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COURT OF APPEAL

10TH JULY 1987

BEFORE JOHN MARTIN COLLINS ESQ., Q.C., (President)
JOHN DESMOND AUGUSTINE FENNELL ESQ., O.B.E., Q.C.,
ROBERT DONALD HARMAN, ESQ., Q.C.,

Appeal of Charles Le Quesne (1956) Ltd from the Order of the Royal Court (Samedi Division) of the 31st July, 1986 in Charles Le Quesne (1956) Ltd -v- T.S.B. Channel Islands Ltd.

ADVOCATE R.A. FALLE for the Appellant
ADVOCATE P. de C. MOURANT for the Respondent

JUDGEMENT

THE PRESIDENT: Charles Le Quesne (1956) Limited, the claimants in arbitration proceedings bring this Appeal from the Order of the Royal Court dated 31st July, 1986, striking out a Representation presented by the claimants twenty days previously. By that Representation the claimants, now the appellants, had sought an Order setting aside an interim award by the arbitrator or alternatively granting the claimant leave to appeal on a question of law. The Court had further been requested to order the arbitrator to give further reasons for his award, these to be followed by an Order that the award be set aside. Those claims were all made by the representation.

The respondents in the arbitration, who are also respondents to this Appeal, are ~~the custodian trustees of the Trustee Savings Bank of the Channel Islands.~~ T.S.B. Channel Islands Limited They had taken out a summons to strike out the representation in accordance with Rule 6/13 of the Royal Court Rules, 1982, or as a matter of inherent jurisdiction, on the grounds that the representation disclosed no reasonable cause of action or was scandalous, frivolous or vexatious, or was otherwise an abuse of the process of the Court.

The respondents succeeded in obtaining the Order which they had sought and from this Order the claimant now appeals.

The dispute arose from a building contract dated the 1st February, 1984, under which the claimants undertook to construct a four storey office building at 25/29 New Street, St. Helier, for the respondents. The contract was on the JCT Standard Form of Building Contract for use with Quantities, Private Edition 1963, July 1977 Revision. This contract contained and incorporated conditions which included an arbitration clause. By an architect's instruction the architect ordered a postponement of the works, and thereafter and in reliance thereon the claimant purported to determine the contract under its terms. Their right so to do could be defeated if the instruction to postpone could be shown to have been caused by some negligence or default of the contractor, that is the claimants. If it was so caused the contractor had no right to determine the contract and would have repudiated the same by his refusal to restart work when later instructed so to do. If it was not so caused, then the claimants were not in breach of contract and would been entitiled to bring the contract to an end and to recover certain sums which would have fallen to be ascertained under the terms of the contract. All these matters were within the scope of the arbitration clause and in due course an arbitrator, Mr. Peter Hollins, was appointed by the Vice President of the Royal Institute of British Architects.

By agreement between the parties, liability and quantum were to be heard separately. The rules to which we refer below having provided for the arbitrator making an interim award, liability was dealt with by agreement in that manner. That award is in favour of the respondents, that is to say the respondents in the arbitration and the respondents to this

appeal. And the arbitrator clearly found that the postponement was caused by some negligence or default of the claimants and that the claimants repudiated their contract by a refusal to proceed with the work when ordered to restart after the postponement. It is a reasoned award and it reads sensibly and convincingly. The hearing before the arbitrator lasted fifteen days and both parties were represented by leading counsel and called evidence.

In the absence of any statutory code in these Islands, a set of arbitration rules was agreed between the parties. It being a provision of those rules that the reference should be governed by the laws and procedures of the Island of Jersey. Apart from the fact that an bitrator can be required to state a case, initially to an advocate of the Jersey Bar, and then to the Royal Court, the rules follow very much the terms of the Arbitration Act, 1979. Most significantly the provisions as to an appeal to the Royal Court are in substance in identical terms to those contained in the Act of 1979. We consider that in these circumstances unless some local conditions suggest otherwise, it is right to construe and apply the rules in relation to appeals by reference to the English Authorities which have explained the effect of the Act of 1979.

The arbitrator was not asked to state a case, nor did he do so. There is no provision in the rules for an award to be set aside on the ground of an error of law or fact appearing on the face of the award. Such remedy having been abolished by the Act of 1979 upon the introduction of the provisions for appeal therein contained, we can see no reason why any such power to set set aside should be implied into the rules agreed between the parties or given effect to under the laws of Jersey in these circumstances.

