**NAAMLOOZE VENNOOTSCHAP HANDELS-EN-TRANSPORT MAATSCHAPPIJ "VULCAAN"**

**v.**

**A/S J LUDWIG MOWINCKELS REDERI**

HOUSE OF LORDS

22, 24, 25 FEBRUARY, 17 MARCH 1938

**LEX (1938) – 2 ALL E.R. 152**

**CITATIONS**

2PLR/1914/5 (HL)

[1938] 2 ALL E.R. 152

**HOUSE OF LORDS**

LORD MAUGHAM LC

LORD ATKIN

LORD THANKERTON

LORD RUSSELL OF KILLOWEN AND

LORD MACMILLAN

**ORIGINATING COURT(S)**

1. COURT OF APPEAL

2. HIGH COURT

2. ARBITRATION PANEL

**REPRESENTATION**

*H U WILLINK KC* and *C* *T MILLER* for the Appellants.

*ROBERT ASKE KC* and *J V NAISBY* for the Respondents.

Solicitors: *RICHARDS BUTLER STOKES & WOODHAM SMITH* (for the Appellants)

*SINCLAIR ROCHE & TEMPERLEY* (for the Respondents)

MICHAEL MARCUS Esq. Barrister.

**ISSUES FROM THE CAUSE(S) OF ACTION**

ALTERNATIVE DISPUTE RESOLUTION - ARBITRATION:- Application of Statutes of Limitation to arbitrations - Arbitration Act 1889 – Date of commencement of arbitration proceedings where no arbitrator named by either party

SHIPPING AND ADMIRALTY LAW:- Claims as time charterers under several charter parties of steamships – Payment for hire of vessels, the amounts being based on the alleged dead-weight carrying-capacity of the vessels - Overpayment by reason of shortage in capacity of vessel - Mutual mistake of fact – How resolved

**CASE SUMMARY**

ORIGINATING FACTS/CLAIMS

The appellants are a Dutch company carrying on business in Rotterdam, and they made their claims as time charterers under several charter parties of two steamships against the respondents, Norwegian shipowners carrying on business in Bergen. Their claims, which were founded on various causes of action, were all based on the facts that they had for a long period in fact or in account paid to the respondents hire for the two vessels, the amounts being based on the alleged dead-weight carrying-capacity of the vessels, and that there had been by them an overpayment by reason of the shortage in that capacity. The arbitrator found in favour of the appellants that each vessel was short of the capacity indicated in her dead-weight scale. The arbitrator has also found that the appellants have made, and that the respondents have received, overpayments of charter-hire for a period of nearly 19 years under a mutual mistake of fact.

The first charter contained an arbitration clause which the subsequent charters either incorporated by reference or repeated. The ships began to run under the first time charter in December 1912 and in February 1913. Excluding a period during the War during which a different arrangement was made, the last time charter came to an end by the redelivery, as to one vessel, on 11 June 1931, and, as to the other, five days later. On 13 November 1931, a claim was made by the appellants, based on the statement that the vessels were not of the dead-weight capacity on which freight had been calculated. Correspondence followed. The respondents declined to allow the accounts, which, as they contended, had been settled, to be reopened. On 20 October 1932, a short agreement was executed whereby, after reciting that disputes had arisen, and that the parties had agreed to vary the submissions contained in the charter parties, it was agreed that the disputes should be referred to the decision of Mr A T Miller KC, that pleadings should be delivered on fixed dates, that lists of documents should be exchanged, that the arbitrator should be at liberty to act upon all such documentary and other evidence as he should think fit, and that, except as varied by the agreement, the original submissions should remain in force.

DECISION APPEALED AGAINST

The respondents, in addition to other defences, set up the Statute of Limitations—namely, the Limitation Act 1623—in answer to the appellants’ claims. The arbitrator by his award and special case found that certain claims of the appellants had been established, but he held that the Limitation Act 1623 would apply to the proceedings, and that its effect would be to bar claims arising more than six years before the commencement of the arbitration. Further, he held that the relevant date of that commencement was 20 October 1932. Both these opinions were to be subject to the opinion of the court. On the footing that they were both correct, he awarded that all the appellants’ claims failed. There were alternative awards in the event of the court not agreeing with his decisions on the two points. There was another contention raised by the appellants, and submitted by the special case.

The decision was referred to the High Court (Branson J., presiding) which upheld the Arbitrator’s decision, a decision further affirmed by the Court of Appeal.

ISSUE FOR DETERMINATIONS

1. Whether it was open to the respondents to rely on the Limitation Act 1623 in this arbitration as a defence to the appellants’ claims?

