Neutral Citation Number: [2018] EWHC 3431 (Comm)

Case No: CL-2018-000242

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2018

Before :

MR JUSTICE MALES

- -

Between :

(1) MIDNIGHT MARINE LIMITED **(2) MILLER SHIPPING LIMITED**	**Claimants**
- and -	
THOMAS MILLER SPECIALITY UNDERWRITING AGENCY LIMITED (formerly OSPREY UNDERWRITING AGENCY LIMITED)	**Defendant**

"LABHAULER"

- -
- -

Jeremy Richmond (instructed by **EC3 Legal LLP**) for the **Claimants**
Nigel Cooper QC (instructed by **Cozen O'Connor LLP**) for the **Defendant**

Hearing date: 7th December 2018

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Approved Judgment

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MR JUSTICE MALES

Mr Justice Males :

Introduction

1. This is an application by the claimants (1) to set aside an order made by Butcher J dismissing without a hearing the claimants' challenge to an arbitration award on the ground of serious irregularity under section 68 of the Arbitration Act 1996 and (2) for permission to appeal to the Court of Appeal against the refusal by Butcher J of the claimant's application for permission to appeal on a question of law to the High Court pursuant to section 69 of the Act.

2. I heard submissions on both applications from Mr Jeremy Richmond for the claimants and did not need to call upon Mr Nigel Cooper QC for the defendant. At the conclusion of the hearing I dismissed both applications and said that I would give my reasons in writing. I now do so.

3. The procedure in paragraph O8.5 the Commercial Court Guide for dismissal of a section 68 application at a hearing is intended to be a summary procedure for identifying and disposing economically and promptly of hopeless applications. The provision for an oral hearing of an application to set aside a dismissal on paper should not lead to a major escalation in the costs incurred in dealing with unmeritorious section 68 challenges.

4. I am concerned that in the present case the application to set aside the dismissal on paper has been argued as fully as the section 68 application itself would have been. If that were to become the standard procedure, the availability of a procedure for dismissal on paper would achieve nothing. It may therefore be helpful to say something about the procedure for such applications. When I was told, after announcing my decision, that the combined costs incurred by the parties in dealing with the present applications amounted to over £150,000, my concern was exacerbated.

Background

5. The arbitration arose out of the loss of the cargo being carried on the barge "Labhauler" in March 2007, which was owned by the claimants (to whom I shall refer together as " the Assured"). The barge was being towed by the tug "Western Tugger" on a voyage from St Martin in the Caribbean to Newfoundland with a cargo of scrap crushed motor vehicles, together with some other equipment. On 8 March 2007 the barge rolled suddenly to starboard in good weather conditions and shed the cargo, which was lost overboard. Later in the month the barge capsized and sank.

6. These events gave rise to a claim against the Assured by the owners of the cargo which was settled on 11 July 2008 for the sum of CAD $625,000.

7. The Assured claimed to be entitled to an indemnity in respect of this sum from the defendant ("the Underwriters") who had provided P&I cover under a policy dated 14 August 2006. The policy contained a London arbitration clause providing that "any dispute arising under or in connection with this insurance is to be referred to Arbitration in London". The Underwriters had advised, prior to the settlement with the cargo owners, that they did not accept liability under the policy and that any claim

against them should be made in London arbitration. After the settlement was concluded, however, the Assured commenced proceedings for an indemnity against the Underwriters in the Supreme Court of Newfoundland and Labrador (Trial Division) and not in arbitration.

8. In response the Underwriters commenced arbitration on 17 October 2008. Its notice of arbitration was in the following terms:

> "… Given that your clients are now preparing to issue a Statement of Claim through the Canadian Court, our client is forced to take positive steps to commence arbitration in London to seek declaratory relief that they have no liability to your clients. …"

9. Details of the Underwriters' nominated arbitrator were then given together with notice for the Assured to appoint an arbitrator within 14 days. However, it was then agreed between the parties that the Assured need not appoint its arbitrator until after the Canadian court had ruled on an application for a stay of the Canadian proceedings to be made by the Underwriters. That application was made and was eventually successful on appeal to the Supreme Court of Newfoundland and Labrador Court of Appeal, whose judgment was dated 22 October 2010.

