OUTER HOUSE, COURT OF SESSION

[2024] CSOH 63

CA77/22

OPINION OF LORD BRAID

In the cause

BRIGGS MARINE CONTRACTORS LIMITED

Pursuer

against

BAKKAFROST SCOTLAND LIMITED

Defender

Pursuer: E Grieve (sol adv); Addleshaw Goddard
Defender: Manson; Morton Fraser MacRoberts LLP

21 June 2024

Introduction

[1] Following a debate, this commercial action was sisted for a period of 3 months on 2 February 2023 (2023 SLT 193); that was because the matters in dispute were, and are, governed by an arbitration clause in the contract between the parties. Since then, the arbitration (which is seated in England, the parties' contract being governed by English law) has begun and is proceeding in what appears to the outsider to be a somewhat leisurely fashion towards a final resolution. Some written pleading has taken place; neither party was able to tell me when there would be a substantive hearing, but it appears to be common

ground that resolution within the next year is unlikely (this in the context of a relatively narrow dispute in which the summons was lodged in this court in September 2022).

[2] The issue for resolution now is whether the action must remain sisted, standing the terms of section 10 of the Arbitration (Scotland) Act 2010, below, or whether it should now more appropriately be dismissed.

Section 10 of the Arbitration (Scotland) Act 2010

[3] Section 10 of the 2010 Act provides, insofar as material:

> **"10 Suspension of legal proceedings**
> (1) The court must, on an application by a party to legal proceedings concerning any matter under dispute, sist those proceedings in so far as they concern that matter if –
> (a) an arbitration agreement provides that a dispute on the matter is to be resolved by arbitration...
> [certain other conditions which must be met]
> (e) nothing has caused the court to be satisfied that the arbitration agreement concerned is void, inoperative or incapable of being performed.
> ...
> (3) This section applies regardless of whether the arbitration concerned is to be seated in Scotland."

Procedural history

[4] Following the initial 3-month sist, the action has subsequently been sisted for periods of respectively 6 and 4 months, the most recent sist expiring on 13 March 2024. When it called before me on 15 March 2024, the defender moved at the bar to dismiss the action on the ground that it was serving no discernible purpose. Since the pursuer had had no advance notice of that motion, I continued it, and the action, for 3 months, to afford the pursuer the opportunity of addressing the court on what benefit there was to the pursuer in keeping the action alive, and of updating me on the progress of the arbitration generally.

Submissions

Defender

[5] When the action called before me afresh, counsel for the defender renewed the motion to dismiss the action. He submitted that the action had no utility. Its continued existence was causing the defender prejudice since it had to keep checking in with the court and was incurring continuing, and pointless, expense. While it could not be said that there was no conceivable circumstance in which the action might serve some purpose or other, it was for the pursuer to articulate what that purpose might be and it had been unable to do so. The position would be otherwise had the arbitration been seated in Scotland, in which event the parties might have had a need to have recourse to the court, but this was an English arbitration governed by English law and should recourse to the courts be needed, that would be to an English court. While section 10 of the 2010 Act required the court to sist an action where parties had agreed to arbitration, the court had done that. There was nothing in that provision which required the court to allow an action to remain sisted indefinitely. The court retained an inherent power to dismiss an action where it was pointless, and where its jurisdiction had been ousted: *North British Railway Co* v *Newburgh and North Fife Railway Co* 1911 SC 710. Nothing in *Fraserburgh Harbour Commissioners* v *McLaughlin & Harvey Ltd* [2021] CSIH 58 prevented the court from exercising that power, where it was appropriate so to do. If not dismissing the action, the court should accede to the pursuer's motion and appoint it to proceed as an ordinary action.

