Supreme Court of Canada
Stokes-Stephens Oil Co. v. McNaught, (1918) 57 S.C.R. 549
Date: 1918-03-25

The Stokes-Stephens Oil Company (Plaintiff) Appellant;

and

Joseph Young Mcnaught (Defendant) Respondent

1918: February 28; 1918: March 25.

Present:—Sir Charles Fitzpatrick C.J. and Idington, Anglin and Brodeur JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Contract—Arbitration—Breach of Contract—Stay of Action—"Arbitration Act" (Alta), 9 Edw. VII. c. 6, s. 4.

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A contract for the drilling of an oil well provided: "That if at anytime during the prosecution of the said work, or after the completion thereof, any dispute, difference or question shall arise between the parties hereto, or any of their representatives, touching the said work, or the construction, meaning, or effect of these presents, or anything herein contained, or the rights or liabilities of the parties or their representatives, under these presents or otherwise in relation to the premises, then every such dispute, difference or question shall be referred to" arbitration. After an award had been made, the appellant took an action in damages for breach of contract and the respondent applied for a stay of action.

Held, Idington J. dissenting, that the intention of the parties was to refer to arbitration not only the disputes between them but also the question whether these disputes fell within the arbitration clause; and that the issues between the parties ought to be determined by arbitration rather than by action.

Per Fitzpatrick C.J. and Anglin and Brodeur JJ.:—The provision "at any time during the prosecution of the work or after the completion thereof" relates to time and not to the condition of the work and is applicable even if the work is not being prosecuted through the default of one party.

Judgment of the Appellate Division (12 Alta. L.R. 501; 34 D.L.R. 375), affirmed. Idington J. dissenting.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta[1], reversing the judgment of Hyndman J. and maintaining an application by the defendant to stay the plaintiff's action for damages for breach of contract.

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The appellant and the respondent entered into an agreement for the drilling of a well for the discovery of oil or gas. The principal clause of the agreement is cited in the above head-note. The respondent proceeded under the contract, but at a depth of 2,400 feet, a joint of the casing collapsed and broke. Continuance of the work had been agreed on, but

[1] 12 Alta. L.R. 501; 34 D.L.R. 375.

a dispute occurred between the parties as to the size of the casing; the respondent appointed an arbitrator and called upon the appellant to do the same under the terms of the arbitration clause. The appellant notified the respondent of the appointment of an arbitrator, though maintaining at the same time that no dispute had arisen and that the appointment was without prejudice to its right to so maintain and to dispute the validity of any award.

A third arbitrator was subsequently named and an unanimous award was made in favour of the respondent. The appellant then took an action in damages for breach of contract. The respondent made an application for stay of that action, pursuant to section 4 of the "Arbitration Act" (Alta.), 9 Ewd. VII. ch. 6. This application was refused by Hyndman J., but granted by the Appellate Division.

Eug. Lafleur K.C. and J. H. Charman for the appellant.
A. H. Clarke K.C. for the respondent.

THE CHIEF JUSTICE.—I have had the advantage of reading the judgment which will be delivered by my brother Anglin. He has dealt very fully with the matter and there is little need that I should add anything to his reasons, with which I agree.

I may say, however, that I think the courts should be reluctant to permit an appeal to them by one of the

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parties to an agreement to refer questions that may arise between them to a domestic forum rather than the ordinary courts, when that agreement is couched in such wide terms as in the present case. The bringing of an action in such cases on a technical point even if necessarily held permissible is likely to defeat the intention of the parties to the agreement, as I cannot doubt would be the case here. I think the parties to this agreement intended at the time it was entered into that all questions that might arise between them touching the subject matter of the contract should be settled by arbitration without proceedings before the courts.

This is the second attempt on the part of the appellants to withdraw these matters from the arbitrators and such proceedings would go far to render agreements for arbitration undesirable as rather increasing than avoiding litigation.

The appellants appointed an arbitrator "without prejudice," by which I can only understand that they were willing to wait and see if the award were in their favour and accept or refuse to be bound by it accordingly. This, I think, is also a proceeding to be discouraged and is an additional reason why I would dismiss the appeal.