2. What incident is to be taken as being in this case analogous to the commencement of the action?

JUDGMENT OF HOUSE OF LORDS

1. In the absence of any agreement to the contrary, it is an implied term of an agreement of reference to arbitration (in a case prior to the operation of the Arbitration Act 1934) that the arbitrator should decide the dispute according to the existing law of contract, and give effect to defences under the Statutes of Limitation.

2. Where no arbitrator has been named by either party within an agreed period from the date of the notice by one of the parties, the proceedings by arbitration shall be held to have commenced on the date when the agreement to refer the dispute to a single named arbitrator was entered into.

**Notes**

This decision, in so far as it refers to the applicability of the Statutes of Limitation to arbitrations, will not apply to arbitrations under the Arbitration Act 1934. By s 16 of the latter Act, the Statutes of Limitation are to apply to arbitrations as they apply to proceedings in court; but this section does not apply to statutory arbitrations.

As to Implied Terms in Arbitrations, see Halsbury (Hailsham Edn), Vol 1, p 653, para 1104; and for Cases, see Digest, Vol 2, p 349, No 254, and Supp.

**MAIN JUDGMENT**

17 March 1938.

The following opinions were given.

**LORD MAUGHAM LC** (read by Lord Thankerton).

My Lords, the appeal in this case raises two questions submitted for the opinion of the court by an award and special case made by an able and distinguished legal arbitrator. The appellants have been uniformly unsuccessful heretofore, the arbitrator, the trial judge and the Court of Appeal having decided against their contentions, but the points raised are neither without interest nor unworthy of careful discussion. After a full consideration, your Lordships have found yourselves unable to differ in any material respect from the judgments under appeal. I will endeavour to state shortly the grounds on which I have myself arrived at that conclusion.

The facts as stated in the special case are of some complexity, but for the purposes of this appeal they may be shortly stated. The appellants are a Dutch company carrying on business in Rotterdam, and they made their claims as time charterers under several charter parties of two steamships against the respondents, Norwegian shipowners carrying on business in Bergen. Their claims, which were founded on various causes of action, were all based on the facts that they had for a long period in fact or in account paid to the respondents hire for the two vessels, the amounts being based on the alleged dead-weight carrying-capacity of the vessels, and that there had been by them an overpayment by reason of the shortage in that capacity. The arbitrator found in favour of the appellants that each vessel was short of the capacity indicated in her dead-weight scale. The arbitrator has also found that the appellants have made, and that the respondents have received, overpayments of charter-hire for a period of nearly 19 years under a mutual mistake of fact.

Timecharters were made in 1911, 1914, 1915, 1920 and 1921 between the appellants and respondents, including in the latter term their predecessor in title J Ludwig Mowinckel. The first charter contained an arbitration clause which the subsequent charters either incorporated by reference or repeated. It was in the following terms:

‘That any dispute arising from the conditions execution or sense of this charter shall be referred to the arbitration of two persons in London, one to be nominated by the owner and the other by the charterers. Should either of the parties not name an arbitrator within 21 days from the date of notice of one of the parties the other arbitrator named by owners or charterers shall be competent to arbitrate alone, this charter being submitted to arbitrary jurisdiction. In case of disagreement between the arbitrators, and in case they shall not agree as to the nomination of an umpire within four weeks from the day their intention of doing so has been notified to the parties, the directors of the Baltic Mercantile and Shipping Exchange, London, shall be requested to nominate an umpire. The award of the said arbitrators or umpire shall be final and binding upon both parties hereto. The question as to which party shall bear the cost of arbitration shall be left to the decision of the arbitrators.’

The ships began to run under the first time charter in December 1912 and in February 1913. Excluding a period during the War during which a different arrangement was made, the last time charter came to an end by the redelivery, as to one vessel, on 11 June 1931, and, as to the other, five days later. On 13 November 1931, a claim was made by the appellants, based on the statement that the vessels were not of the dead-weight capacity on which freight had been calculated. Correspondence followed. The respondents declined to allow the accounts, which, as they contended, had been settled, to be reopened. On 5 February 1932, the respondents wrote that, if the appellants insisted on their claim, the respondents assumed that they would give the name of their arbitrator in London. On 3 May 1932, after some further correspondence, the appellants, without naming their arbitrator, requested the respondents to nominate their arbitrator in London. On 13 May, the respondents stated that it was more in accordance with custom and practice that the appellants as claimants should first nominate their arbitrator. On 28 June 1932, the appellants stated in reply that they hoped to name their arbitrator in the near future. On 9 July 1932, however, they suggested that it would be a considerable saving of expense if both parties were to agree upon a sole arbitrator. The respondents agreed, and on 20 October 1932, a short agreement was executed whereby, after reciting that disputes had arisen, and that the parties had agreed to vary the submissions contained in the charterparties, it was agreed that the disputes should be referred to the decision of Mr A T Miller KC, that pleadings should be delivered on fixed dates, that lists of documents should be exchanged, that the arbitrator should be at liberty to act upon all such documentary and other evidence as he should think fit, and that, except as varied by the agreement, the original submissions should remain in force.