By the representation by which these proceedings were started and which, in effect, would have formed the statement of claim in any action, the claimants sought first to impugn the award of the arbitrator on the ground of misconduct. It was contended that the arbitrator had misconducted himself on the following grounds:

First, it was asserted that he had relied upon his own expertise without informing the parties and without giving them the opportunity to make representatons thereunder.

Secondly, it was asserted that the arbitrator had made a finding for which there was

no evidence and that he had made findings against the weight of the evidence.

Thirdly, it was asserted that he had exceeded his authority and, finally, complaint was made that he had refused to clarify the reasons for his award.

Both in relation to this aspect of the matter and in relation to this appeal, it is of course to be observed that the matter came before the Royal Court on a summons to strike out at the instance of the respondents and the hearing was not simply an application to set aside the award on the ground of misconduct or an application for leave to appeal under the rules.

It has been argued on behalf of the appellants that the Royal Court in reaching its decision overlooked the nature of the matter before it and treated the application to strike out as if it were an application for leave to appeal or for relief against misconduct under the arbitration agreement. We reject this submission for these reasons:

First, it is clear that the Royal Court directed themselves as to the appropriate principles generally applicable to a striking out application. While the Royal Court continued by referring to the terms of the arbitration agreement which, as I have already stated, mirrored the provisions of the Arbitration Act, 1979, we do not consider that it was doing more than emphasising the difficulties which the provisions of that agreement would place in the way of an applicant for leave to appeal.

Secondly, it is common ground that the thrust of the respondent's case before the Royal Court was that the applicant's claim for relief in the representation was hopeless. This inevitably required the Royal Court to enter upon some consideration of the merits and of the chances of success if such an application were to be argued substantively before the Court. Further, the appellants urged upon us a criticism of the Royal Court in that it was contended that the Royal Court should not have had regard to affidavit evidence on an application to strike out on the ground that the representation did not disclose a cause of action. We reject this criticism on the grounds first that the application made was wider than an application on the ground that the representation did not disclose a cause of action and was made on all the grounds contained in Rule 6/13 of the Royal Court Rules, 1982. By that sub-Rule the Court

may at any stage of proceedings order to be struck out or amended any claim or pleading on the ground either that it discloses no reasonable cause of action on that it is scandalous, frivolous or vexatious, or that it may prejudice, embarrass or delay the fair trial of the action, or that it is otherwise an abuse of the process of the Court.

Our attention has been directed to a number of authorities and principally to Willis -v- Earl Howe (1893) 2 Ch. 545, as establishing beyond doubt that a hopeless case may be struck out as one which is scandalous, frivolous or vexatious, or possibly as an abuse of the process of the Court. It has further to be borne in mind that the Court has an inherent jurisdiction to strike out cases which are hopeless and can expect to receive one result only. But as if that were not enough, it is clear that the affidavit evidence in question was admitted before the Royal Court without objection on behalf of the appellants. Furthermore, it was open to the appellants having seen such evidence admitted without objection, themselves to seek to adduce any evidence which they may have wished to adduce. If time had made it necessary it would have been possible for them to request an adjournment for this to be done. As it was, the affidavit evidence was admitted without objection and formed part of the material upon which the Court was in any event properly entitled to adjudicate.

In these circumstances it is our duty to approach the hearing of this appeal on the basis that the Royal Court has exercised its discretion in striking out the proceedings so that we should be loth to interfere with the exercise of that discretion having regard to the principles contained in the decision of the House of Lords in Birkett -v- James, (1978) A.C. 297.

The effect of the starting of the proceedings by representation has been unfortunate in that the arbitrator has been, at the request of the claimant's solicitors, inhibited from making any order for costs in relation to liability and has not of course been able to enter upon that part of the arbitration which deals with quantum. It was no doubt, with this kind of delay in mind, that the respondents sought to bring the matter to a swift conclusion by an application to strike out. In relation to such an application not only is the burden shifted to the party who made it, but also the power of the Court should only be exercised where it can be seen that the claim is obviously unsustainable and where as a matter of discretion the Court considers it

right to exercise the power.