IDINGTON J. (dissenting)**—**There are several rather important and difficult questions raised herein which, in the last analysis, depend upon the construction of the submission, and that ought to be determined by the court under the circumstances existent in this case.

Allowing the action to proceed will facilitate that being done. I therefore think the appeal should be allowed with costs. I may be permitted to add that I am very far from holding that every case dependent

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upon the construction of the submission must be tried out by a court. Many documents, penned by commercial men especially, I believe, would often find, if submitted to men of the class that framed them, a construction more in accord with what the parties concerned contemplated than would be apt to be given by a court.

In this case, however, I think the court probably will be the better tribunal to determine the questions raised.

I purposely abstain from intimating or discussing what points of construction may be involved, or presenting any views thereupon, and thereby embarrassing those who will have to consider and dispose thereof.

ANGLIN J.—Under the terms of sec. 5 of the "Alberta Arbitration Act" (1909, ch. 6), if the defendant desired to obtain a stay of this action he was obliged to apply for it

> before delivering any pleadings or taking any other steps in the proceedings.

To determine on a mere perusal of a statement of claim whether the real issues between the parties are within the scope of an agreement for arbitration, or are such that, notwithstanding that they fall within its purview, the court should, in the exercise of its discretion (*Lyon* v. *Johnson*[2]), refuse to stay the action is often a difficult matter. It is so in the case at bar. The judges of the provincial courts have differed upon this question. For my part I should, therefore, have preferred to have taken the course adopted by North J. in *Re Carlisle*[3], and have directed that the motion to stay should stand over until the pleadings should be

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closed and such evidence taken (if any) as the judge before whom the case might come for trial should deem necessary to develop and make plain the real matters in controversy.

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[2] 40 Ch. D. 579.

The issues would probably then be defined and it could be determined more readily and satisfactorily whether they do or do not fall within the scope of the arbitration clause in the agreement between the parties.

I understand, however, that two of my learned brothers think the adoption of this dilatory course unnecessary and therefore unjustified. In deference to their view I shall express my opinion upon the question whether the cause of action disclosed in the statement of claim is such that the judgment granting a stay should be reversed.

The appellants seek to distinguish the case of *Willesford* v. *Watson*[4], cited by the learned Chief Justice of Alberta, and refer to some observations upon it made by Jessel M.R. in *Piercy* v. *Young*[5]. In the *Willesford Case* [4], Lord Chancellor Selborne held that under the submission there before the court

> the very thing which the arbitrators ought to do (was) to look into the whole matter, to construe the instrument, and to decide whether the thing which is complained of is inside or outside of the agreement.

His Lordship declined to have the court

> limit the arbitrators' power to those things which are determined by the court to be within the agreement.

The words of the submission, to which effect was thus given, were as follows:—

> Any dispute, question or difference * * * between the parties to these presents * * * touching these presents or any clause or matter or thing herein contained, or the construction hereof * * * or touching the rights, duties, and liabilities of either party in connection with the premises.

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This arbitration clause was contained in a mining lease. The question between the parties was whether a claim arising out of the sinking by the lessees of a shaft through the leased land in a slanting direction into adjoining mining land, of which they were also lessees, was in violation of the lessors' rights. They alleged that it was, and also maintained that such a dispute was not within the provision for arbitration and accordingly they brought action for an injunction. Their action was stayed. In the case at bar the agreement provides for the arbitration of

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[3] 44 Ch. D. 200.
[4] 8 Ch. App. 473.
[5] 14 Ch. D. 200, at p. 208.
[4] 8 Ch. App. 473.

> any dispute, difference or question between the parties hereto * * * touching * * * the construction, meaning or effect of these presents or anything herein contained or the rights or liabilities of the parties * * * under these presents or otherwise in relation to the premises.

I am, with respect, of the opinion that it is impossible to distinguish this language from that in the Willesford agreement. The scope of the arbitration clause now before us is, if anything, wider than that dealt with by Lord Selborne and vests in the arbitrators the power to determine whether or not any claim presented to them is within the purview of the submission. In *Piercy* v. *Young*[6], the agreement was merely for the reference to arbitration of

> any differences or disputes which may arise between the partners.