10. There was further correspondence between the parties which it is unnecessary to set out. In brief, the Assured's Canadian lawyer insisted that the Assured's claim was not going to go away and had to be paid, but there was no further step taken in the arbitration until the Assured appointed an arbitrator on 12 July 2017. By this time the Underwriters had closed their file on the case.

The application to the arbitrators

11. This led to an application to the arbitrators made by the Underwriters for a declaration that any claim by the Assured was time-barred, no claim having been brought either within a one-year contractual time limit contained in the policy or within the six-year statutory limitation period for contractual claims. Alternatively, the Underwriters contended that the claim should be dismissed pursuant to section 41(3) of the 1996 Act on the ground of inordinate and inexcusable delay.

12. The Assured contended in response that there was no applicable contractual time limit, that the claim was not time-barred because proceedings were commenced when the Underwriters served notice of arbitration, and that the Underwriters had waived any time bar that might otherwise apply. In response to the application under section 41(3) the Assured contended that there was no power under that section to dismiss a counterclaim, that it was not in fact a claimant or counter claimant in the arbitration, that there was no inexcusable delay, and that a fair resolution of the issues in the case remained possible.

The award

13. The arbitrators dealt first with the question whether the Assured's claim was time barred. They held as follows:

(1) The policy contained a one-year contractual time limit within which the claim had to be brought.

(2) The six-year statutory limitation period also applied.

(3) Although the Underwriters had waived compliance with the one-year contractual time limit, they had not waived compliance with the six-year statutory period.

(4) Accordingly, as the Assured had done nothing else within the six-year period which might suffice to stop time running, the critical question was whether the Underwriters' own notice of arbitration was sufficient to protect time in respect of the Assured's claim.

(5) By a majority, the Underwriters' notice of arbitration was not sufficient. The only matter referred to arbitration was the Underwriters' claim for a declaration of non-liability and no arbitration had been commenced in respect of the Assured's claim.

(6) Accordingly that claim was time-barred.

14. The arbitrators went on to consider the application under section 41(3) "for completeness and in case the majority is wrong on the time bar point". As they pointed out, the only basis on which it could be concluded that the Assured's claim was not time barred was that the claim was to be treated as having been brought in arbitration within time by reason of the Underwriters' notice of arbitration dated 17 October 2008. On this basis the Assured had done nothing to progress its claim for over nine years since the commencement of arbitration and over 10 years since the casualty.

15. The arbitrators concluded that (1) it was appropriate to treat the Assured as a claimant or counter claimant within the meaning of section 41(3), (2) there had been inordinate and inexcusable delay on the part of the Assured and (3) there was a substantial risk that it would not be possible to have a fair resolution of the issues in the case such that, if the arbitration were to proceed, that would be likely to cause substantial prejudice to the Underwriters. Accordingly they concluded that it was appropriate to make an award dismissing the claim pursuant to section 41(3).

The challenge to the award

16. The Assured challenged the award on two bases. First, it said that the arbitrators had "exceeded their jurisdiction" by dismissing the claim pursuant to section 41(3) of the 1996 Act as this section only applied to delay on the part of "the claimant" in the arbitral proceedings, which did not include the Assured, and that this had caused it substantial injustice. Although couched in terms of excess of jurisdiction, it is clear that this was an application made pursuant to section 68 and not section 67 of the Act. Second, it sought permission to appeal on a question of law under section 69, contending that the majority arbitrators were wrong in concluding that the Underwriters' notice of arbitration was insufficient to refer its claim for an indemnity to arbitration.

17. It is immediately apparent that the Assured needed to succeed on both applications in order to make any progress. Any potential irregularity dealing with the section 41(3)

application could not possibly cause "substantial injustice" and therefore could not qualify as a serious irregularity under section 68 unless the majority decision on time bar was reversed. As the arbitrators themselves had said, the section 41(3) application would only arise if the majority was wrong on that issue. Conversely, even if there was an error of law on the part of the majority so that the claim was brought in time, that would not "substantially affect the rights of one or more of the parties" (a condition for the grant of permission to appeal) if the claim was going to be dismissed anyway for inordinate and inexcusable delay.