Differences of approach have been apparent in the past as to the extent to which a Court should be prepared to look into the detail of the matter upon such an application. However, considerable assistance is now to be derived from the decision of the House of Lords in Williams and Humbert -v- W & H Trade Marks, (1986) 1 A.C. 368. Lord Templeman at p. 435, with whom Lords Scarman, Bridge and Brandon agreed, said this:

"My Lords, if an application to strike out involves a prolonged and serious argument the judge should as a general rule decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but in addition is satisfied that striking out will obviate the necessity for a trial, or will substantially reduce the burden of preparing for trial, or the burden of the trial itself".

In the instant case we are satisfied that the Royal Court would not have been any differently informed had it been hearing a substantive case advanced by the representation as distinct from hearing a summons to strike out. We have looked at the nature of the contentions which were raised by the representation in order to see whether it is right to interfere with the discretion of the Royal Court. We ourselves find the allegations of misconduct to be wholly misconceived. Rule 17A of the Arbitration Rules adopted by the parties provides that where the arbitrator has misconducted himself or the proceedings, the parties or one of them may apply to the Royal Court for an Order removing him. By Rule 17B it is provided that where an arbitrator has misconducted himself applications may be made to the Royal Court by either party to set the award aside. Quite clearly the reference to misconduct in the Rules is to be taken as a reference to such conduct as would under the principles of English Law governing arbitration be regarded as misconduct on the part of an arbitrator. The first respect in which it is contended that there was misconduct is that it is said that the arbitrator relied upon his own expertise in reaching his conclusions without informing the parties that he was intending to rely upon his personal experience and giving them an opportunity of making representations thereon.

Clearly an architect is selected as arbitrator for the very reason that he has a fund of

professional knowledge and experience which would not be possessed by a lawyer or a layman. The fact that he has such expertise can hardly be relied upon as impugning the decision at which he has arrived. There have been cases in the past in which arbitrators drawing on their own expertise have struck out along some line of their own which the parties have never had an opportunity to deal with. That is not this case. It is clear that the arbitration was fully and properly conducted and that all the matters appearing in the arbitrator's reasons for his award had been properly debated and our attention has been drawn to passages both from the evidence and from the submissions of counsel which fully support this.

It is further contended that the arbitrator misconducted himself in making a finding for which there was no evidence and in making findings which it is said were contrary to the weight of the evidence and which it was contended no reasonable arbitrator could have reached if he had properly directed himself. It is axiomatic that it is not misconduct for an arbitrator to make a mistake of law or fact. There are many authorities which support this. We refer in particular to the Judgement of Atkin L.J. in Gillespie Bros & Co -v- Thomas Bros & Co (1923) 13 Ll. L. R. 519 at p.524: "It is no ground", said Atkin, L.J. "for coming to a conclusion on an award that the facts are wrongly found. The facts have got to be treated as found. Nor is it a ground for setting aside an award that the conclusion is wrong in fact. Nor is it even a ground for setting aside an award that there is no evidence on which the facts could be found, because that would be mere error in law and it is not misconduct to come to a wrong conclusion in law and would be no ground for ruling aside the award unless the error in law appeared on the face of it".

Furthermore, it is clear to us that were an error of this kind to be treated as misconduct, if it were to be so treated, the clear provisions in England of the Act of 1979, and in this case of the rules adopted by the parties, in relation to the obtaining of leave to appeal, could clearly be circumvented.

It is further contended that the arbitrator misconducted himself by exceeding his authority and jurisdiction by making a finding as to the direct cause of certain damage to the original Trustee Savings Bank building in Burrard Place and number 31 New Street. As to this,

we find that this was clearly within the scope of the arbitration agreement and indeed that this was a finding which was a necessary step towards deciding the essential issue between the parties as to causation. It would have been quite unreal for any conclusion to have been reached as to that central issue without considering such evidence.

Finally it is contended that the arbitrator misconducted himself by refusing to clarify the reasons for his award, after having agreed that he would do so pursuant to the claimants' acceptance of an offer contained in the arbitrator's letter of the 24th April, 1986. It was clear to us that the arbitrator offered to clarify the reasons for his award in two instances only. It .d been represented to him at the hearing that points of Jersey Law might arise in connection with the issues between the parties as to which he as an architect, coming from the Mainland, would not be conversant. Secondly, he had referred to the possiblility of error and we are satisfied that he had in mind nothing more than the type of matter which is customarily dealt with under the slip rule.