Such an agreement was clearly distinguishable from that in the *Willesford Case*[7], as the Master of the Rolls points out, and the only relevancy of his judgment is his observation that

> Of course persons can agree to refer to arbitration not merely the disputes between them, but even the question whether the disputes between them are within the arbitration clause.

I may add that, except for whatever limitation may be involved in the words

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> at any time during the prosecution of the work or after the completion thereof,

I see no serious difficulty in treating the cause of action stated in the statement of claim as a

> dispute, difference or question * * touching the effect of these presents * * or the rights or liabilities of the parties under these presents or otherwise in relation to the premises,

within the meaning of those terms as used in the agreement. To quote Lord Selborne, the parties here

> seem to have taken more than ordinary pains to throw in words that cover all things collateral as well as things expressed.

The plaintiffs complain of an alleged wrongful withdrawal by the defendant of the casing thereby destroying the well and depriving them of an opportunity to exercise an option to purchase the casing (presumably in place) given by the agreement. They also complain of the non-completion of the well to a depth of 2,500 feet. They claim payment of a balance of $10,875 of moneys deposited by them with the Royal Bank of Canada as a guarantee for the carrying out of the contract by them, out of which payments were to be

[6] 14 Ch. D. 200, at p. 208.

made to the defendant as they accrued due. They also claim damages to the amount of $21,625.

Whether the casing was properly or improperly withdrawn from the well by the defendant in an unsuccessful effort to remove 300 feet of it from the bottom after it had collapsed, whether the failure to complete the contract is attributable to the fault of the defendant or to a wrongful failure of the plaintiffs' managing director to give proper directions as to the diameter of the well if it should be continued below the depth attained at the time of the collapse, whether the removal of the 300 feet of casing at the bottom of the well was impracticable as alleged by the defendant, whether the plaintiffs' managing director was within

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his rights in insisting that the defendant should furnish him with "conclusive evidence" of the impracticability of removing 300 feet of casing and of the necessity for reducing the diameter of the well if the work were to be continued, whether any damage sustained by the plaintiffs is attributable to fault or misconduct of the defendant and, if so, what would be a reasonable sum to allow as compensation, and whether the plaintiffs are entitled to the balance of $10,875 deposited in bank —all these appear to be questions

> touching the effect of these presents * * * or the rights or liabilities of the parties under these presents or otherwise in relation to the premises.

It is true that the determination of the practicability of carrying an 8¼-inch casing to the full depth of 2,500 feet is by the agreement left with "the owners' managing director" whose decision upon it is made final. But whether such a decision was given or was wrongfully withheld and what was the effect upon the rights of the parties of such a wrongful withholding if it occurred, or of the defendants' failure to carry out a proper and lawful direction if given, appear to be questions

> touching the effect of these presents or the rights or liabilities of the parties under these presents or otherwise in relation to the premises.

It may be that if they should find the withdrawal of the casing to have been tortious, the arbitrators would determine that a claim in respect of it is not covered by the arbitration agreement. It would be competent for them to so hold, though for my part I find it difficult to understand how such a claim can be other than

> in relation to the premises * * * under these presents or otherwise—

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[7] 8 Ch. App. 473.

just as was that based on the alleged wrongful sinking of a transverse shaft in the *Willesford Case*[8]. The

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parties have seen fit, to use the language of Jessel M.R.,

> to refer to arbitration not merely disputes between them, but even the question whether the disputes between them are within the arbitration clause.

I agree with Chief Justice Harvey that the opening words

> relate to time and not to condition of the work and the parties would naturally be considering the contract as one to be performed and not one to be broken and in that case everything would happen "during the prosecution of the work or after the completion thereof," and in their contemplation at the time of the making of the agreement it appears to me that these words would be considered comprehensive enough to cover every question that might arise out of the contract.
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> Then it may be that the work has been completed. It is true that the work has not been completed by the drilling of a successful well, but if this is due to the default of the plaintiff the work has been completed in so far as the contract imposes any obligation on the defendant to complete it, and the arbitrators have so found.