18. Mr Richmond submitted that the two applications, under section 68 and section 69, were independent of each other and could be considered separately. For the reason just explained, that is manifestly not so.

The decision of Butcher J

19. Both parties served written submissions. The submissions served by the Underwriters included a submission that the section 68 application should be dismissed without a hearing in accordance with paragraph O8.5 of the Commercial Court Guide. The applications then came before Butcher J to deal with the issue of permission to appeal under section 69 and to consider whether the section 68 application should be dismissed without a hearing.

20. Butcher J dealt first with the application for permission to appeal under section 69 which he rejected, holding that the majority decision of the arbitrators was not a point of general public importance and was not obviously wrong. Turning to the section 68 application, he pointed out that in view of his refusal of permission on the time bar point, the alleged irregularity had not caused and would not cause substantial injustice, so that the section 68 challenge had no real prospect of success. Accordingly he dismissed the challenge without a hearing.

The Assured's renewed application

21. The Assured seeks to challenge both aspects of Butcher J's decision. So far as the refusal of permission to appeal under section 69 is concerned, there is no right of renewal to an oral hearing. The only further recourse available if permission is refused by this court without a hearing, the usual procedure for which section 69(5) provides, is an appeal to the Court of Appeal. However, section 69(6) provides that the leave of this court is required for any such appeal. I note that section 69(8), which deals with leave to appeal to the Court of Appeal from a decision of this court on a substantive appeal under section 69 provides that such leave can only be given if "the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal". Although not directly applicable to an appeal from a decision to grant or refuse leave to appeal in the first place, this underlines the exceptional nature of such appeals.

22. So far as the dismissal on paper of the section 68 application is concerned, an applicant has a right to apply to set aside that order, as paragraph O8.5 of the Guide explains.

23. Accordingly the Assured applied to set aside the dismissal of its section 68 application and sought leave to appeal to the Court of Appeal against the refusal of permission under section 69.

24. On 13 July 2018, following notification of Butcher J's decision, a consent order was made for the service of further witness statements and skeleton arguments by both parties dealing with both applications, leading to a hearing at which the two applications would be considered. That was the hearing that took place before me.

The section 68 application

25. It is convenient to begin with section 68. As is well known, in order to challenge an award on the ground of serious irregularity, an applicant must show that (1) there has been an irregularity falling within the closed list set out in section 68(2) of the Act and (2) this has caused or will cause substantial injustice to the applicant. The list of irregularities in section 68(2) includes "(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67)".

26. One of the powers which a tribunal has unless otherwise agreed is to dismiss a claim if it is satisfied of the matters set out in section 41(3) of the 1996 Act. This provides:

> "If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay–
>
> (a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or
>
> (b) has caused, or is likely to cause, serious prejudice to the respondent,
>
> the tribunal may make an award dismissing the claim."

27. The terms "claim" and "claimant" in section 41(3) include a counterclaim and counterclaimant unless the context requires otherwise, which it does not: see section 82(1).

28. Mr Richmond submitted that (1) the arbitrators had no power to prevent the Assured from defending the Underwriters' claim, (2) a time bar could not apply to a defence (citing *The Brede* [1974] QB 233 at 245G-H), and (3) the arbitrators had no power to dismiss a claim by the Assured because the Assured had never made any claim or counterclaim in the arbitration.

29. The first two of these submissions, with respect, completely miss the point. The arbitrators were not concerned with the Underwriters' claim for a negative declaration or with what the Assured's defence to that claim might be. They said nothing about what might happen if the Underwriters were to resurrect that claim. In fact it is obvious that the Underwriters have no interest in doing so. It has long been clear that the only way in which the arbitration was ever going to proceed would be if the Assured took the initiative to pursue its claim for an indemnity.

30. The third submission illustrates how the Assured is impaled on an insuperable dilemma. Either the Assured's claim for an indemnity has been referred to arbitration or it has not. If it has not, it is plainly time barred. If it has, that can only be because of

the Underwriters' notice of arbitration dated 17 October 2008, in which case the arbitrators have found that the assured is guilty of inordinate and inexcusable delay in pursuing the claim and have exercised the power which they undoubtedly have to dismiss it. There is no no-man's-land in which (as Mr Richmond put it) the Assured's counterclaim has been referred to arbitration but they are not a counterclaimant.