The respondents, in addition to other defences, set up the Statute of Limitations—namely, the Limitation Act 1623—in answer to the appellants’ claims. The arbitrator by his award and special case found that certain claims of the appellants had been established, but he held that the Limitation Act 1623 would apply to the proceedings, and that its effect would be to bar claims arising more than six years before the commencement of the arbitration. Further, he held that the relevant date of that commencement was 20 October 1932. Both these opinions were to be subject to the opinion of the court. On the footing that they were both correct, he awarded that all the appellants’ claims failed. There were alternative awards in the event of the court not agreeing with his decisions on the two points. There was another contention raised by the appellants, and submitted by the special case, which need not be dealt with here, since it has now been abandoned.

It may be well to clear out of the way two matters which did not arise on the appeal. The appellants did not raise in the arbitration a possible point as to the absence of the respondents beyond the seas: stat (1705) 4 & 5 Ann, c 3, Amendment of the Law, s 19, and see Civil Procedure Act 1833, and Mercantile Law Amendment Act 1856. Apart from a legal difficulty, it seems not unlikely that on the facts the point was not open. The other matter to be mentioned is that the Arbitration Act 1934 did not come into force till 1 January 1935, and that its provisions do not affect any arbitration commenced before that date. The useful provisions of s 16 of that Act could not therefore be invoked in this case. I need not further refer to that Act, and the following observations must be taken as referring to the law as it existed before 1 January 1935.

The appellants raised two points before your Lordships which may be stated thus. First, was it open to the respondents to rely on the Limitation Act 1623 in this arbitration as a defence to the appellants’ claims? Secondly, if so, what incident is to be taken as being in this case analogous to the commencement of the action? In considering the first point, it should be remembered that the Limitation Act 1623, s 3, only takes away the remedy by action or set-off, and leaves the right otherwise unaffected. This seems to be a good reason for holding that there may well be cases where the object of both parties to the arbitration might be to determine whether a sum was due, though possibly or certainly not recoverable by legal proceedings. We are, however, here concerned, as was pointed out in the court of Appeal, with an arbitration in which legal rights are being advanced or denied. In effect, an alleged debt is being claimed. Moreover, it is not immaterial to point out that the various submissions prior to the agreement of 20 October 1932 were framed as being intended to apply to future disputes. If the defence of the statute is to be deemed inadmissible, it would seem that the claims of one party or the other might be put forward long after the persons who could give useful evidence had died and the most relevant documents had been destroyed. Further, the agreement of 20 October 1932 referred the dispute to a legal arbitrator, and provided for points of claim and defence and other matters of procedure in much the same way as if the matter were being considered in the commercial court. If any legal defences were to be excluded, it was in this agreement that one would expect to find such a provision. It is not, I think, disputed that in the present case English rules of evidence must be applicable, and English procedure, so far as it would be applicable in an arbitration.

The matter does not rest there, because we have to consider how far the suggested elimination of defences available at law or in equity must logically be held to extend in other arbitrations. If the party defending may not rely on the Statute of Limitations, can he rely on the Statute of Frauds, or the Act partially replacing it? Could he rely in a commercial arbitration on the Gaming Act? A number of like questions might be asked. It is true, and this is the main point on which the appellants rely, that the Limitation Act 1623, s 3, was in terms limited to actions. It may be noted that no such statute passed before the Real Property Limitation Act 1833 expressly bound courts of equity. There is, however, no doubt that long before the Judicature Act 1873, where a court of equity had to adjudicate on the validity of a debt in a suit to administer an estate, or in any like suit, it held itself bound to apply the Statutes of Limitations in precisely the same way as if there were an action at law to recover the debt. There have been different reasons given for this practice (see *Hovenden v Annesley* (*Lord*),at p 631, *Knox v Gye*, at pp 674, 684, and see the cases referred to in Hanbury’s Modern Equity, p 76 n.), but as to the fact there is, in my opinion, no doubt. It is indisputable that, in a modern arbitration, the principles of equity must be applied just as they would now be applied in a court of law, since upon a special case for the opinion of the court under s 7 of the Arbitration Act or the Judicature Act 1925, s 94 (replacing s 19 of the Arbitration Act), the court is, and has long been, bound to apply equitable rules and relief. It is difficult to see how the equitable view of the applicability of the Limitation Act 1623 to a case of debt can be excluded in a legal arbitration.

