Judgments

CA, CIVIL DIVISION

Case No: A3/2010/2688 and A3/2011/0424

Neutral Citation Number: [2011] EWCA Civ 410

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

(MRS JUSTICE GLOSTER)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: Monday 7 March 2011

Before:

LORD JUSTICE RIX

- -

TXM OLAJ-ES GAZKUTATO KFT **Appellant**

- and -

CLAXTON ENGINEERING SERVICES LTD

Respondent

- -

(DAR Transcript of

WordWave International Limited

A Merrill Communications Company

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400 Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

- -

Mr S Shackleton (instructed by Mundays LLP) appeared on behalf of the **Appellant**.

The **Respondent** did not appear and was not represented.

- -

Judgment

(As Approved by the Court)

Crown Copyright©Lord Justice Rix:

1. This is a renewed application for permission to appeal from the judgment of Gloster J given on 15 October 2010 in litigation between Claxton Engineering Services Ltd as claimant and a Hungarian company, whom I will for convenience simply describe as TXM, as defendant. Conjoined with this is an application for permission to appeal (I cannot describe it as a renewed application because it has not been dealt with on paper yet, but I directed that it should join up with the renewed application for permission to appeal from the judgment of Gloster J) and that is a second application for permission to appeal on a subsequent judgment

of Hamblen J given on 1 February 2011.

2. The position is that Gloster J decided, in what could be called a battle of forms between Claxton and TXM, that ultimately it was Claxton's proposal for English law and English jurisdiction which prevailed and not TXM's proposal in its purchase orders for Hungarian arbitration and Hungarian law. Gloster J, having decided that English law and English jurisdiction prevailed, dismissed TXM's application for a stay to arbitration pursuant to section 9 of the Arbitration Act 1996. Gloster J having decided that point, Hamblen J subsequently agreed to grant Claxton an anti-suit injunction against arbitration proceedings in Hungary. He considered that his award of such an anti-suit injunction was premised upon Gloster J's judgment. He accepted that if there were to be permission to appeal against Gloster J's judgment then there ought also to be permission to appeal against his judgment, but otherwise not.

3. In my judgment there should be permission to appeal from both judgments. There are numerous grounds of appeal - perhaps too many - but in essence the underlying ground is opposition to Gloster J's decision that she was entitled, by reason of what she considered to be a binding decision of this court in Ahmad Al-Naimi -v- Islamic Press Agency [2000] 1 Lloyd's Rep 522, to exercise her jurisdiction to decide whether or not there was a binding arbitration agreement between the parties rather than to leave that question, provided there was a good arguable case for such an arbitration agreement, to the Kompetenz Kompetenz jurisdiction of the arbitrators concerned.

4. In my judgment there is an arguable issue suitable for appeal as to the effect of the Ahmad Al-Naimi judgment in circumstances where Waller LJ appears to have left it open at 525 in the right hand column as to whether section 9 of the Arbitration Act 1996 does require a decision on the existence of an arbitration clause, and in circumstances where the critical point in that case (see the turn of the page 525/526) is that the parties there had agreed that the issue whether the arbitration clause applied should be determined by the English court. In the present case there was no such common ground. TXM submitted that it was contrary to the philosophy of arbitration pursuant to both the New York Convention and the Arbitration Act 1996 and to the importance of Kompetenz Kompetenz jurisdiction in the role of arbitrators that this court should go beyond establishing whether there was a good arguable case for an arbitration agreement. The only concession made on behalf of TXM recorded by the judge at paragraph 15 of Gloster J's judgment was that if it was "necessary" for the English court to decide the threshold question, then it was accepted that there would be no further evidence beyond that which was already before the court. Both parties were agreed on that. But it was not common ground that Gloster J should decide the issue. On that basis it seems to me that whatever the validity of other grounds of appeal, the applicants are entitled to permission to appeal from both judgments on this ground.

5. Nevertheless, it seems to me that there are also two other plainly arguable grounds available to TXM. One is in respect of Gloster J's finding that English law and jurisdiction had been agreed by silence following a proposal of such law and jurisdiction on the part of Claxton, but I consider that there is an arguable case to the contrary in the light of, for instance, Jayaar Impex Ltd v Toaken Group Ltd [1996] 2 Lloyds Rep 437. A third matter which I would mention is that there were at least six of the nineteen disputed purchase orders which had been signed by Claxton without any reserve on the signature. Those purchase orders referred to terms and conditions which included reference to Hungarian arbitration and law. Other purchase orders, however, were signed under reserves and some purchase orders were not signed and returned at all. So there is possibly a mixture of circumstances over the nineteen purchase orders concerned which will have to be looked at. However, TXM's submission, that there was a sufficient course of dealing in relation to the terms of their purchase orders covering all the disputed contracts and invoices so as to embrace cases other than the six signed purchase orders not signed under reserves, is a matter which is within the appeal.

6. There are other grounds of appeal where it may be the argument of TXM is very much weaker, for instance the question about whether delivery under the contracts was ex-works in England, thereby invoking the underlying Judgment Regulation jurisdiction under article 5.1, or whether delivery was only at ultimate

destination in Hungary, thereby requiring an underlying jurisdiction (putting aside all jurisdictional issues concerning arbitration clauses) under article 2 of the Judgment Regulation. So there is that issue there as well, although if that issue had stood by itself I am not sure that permission to appeal would have been granted on that ground alone. Nevertheless, it seems to me that I would not limit any of the grounds for which permission is sought and I would give permission in general to appeal from the two judgments of Gloster J and Hamblen J.

7. I would only say that it is not at all clear to me what the underlying merits of the claim are. Mr Shackleton, who has been very helpful this morning, has told me that the goods concerned under the contract of sale are still in England. It is not clear to me what the real arguments are under the contracts of sale in the case and I am concerned that the parties are being required to spend a lot of time and money on sorting out the jurisdiction and law under which their disputes will be resolved. However, that does happen in commercial disputes from time to time. I would only counsel the parties, if the nature of their dispute permits it, before they spend too much money on interlocutory fights of this kind, that they should get to grips with the ultimate merits of their case and see if they cannot mediate those matters between them. That may well be a more satisfactory direction for their dispute than pouring money into jurisdictional black holes. However, that said, permission is granted.

Order: Applications granted.

Crown Copyright. Source: BAILII. This information is licensed under the terms of the Open Government Licence: http://www.nationalarchives.gov.uk/doc/open-government-licence. (http://www.bailii.org/ew/cases/EWCA/Civ/2011/410.html, accessed 13 September 2012.)