31. The absurdity of the Assured's position is further illustrated by the consideration that the arbitrators have found that as a result of the Assured's inordinate and inexcusable delay, there is a substantial risk that it is not possible to have a fair resolution of the issues. Mr Richmond's submission necessarily has to be that the dismissal of the claim has caused or will cause substantial injustice to the Assured. It is obvious that the reverse is the case. Requiring the Underwriters to defend the claim when there is a substantial risk that a fair resolution is no longer possible as a result of the Assured's own conduct would be a plain injustice to the Underwriters.

32. For these reasons the Assured's section 68 application is hopeless.

33. It is therefore unnecessary to consider whether the Assured's complaint as to the way in which the arbitrators exercised their power under section 41(3) amounts to an excess of powers within the meaning of section 68(2)(b).

The section 69 application

34. In these circumstances the Assured's section 69 application cannot possibly succeed. Permission to appeal to the High Court under section 69 can only be given if determination of the question of law "will substantially affect the rights of one or more of the parties" (see section 69(3)(a)). As already explained, however, reversal of the majority decision on an appeal under section 69 cannot possibly affect the rights of the parties if the section 68 application is dismissed, as it now has been. There is therefore no possibility that the Court of Appeal would grant permission to appeal under section 69.

35. If the section 69 application had stood alone, I might have been inclined to grant permission to appeal to this court against the majority arbitrators' decision if that application had come before me. I can see an argument that in the circumstances of the Canadian proceedings, one important purpose of the Underwriters' notice of arbitration was to enable it to submit to the Canadian court that the Assured's claim had been referred to arbitration in London. There would have been little benefit to the Underwriters in telling the Canadian court that its claim for a negative declaration had been referred to arbitration but that the Assured's claim for an indemnity had not.

36. Be that as it may, however, that is not the point. Permission to appeal under section 69 has been refused by Butcher J and that refusal is final unless leave is now given to appeal it to the Court of Appeal. The fact that this application happens to come before a judge who might have given permission to appeal under section 69 when permission has in fact been refused by the judge who dealt with the application does not begin to qualify as a reason why the case should go further. The importance of arbitral finality is well known and the court is required by section 1(a) of the 1996 Act to have regard to the need to avoid unnecessary delay and expense.

Paragraph O8.5 of the Guide

37. For the reasons which I have explained, the section 68 application was hopeless and this case was a strong candidate for the exercise of the court's power to dismiss the application without a hearing set out in paragraph O8.5 of the Commercial Court Guide. This provides:

> "If the nature of the challenge itself or the evidence filed in support of it leads the Court to consider that the claim has no real prospect of success, the Court may exercise its powers under rule 3.3(4) and/or rule 23.8(c) to dismiss the application without a hearing. If a respondent considers that the case is one in which the Court could appropriately deal with the application without a hearing it should within 21 days file a respondent's notice to that effect together with a skeleton argument (not exceeding 15 pages) and any evidence relied upon. The applicant may file a skeleton/evidence in reply within 7 days of service of the respondent's notice and skeleton argument. Where the Court makes an order dismissing the application without a hearing the applicant will have the right to apply to the Court to set aside the order and to seek directions for the hearing of the application. If such application is made and dismissed after a hearing the Court may consider whether it is appropriate to award costs on an indemnity basis."

38. As can be seen, the power to dismiss without a hearing may be exercised either on the court's own motion or at the invitation of the respondent. In either event by the time the court comes to consider whether to exercise this power, it will have before it written submissions from both parties. That will usually be sufficient for the court to determine whether or not the application has a real prospect of success. If the application is dismissed without a hearing, the applicant has a right to an oral hearing at which it can apply to set aside the decision. But it must be remembered that the question at that oral hearing will simply be whether there is a real prospect of success such that the case should be allowed to go forward to a full hearing of the section 68 application. If the oral hearing for which paragraph O8.5 provides becomes effectively a full hearing of the section 68 application preceded by a further round of submissions and evidence, the objective of weeding out hopeless applications at an early stage by a prompt and economical procedure will have been frustrated.