I think the parties meant to provide, and have provided, for the arbitration of any dispute or difference arising between them in relation to the premises, whether under the contract or otherwise, after the commencement of the work.

But it is said that although they should be within the arbitration clause of the agreement the plaintiffs' claims as disclosed in the statement of claim are of such a character that the court in the exercise of its discretion should not stay the action. It is the case presented by the statement of claim that must be dealt with (*Monro* v. *Bognor Urban District Council*[9]).

If the judge of first instance had refused a stay in the exercise of judicial discretion the Appellate Court might properly have declined to entertain an appeal from his order. *Clough* v. *County Live Stock Ins. Association*[10]; *Walmsley* v. *White*[11]; *Vawdrey* v.

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Simpson[12]. But the learned judge based his refusal on the ground that the claims set up in the statement of claim are not within the agreement for arbitration. He apparently did not exercise any discretion;

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[8] 8 Ch. App. 473.
[9] [1915] 3 K.B. 167.
[10] 85 L.J.K.B. 1185.
[11] 40 W.R. 675.
[12] [1896] 1 Ch. 166 at p. 169.

In the Appellate Division, on the other hand, the majority of the court held the cause of action to be within the scope of the arbitration agreement, one learned judge thinking it proper to go outside of the statement of claim and to

look at the affidavit evidence and discover what the real dispute is about.

Although there is no explicit reference to any consideration of discretion in the opinions delivered by the learned Chief Justice (concurred in by Walsh J.) and Mr. Justice Stuart, it should not be assumed that those learned judges overlooked the fact that, although the cause of action should be within the purview of the arbitration agreement, the court would have a discretion—to be exercised judicially, not arbitrarily—to grant a stay. On the contrary, it should be assumed that the conclusion was reached that the circumstances did not call for an exercise of this discretion.

If the sole matter to be dealt with by the arbitrators were a question of law, a stay of the action on that ground might be properly refused: *Edward Grey & Co.* v. *Tolme & Runge*[13]. But where there are important questions of fact to be determined, such as the practicability of continuing the well with a diameter of ten inches, the propriety of taking out the casing, whether the managing director did or did not exercise the power conferred on him by the agreement, and the amount of damage sustained by either party, the circumstance that important questions of law are also involved will not justify the refusal of a stay if the claims in the

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action be otherwise proper for submission to arbitrators. *Rowe Bros.* v. *Crosley Bros.*[14]; *Lock* v. *Army, Navy and General Assurance Association*[15]. Especially must this be so where the parties have, as here, expressed their purpose that all questions of the construction of the agreement, which may be the chief legal questions to be determined, should be dealt with by the arbitrators. That circumstance, with the fact that there is no claim in the present case which is clearly outside the purview of the arbitration clause, distinguishes it from *Printing Machinery Co.* v. *Linotype and Machinery Ltd.*[16].

Neither, in my opinion, does it appear that the claim in the pending action is in itself, or that it involves, a question of such a character or arising under such circumstances that a judge in the exercise of his discretion should retain it for decision by the court. Such a

[13] 31 Times L.R. 137.
[14] 108 L.T. 11.
[15] 31 Times L.R. 297.
[16] [1912] 1 Ch. 566.

case was *Barnes* v. *Youngs*[17], as is explained in *Green* v. *Howell*[18]. On the contrary, having regard to the terms of the arbitration agreement, the questions presented by the statement of claim seem to me to be such as may very properly be dealt with by arbitration under it.

Once the conclusion is reached that the agreement for arbitration is wide enough to embrace the claims presented in the action it is the *prima facie* duty of the court to allow the agreement to govern *(Willesford* v. *Watson*[19]), and the onus of shewing that the case is not a fit one for arbitration is thrown on the person opposing the stay of proceedings. *Vawdrey* v. *Simpson*[20]. In my opinion the appellants have not satisfied that onus.

