The only meaning which can sensibly be attributed to clause 26.3 in particular is along the lines of "any dispute within clause 26.1 shall be referred to arbitration, the exclusive forum of which shall be London". 25. Furthermore, for the reasons given by Mr Thompson, we think that clause 26 as so interpreted can be reconciled with clause 25.2. If the notice required by clause 26.1 is not given within the stipulated time period of six months, clause 26 has no application so that there is no referral to arbitration. In those circumstances clause 25.2 comes into play so as to confer exclusive jurisdiction on the courts of Jersey. As was said by Edmund Davies LJ in *Hobbs Padgett*, it is the duty of the Court to seek to attribute meaning to all parts of an agreement concluded between the parties. In our judgment the construction which we favour achieves that objective, whereas the construction contended for by Mr Wilson renders clause 26 meaningless and of no legal effect. If the clause means no more than that, on the serving of the notice referred to in clause 26.1, the parties may negotiate with a view to referring the matter in dispute to arbitration, the whole of clause 26 could be safely omitted. Even without it, it would still always be open to the parties, in the event of a dispute, to agree to refer the matter to arbitration. Clause 26 has therefore achieved nothing. The Court will always be slow to

adopt a construction of a contract which renders a clause meaningless. 26. We therefore conclude that Clause 26 is an arbitration agreement which commits the parties to go to arbitration. However it only applies where the requirements of clause 26.1 are satisfied. Mr Wilson conceded that the matters in dispute as set out in the Order of Justice constitute "... a dispute arising directly from the partnership or arising out of or in connection with this agreement ...". Nevertheless he argued that the notice of dispute required by clause 26.1 had not been given. 27. First he argued that, in order to be valid, a notice had not only to refer to the dispute but had also to state that the party giving the notice wished the matter to be referred to arbitration. As we understood it, this argument was linked with his argument that clause 26 was merely an agreement to discuss going to arbitration. In our judgment the wording in relation to the notice is clear. All that is required is "... notice of the dispute ...". We see no grounds for reading in additional words so as to require that notice must also be given of the party's desire to arbitrate. On the contrary, for the reasons we have given, once the notice of dispute is given, the parties are legally bound to go to arbitration in any event. 28. Secondly, Mr Wilson points out that the notice of the dispute has to be given to the Shareholders' Committee. He accepts that his letter of 24th March 2000 constituted notice of a dispute and that this was sent to all the partners individually with a copy also being sent to "the partners" generally. He accepts therefore that all the members of the Shareholders' Committee have been sent that letter. However he argues that because no letter was sent to the Shareholders' Committee as such, no notice of dispute has been given to that Committee. We see little merit in that submission. The clear intention of the agreement was that the members of the Shareholders' Committee should be notified of the existence of a dispute. In this case each member of the Shareholders' Committee has been notified of the existence of a dispute. The fact that the letter in question was addressed to each member of the Shareholders' Committee in his capacity as a partner rather than in his capacity as a member of the Shareholders' Committee is, in our view, irrelevant. Accordingly we hold that the requirements of clause 26.1 have been complied with. 29. Before concluding we would deal with two additional matters which were raised in argument. First, Mr Thompson sought to adduce evidence of drafts of the partnership agreement or of heads of agreement prepared at the time of the negotiation of the agreement with a view to showing that the parties intended there to be an arbitration provision. We agree with the observations of Edmund Davies LJ in *Hobbs Padgett* that it is not permissible to refer to draft documents which do not resemble what was put in the final contract between the parties. The intention of the parties has to be ascertained from the words which they have chosen to use rather than from words which one or either side might have suggested during the course of negotiations. We have therefore ignored the material put before us in this respect. The Court is however entitled to have regard to the general nature of the contract in ascertaining the intention of the parties. As Salmon LJ said in the same case at 549:- "If ever there was a type of contract in which businessmen would want to include an arbitration clause, this must be a prototype of such a contract. Here is a dispute between what are, in effect, partners in a reinsurance broker's business who decided to split and go their divers ways. Should there be any dispute in future

concerning the meaning of the contract which effected this divorce, I should have thought it very unlikely that ordinary businessmen would want that ventilated in public and their business affairs perhaps exposed to the eyes of their competitors." 30. Secondly, one of the reasons given by the Plaintiff as to why he did not wish to go to arbitration was that the identity of the arbitrator nominated under clause 26.2 was unacceptable to him. At the time the nominated arbitrator was thought to be Mr George Sandars, who was the partner in Wilde Sapte (as it then was) who had been responsible for the drafting of the partnership agreement and had since advised some of the other partners. However it appears from the affidavit of the fifth Defendant that, in the light of events, Mr Sandars had very properly indicated that he did not wish to continue as arbitrator. It appears that, on 31st March 2000, Mr Michael Douglas QC was appointed as arbitrator in his place. On the face of it there now appears to be an independent arbitrator in place to conduct the arbitration. In any event, there always exists a power in the Court to appoint a new arbitrator should this become necessary.

Conclusion

31. For the reasons which we have given, we find that clause 26 of the partnership agreement constitutes a valid arbitration agreement and that the matters in dispute in the Order of Justice are matters which have been agreed to be referred to arbitration by virtue of the provisions of the arbitration agreement. Article 6 of the Law provides that, in those circumstances, the Court must grant a stay and we therefore so order. Authorities GKN (Jersey) Ltd -v- Resources Recovery Board (1982) JJ 359. Arbitration (Jersey) Law 1998: Article 1(2), 2, 6. Mustill and Boyd: The Law and Practice of Commercial Arbitration in England (2nd Ed'n): p.184. Tritonia Shipping Inc. -v- South Nelson Forest Products Corp'n (1966) 1 Lloyd's Rep 114. Hobbs Padgett & Co (Re-insurance) Ltd -v- J. C. Kirkland, Ltd (1969) 2 Lloyd's Rep 547. Transamerican Ocean Contractors Inc -v- Transchemical Rotterdam BV (1978) 1 Lloyd's Rep 238. Page Last Updated: 02 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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