In this case, the appellants being a Dutch company and the respondents Norwegian shipowners, there was a good reason, if not a necessity, for selecting the law which should apply to any future disputes, and the submissions of such matters to the arbitration of two persons in London and of an umpire who in case of difference was to be nominated by the directors of the Baltic Mercantile and Shipping Exchange showed clearly that English law and procedure were to be applied. There does not appear to me to be anything in this circumstance which leads to the conclusion that a defence which would be open in an English court was not to be available in the arbitration.

The authorities on the question as to whether Statutes of Limitation are available in an arbitration have been carefully considered by my noble and learned friend Lord Wright, presiding in the Court of Appeal, and it is not necessary to repeat them. The hesitation or the doubts expressed by Scrutton LJ, in *Board of Trade v Cayzer, Irvine & Co*, appear to be mainly directed against the laying down of an absolute and general rule applicable in all kinds of arbitration. At least, that is how I understand them, and, if I may say so with all respect, to that extent I agree with them. The remarks of Viscount Cave LC, in the same case, when the matter came before this House, certainly tend to show that, in his view, in commercial arbitrations an arbitrator is bound to give effect to all legal defences, including a defence under any Statute of Limitation. On a careful consideration of all the cases, I am content to say that I agree with what was said by Lord Salvesen, delivering the judgment of the Board in *Ram Dutt Ramkissendass v E D Sassoon & Co*. In that case the Indian Limitation Act 1908 (the relevant period being three years), was taken for practical purposes to be the same as the Limitation Act 1623, and Lord Salvesen observed, at p 62:

‘Although the Limitation Act does not in terms apply to arbitrations, they [their Lordships of the Judicial Committee] think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a court of law can be equally proponed for the arbitrator’s decision unless the parties have agreed—which is not suggested here—to exclude that defence. Were it otherwise, a claim for breach of a contract containing a reference clause could be brought at any time, it might be 20 or 30 years after the cause of action had arisen, although the legislature has prescribed a limit of three years for the enforcement of such a claim in any application that might be made to the law courts.’

In the circumstances of this case as above-stated, it is, I think, impossible to come to the conclusion that there was an implied agreement between the parties to exclude any defence under any Statute of Limitations. In the absence of such an implied agreement, the Limitation Act was open to the respondents, and the consequence must follow that the arbitrator was acting rightly in admitting the defence under the statute.

The second question can be dealt with more briefly. If the submission quoted above be carefully examined, it will be observed that, if either of the parties should not name an arbitrator within 21 days from the date of the notice by one of the parties, the other arbitrator is to be competent to arbitrate alone. The necessary implication is that there is *then* a duly nominated arbitrator. That is, the clause must mean that the party calling upon the other to nominate an arbitrator must himself at the same time nominate, or have previously nominated, an arbitrator; and this is plainly the usual practice, for it would be a most unusual proceeding for the party claiming redress by arbitration to call on the party defending to nominate his arbitrator first. If, however, there were any room for doubt on this point, it would be removed by the correspondence above-stated or referred to, from which it is plain that the appellants on 28 June 1932, accepted the contention put forward by the respondents, and stated that they hoped to name their arbitrator in the near future. In these circumstances, and no arbitrator having been named by either party, I can see no good ground for holding that the proceedings by arbitration commenced before 20 October 1932, when the agreement to refer the dispute to a single named arbitrator was entered into.

My Lords, I have stated in my own language the conclusions at which I have arrived. It will be seen that they are those of the arbitrator, the judge and the Court of Appeal, and in substance for the same reasons. In the result, I am of opinion that the appeal fails, and must be dismissed.

LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN and LORD MACMILLAN all concurred.

*Appeal dismissed.*

**Cases referred to**

*Hovenden v Annesley* (*Lord*)(1806) 2 Sch & Lef 607; 32 *Digest* 509, *1687*.

*Knox v Gye* (1872) LR 5 HL 656; 32 *Digest* 511, *1702*, 42 LJCh 234.

*Board of Trade v Cayzer, Irvine & Co* [1927] AC 610; *Digest Supp*, 96 LJKB 872, 137 LT 419, *affg* SC [1927] 1 KB 269.

*Ram Dutt Ramkissendass v Sassoon* (*E D*) *& Co* (1929) 56 LR Ind App 128; *Digest Supp*, 98 LJPC 58, 140 LT 542.