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The arbitration already had—the appellants' arbitrator having been appointed under protest—resulted in a determination that it is not economically practicable to carry the well beyond its present estimated depth of 2,400 feet at the diameter of ten inches and that the delay in arriving at a decision as to the course to be adopted for the completion of the well is attributable to the appellant company and C. W. MacMillan, its managing director, and in an award to the respondent of the contract price for drilling to an estimated depth of 2,400 feet and his cost of the reference. It does not appear whether the claims now made by the plaintiffs were or were not presented to the arbitrator. The submission of "all questions between the parties" by the respondent's notice appointing his arbitrator, was accepted by the appellants when they appointed their arbitrator under protest, was broad enough to include those claims. If they were not presented or dealt with, however, it may yet be open to the appellants to have "the matters referred" remitted to the same board, take them up and dispose of them (s. 11) or possibly to have a new board constituted for that purpose. On this phase of the case, which was not discussed at bar and is not before us for decision, I express no view.

I am, for the foregoing reasons, of the opinion that the order of the Appellate Division granting a stay of proceedings in this action should not be disturbed.

BRODEUR J.—By a contract made between the parties on the 25th of February, 1915, it was agreed that McNaught. should drill a well to a depth of 2,500 feet for the

[17] [1898] 1 Ch. 414.
[18] [1910] 1 Ch. 495, at p. 506.
[19] 8 Ch. App. 473, at p. 480.
[20] [1896] 1 Ch. 166, at p. 169.

purpose of discovering oil on the Stokes-Stephens Oil Company's property. Clause 4 of that agreement provided that

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> if at any time during the prosecution of the said work or after the completion thereof any dispute, difference, or question shall arise between the parties thereto touching the said work, or the construction, meaning or effect of those presents, or anything herein contained or the rights or liabilities of the parties under these presents or otherwise in relation to the premises, then every such dispute, difference or question shall be referred to arbitration.

An action was instituted by the oil company claiming damages for breach of that contract. They claim that the well has been destroyed by withdrawing the casing therefrom. Application was then made by the contractor McNaught, to stay this action, pursuant to section 5 of the "Arbitration Act" of Alberta.

The latter section is to the effect that if a party to a submission commence legal proceedings in any court against any other party to the contract, the latter may before pleading apply to the court to stay the proceedings.

The honourable judge of original jurisdiction refused the application but his decision was reversed by the Appellate Division.

The question is whether the matters disclosed in the action come within the arbitration clause stipulated by the parties in their contract.

The plaintiff company claims that the work has been destroyed by the fault or negligence of the contractor.

The work of drilling oil wells is a peculiar one and known only to a somewhat limited class of persons. It is no wonder then that the parties have agreed to refer to arbitration matters concerning it and that their rights or their liabilities under the contract should be decided upon by arbitrators. They went even so far as to declare that the meaning of the contract itself should be passed upon by those arbitrators.

It seems to me that the intention of the parties in that respect is as formal as it could be and it would

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require very exceptional circumstances to prevent arbitrators from acting.

The plaintiff contends, however, that those circumstances must arise during the prosecution of the work or after its completion and that in the present case the work has not been completed and is not being prosecuted.

That provision in the contract relates to time and not to the condition of the work and we could construe it as relating as well to a breach of the contract as to its performance. All the rights of the parties arising out of the contract as well as all their liabilities are within the terms of the submission.

The claim which is now being made by the appellant company arises out of the contract and its rights will have to be determined by the construction or meaning of that contract.

The parties have agreed to determine that they will have arbitrators to decide their claims, instead of resorting to the ordinary courts of the land. It is our duty, therefore, to act upon that agreement.

It is highly desirable, as was stated in the case of *Bos* v. *Helsham*[21], that

> where an arbitration of any sort has been agreed to between the parties those (claims) should be held to apply.

I would rely also on the case of *Willesford* v. *Watson*[22].

For those reasons I would dismiss the appeal with costs.

Appeal dismissed with costs.

[21] L.R. 2 Ex. 72, at page 78.
[22] 8 Ch. App. 473.