39. The procedure to be adopted for such hearings merits further consideration by the judges of this court. I would suggest that such hearings should be short, typically no more than 30 minutes; they should where possible be listed before the judge who has dismissed the application without a hearing; there should be no need for further written submissions in addition to those already provided by both parties save for the applicant to explain succinctly what is said to be wrong with the judge's reasons for dismissing the application without a hearing; and (bearing in mind the limited nature of the issue, i.e. whether the claim has a real prospect of success, and that respondents will already have made submissions on the point in writing) in general respondents should not attend or, at any rate, should not recover their costs if they do. In these respects such hearings would be similar to the oral renewal of applications for permission to apply for judicial review after a refusal on paper. No doubt there may be some cases in which something more is required, but a procedure such as I have suggested would in the general run of cases promote the objective which the court is seeking to achieve.

Applications for permission to appeal to the Court of Appeal under section 69(6)

40. I would suggest further that if an applicant who has been refused permission to appeal under section 69 seeks leave to appeal that refusal to the Court of Appeal, there is no reason why that application should not be dealt with on paper by the judge who refused permission to appeal to this court. That is clearly the quickest and most economical procedure. For the application to be listed for an oral hearing before a different judge, as happened in this case, is unnecessarily wasteful.

The costs of the present applications

41. The parties in the case are not to be criticised for not following the procedures which I have suggested above. There was an order made by the court which gave directions for further evidence and written submissions even if, as a jointly submitted consent order, it may not have received detailed scrutiny by a judge familiar with the case. Accordingly I ordered that the Assured should pay the Underwriters' reasonable and proportionate costs of the hearing before me which I assessed summarily in the sum of £30,000.

42. I was, however, disturbed to be told that the costs actually incurred by the Underwriters for this one-hour hearing amounted to £51,000 and that those incurred by the Assured came to just over £100,000. Those figures are remarkable when the claim itself (which the Assured has done nothing to pursue for ten years) is only worth CAD $625,000. While commercial parties are free to spend their money as they wish, it cannot be in the interests of London arbitration generally for costs on that scale to be incurred for a hearing of this nature. There is after all such a thing as killing the golden goose.

CL-2018-000242

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN THE MATTER OF AN ARBITRATION

BEFORE: THE HONOURABLE MR. JUSTICE MALES
DATED: 7 DECEMBER 2018

B E T W E E N:-

(1) MIDNIGHT MARINE LIMITED
(2) MILLER SHIPPING LIMITED

Claimants

- and -

OSPREY UNDERWRITING AGENCY LIMITED

Defendant

ORDER

Upon the Claimants' application dated 12 April 2018 for (a) permission to appeal a First Partial Award dated 15 March 2018 ("**the Award**") under section 69 of the Arbitration Act 1996 ("**the section 69 application**"); and (b) their challenge of the Award under section 68 of the Arbitration Act 1996 ("**the section 68 challenge application**");

And upon the ruling of Mr. Justice Butcher dated 26 June 2018 dismissing the section 69 application and dismissing without a hearing the section 68 challenge application;

And upon the Claimants' application dated 4 July 2018 to set aside the ruling of Mr. Justice Butcher dismissing without a hearing the section 68 section challenge application ("**the Claimants' section 68 set aside application**");

And upon the Claimants' application dated 5 July 2018 under sections 69(6) and (8) of the Arbitration Act 1996 for leave to appeal against the ruling of Mr. Justice Butcher dismissing the section 69 application ("**the Claimants' section 69 leave to appeal application**");

And upon hearing Counsel for the Claimants and Leading Counsel for the Defendant;

IT IS ORDERED THAT:

1. The Claimants' section 68 set aside application is dismissed.

2. The Claimants' section 69 leave to appeal application is dismissed.

3. The Claimants do pay the Defendant's costs of the section 69 application, the section 68 challenge application, the Claimants' section 68 set aside application and the Claimants' section 69 leave to appeal application, summarily assessed in the amount of £30,000 to be paid by 4:00 p.m., 21 December 2018.

Dated 12 December 2018