Accordingly, in case any such point were to arise and to require clarification of his findings, it had been agreed that he would be prepared to provide such further clarification as might be necessary in those two instances.

No issue of law has arisen and indeed it is to be noted that nowhere in any of the argument presented before the Royal Court, nor before us, has there been reference to any dispute as to any principle of law which fell to be applied in the arbitration, whether Jersey Law or otherwise.

It is clear to us that the claimants took hold of the arbitrator's offer as entitling them in effect to cross-examine the arbitrator with regard to his reasons. By agreement between the parties we have been shown seven pages of questions which were put to the arbitrator. We do not consider that it would have been right for the arbitrator to respond to that cross-examination, far from it being misconduct on his part to have refused to do so.

The rules adopted by the parties make very limited provision for an order to an arbitrator to state reasons for his award. It is provided by Rule 19, sub-rule 4 that if an award is made and on an application made by a party to the reference either with the consent of the

other party, or with the leave of the Court, it appears to the Royal Court that the order does not or does not sufficiently set out the reasons for the award, the Court may order the arbitrator to state the reasons for his award in sufficient detail to enable the Court, should an appeal be brought under this section, to consider any question of law arising out of the award. The existence of that power has no bearing upon any issue as to whether it could be said to have been misconduct on the part of the arbitrator himself to refuse to clarify his reasons. As we have already stated, far from it being misconduct on his part to refuse to respond to those seven pages of requests, we consider that it would have been out of place for him to do so. The undesirability of seeking in effect to cross-examine an arbitrator upon his award has recently been stressed by the Court of Appeal in England in the Universal Petroleum Co Ltd -v- Handels und Transport Gesellschaft m.b. H (unreported judgement given on the 17th February, 1987). We return to this authority in relation to the application for leave to appeal.

By the representation the claimant, as we have already mentioned, sought leave to appeal under Rule 19 of the rules adopted by the parties, and contended that those very matters which he had relied upon as allegations of misconduct also amounted to appealable points of law. By Rule 19 an appeal lies to the Royal Court of Jersey on any question of law arising out of an award and I stress the words: "arising out of an award". That appeal, by sub-rule 2 may only be brought either with the consent of the other party or with the leave of Court. By sub-rule 3, the Royal Court shall not grant leave under sub-rule 2b above, unless it considers that having regard to all the circumstances the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement and the Court may make any leave which it gives conditional upon the applicant complying with such conditions as it considers appropriate.

The claimants by their representation had applied for an order that the arbritrator should state the reasons for his award in sufficient detail to enable the Court to consider any question of law arising out of the award this application being made under the rule to which I have referred. We find that there is no grounds for making such an order.

It was urged upon the Royal Court and on the Court of Appeal that an application for

leave to appeal on a point of law would have been hopeless. This was the contention of the respondents. As I have already mentioned the allegations of error on the part of the arbitrator as to law appear merely in one short paragraph which repeats and relies upon allegations of misconduct already made. We are satisfied that the respondents made good their contention that an application for leave to appeal on a point of law under the representation would have been hopeless.

The granting of leave to appeal is essentially a matter for discretion within the limits of the provisions of the rule. Those provisions insofar as they require leave and impose nitations upon the power to grant leave to appeal are identical with section one (3) and (4) of the Arbitration Act 1979. Furthermore, the provisions of the rule in relation to the ordering of further reasons are in identical wording to the wording of section one, sub-section five of the Act of 1979. Bearing in mind that this was an application to strike out, we again approached this aspect of the case on the basis of asking whether the claim was bound to fail. One phrase which was used in the course of argument was whether the claimants, the appellants in this matter would have had a "ghost of a chance" of obtaining leave to appeal.

It is clear from the Judgement of the Royal Court that they had this well in mind. The claimant, as I have stated, relied upon the same grounds in support of an application for leave to appeal on a point of law as those upon which he relied in asserting misconduct, which was to say the least an unusual pattern. We say no more with regard to the contention that the arbitrator relied on his own expertise in determining the fact as referred to save to observe that we cannot see how it could seriously be asserted that this amounted to an error of law even if established.