Pursuer

[6] The solicitor advocate for the pursuer moved me to sist the action for a year (or indefinitely). She recognised (astutely and accurately) that such a long sist would be anathema to the commercial court, and so also moved me to remove the action from the commercial roll. If the action became an ordinary one, there would be no need for parties to "check in" with the court; nor, she assured me, would the parties lose sight of the action once the arbitration was completed, as can so often happen. It would be prejudicial to the pursuer were the action to be dismissed. When pressed by me as to what advantage there was to the pursuer in the action remaining in court, she replied that further claims might arise out of the arbitration which would not be covered by the arbitration clause, and which could be brought in the present action, although she could not give any specification as to what those claims might be. She submitted, again without reference to any concrete examples or to authority, that the court action might prove useful in any document recovery exercise which might be undertaken. She further submitted, again in very general terms, that alternatively the action might be useful in an enforcement context. Although she submitted that section 10 envisaged that an action which was sisted would remain so until the conclusion of the arbitration, she accepted the general principle that the court retained an overall discretion to dismiss an action if the arbitration were taking an inordinate length of time, such as (say) 10 years, although she did not think that the present arbitration would last that long.

Decision

[7] The starting point is to note that sists in the commercial court should be the exception rather than the rule. They are at odds with the oft-and-increasingly-overlooked

premise that the commercial court exists to provide parties with a speedy resolution, utilising a bespoke procedure, to any dispute of a commercial nature. There will be situations where a sist is inevitable - in the present case, by virtue of section 10 of the 2010 Act, it was mandatory - but they should be few and far between; and when a sist is granted, the court, in exercise of its case management powers, will necessarily keep it under review. It is not a productive use of the court's time or resource - both judicial and non-judicial - to be constantly checking on the progress of an arbitration, particularly one which is proceeding slowly.

[8] The next question is whether section 10 of the 2010 Act requires the court, once it has sisted an action, to allow the action to remain sisted indefinitely. Phrased in that way, I do not consider that it does. If, to take as an example the period postulated by the solicitor advocate for the pursuer, the arbitration were still limping along after 10 years, and neither party was showing any enthusiasm in progressing it, I consider that at that point the court would be entitled to dismiss the action, effectively for want of prosecution, or for unconscionable delay. That said, the inevitable corollary of the section 10 requirement to sist an action for an alternative dispute process to take place, is that the action should remain sisted pending the outcome of that process: see *Fraserburgh Harbour Commissioners* v *McLaughlin & Harvey Ltd,* above, at [19]. It would be illogical if part way through that process, and while it was still active, the court then became entitled to recall the sist and to dismiss the action. As Lord President Carloway pointed out at [16], whether the action was of any utility or purpose was not a matter which the court required to determine at the stage of sisting; from which it follows that it is not a matter which the court need, or should, consider after the action has been sisted. Any principle which can be derived from *North British Railway Co* v *Newburgh and North Fife Railway Co*, above, where the circumstances

were in any event unusual, and where the action was dismissed rather than sisted, has been modified by the 2010 Act and the mandatory requirement of section 10.

[9] Accordingly, despite the fact that the pursuer has been unable to articulate what advantage it would derive from the current action being kept alive, and that it is difficult to see any benefit to the pursuer in the present action remaining sisted, I am unable to say that there has been such delay that the action should now be dismissed. For now, the pursuer is entitled to keep the action in court should it wish to do so; that both parties must incur some expense in keeping the court up-dated is simply a vagary of litigation (for which the pursuer might well bear the expense, in due course). It is nothing to the point that the arbitration is seated in England, as section 10(3) makes clear.

[10] That all said, I do not consider that it is appropriate for the action to continue on the commercial roll. Neither party wishes the speedy and efficient determination of the action, and, as already noted, it is taking up valuable resource.

Disposal

[11] For all these reasons I have refused the defender's motion to dismiss the action, but I have withdrawn it from the commercial roll in terms of RCS 47.9 and appointed it to proceed as an ordinary action, being satisfied that the speedy and efficient determination of the action is not being served by the action being on the commercial roll. In any event, neither party wishes the action to continue as a commercial action. Even as an ordinary action, I do not consider that an indefinite sist is appropriate. Having regard to the likely minimum future life of the arbitration, I will sist for a period of 1 year and fix a by order hearing for shortly after the expiry of that sist.