In relation to the contentions that the arbitrator made a finding for which there was no evidence, or made four findings contrary to the weight of the evidence and exceeded his authority, it is necessary to say a little more about the general principles which fall to be applied.

In order to obtain leave to appeal under Rule 19, it is necessary for an applicant to show first that the appeal raises a question of law. Secondly, that the determination of that

question of law concerned could substantially affect his rights, and thirdly, that the discretion of the Court should be exercised in his favour. Sofar as the second of these matters is concerned the effect is that although there may be some question of law of interest in the case it is not to be made the subject of an appeal unless it is in effect likely to win the case for the claimants. If there are other grounds upon which the claimants could be held liable, which were not affected by the point of law, then leave should not be granted.

Furthermore, the Courts in England and we find the Royal Court in Jersey in relation to arbitration covered by such rules as these should only exercise discretion to grant leave to appeal in cases falling within the guidelines as set out in Pioneer Shipping Ltd & Others -v- B.T.P. Tioxide Ltd. "The Nema", (1982) A.C. 724 and Antaios Compania Naviera S.A. -v- Sales Rederierna A.B. "The Antaios" (1985) 1 Appeal Cases p. 191. These principles are now well established and it is clear that a strong prima facie case must be set up.

We are satisfied that the claimants in this case are attempting to upset the arbitrator's decisions on fact under the cloak of an assertion that the decisions amount to errors of law. It is said that they are so wrong that they amount to errors of law. Not merely do we not find any support for this upon the facts that are available to them, but we consider that the whole approach is wrong in principle.

In Universal Petroleum Co Ltd -v- Handels und Transport Gesellschaft m.b.H., above, Kerr L.J. with whom Nourse L.J. agreed referred to a passage at p.541 of Mustill & Boyd's "Commercial Arbitration" (Butterworths) 1982 which stated thus:

"There remains one question to be considered. Namely, whether it is still permissible to invoke the processes of appeal in a case where it is said that a finding of primary or secondary fact was arrived at without any evidence. If the analysis set out above is correct we believe that this jurisdiction should no longer be recognised. But in any event we suggest that the Courts would be likely to stifle such appeals at the stage of the application for leave on the ground that they are out of accord both with the general principle of the arbitrator as master of the facts and the specific commercial aims of the new system".

Kerr L.J. continued in his own words: "While the second sentence may go too far, we

entirely agree with the third".

We have concluded in the present case that the contentions that the arbitrator erred in law in the respects referred to in paragraphs 5(b) and (c) and incorporated into paragraph 6 are little more than a device by which the claimants have attempted to seek to upset decisions of the arbitrator which are essentially questions of fact and not subject to appeal. So far as the allegation or the contention in the representation at paragraphs 5,d and e are concerned, it would be impossible to view these as being allegations of errors of law. A refusal to clarify reasons for example cannot be an error of law, it could either be a misconduct or nothing and therefore no point with regard to error of law arises in relation to those.

We therefore consider that this is a case in which any application for leave to appeal, when heard substantively, would have been bound to fail. We can see no reason to disturb the exercise of the discretion of the Royal Court which we find positively was rightly exercised.

Accordingly, the claimants' appeal is dismissed.

(page 13 & 14 absent!)

CASES REFERRED TO IN THE JUDGEMENT

Willis -v- Earl Howe (1893) 2 Ch. 545.

Birkett -v- James (1978) A.C. 297.

Williams and Humbert -v- W & H Trade Marks (1986) 1. A.C. 368.

Gillespie Bros & Co -v- Thomas Bros & Co (1923) L. .L.R. 519.

Universal Petroleum Co Limited -v- Handels und Transport Gesellschaft .m.b.H (unreported: 17.2.87)

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Hubbuck -v- Wilkinson, (1895-9) All E.R. Rep. 244.

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Wenlock -v- Moloney, (1965) 2 All E.R. 871

Zermalt Holdings S.A. -v- Nu-Life Upholstery Repairs Ltd., (Estates Gazette Vol. 275.p.1134)

The Metropolitan Bank Ltd -v- Pooley, (1885) 10 A.C. 210

Riches -v- D.P.P., (1973) 1W.L.R. 1019

Lawrence -v- Lord Norreys, (1890) 15A.C. 210.

Carl Zeiss Stiftung -v- Rayner & Keeler Ltd and others, (No.3) (1970) 1Ch. 506.