Bulk Trading SA v Moeller [2006] APP.L.R. 09/14

CA on appeal from the CLCC (Judge Mackie QC) before Waller LJ; Longmore LJ. 14th September 2006

LORD JUSTICE WALLER:

1. This is an application for permission to appeal against an order of His Honour Judge Mackie QC made in the Central London County Court where the judge was trying a Mercantile List. He made no order for costs following a successful application by the claimants to set aside an arbitration award under Section 72 of the Arbitration Act 1996. He set aside the award on the basis that the respondents to the application, Moeller, had failed to establish that the claimants had proper notice of the arbitration, but he was of the view that to a "significant extent" the claimants had brought the problem on themselves and he made no order as to costs.

2. In the transcript of the judgment ultimately produced of the oral judgment delivered by the judge on the merits on the application under Section 72, where the judge had first indicated his views as to the likely costs order that he would make, the judge gave two reasons as to why the claimants had brought the problem on themselves. The first reason he gave was, as he put it, "by the unorthodox practice of maintaining a fax which was kept alive against the possibility of future business but not for operational reasons," and the second he gave was because the claimants were responsible for their agent, Ferpandi's failure to answer correspondence.

3. It seems that the judge when giving his judgment orally did not refer to that second reason. Also when giving his judgment orally, the judge in fact stated that the judgment was subject to correction when he saw the transcript, and one of the corrections he made was to add that second reason.

4. In a supplemental written skeleton, Mr Nicholas Craig sought to argue that since the judge's order had been drawn up before he corrected the transcript, the correction should be deleted. In my view, despite the lengthy citation of authority as to the time when and the circumstances in which a judgment or order may be varied, Mr Craig has taken a bad point. The cases on which he relies are not concerned with the judge correcting a transcript of an oral judgment. In civil cases there is no reason why a judge should not correct a transcript of an oral judgment so as to add to or vary his reasons. Indeed, it could be said to have gone further than that. The Court of Appeal, in ***English v Emery Reibold & Strick*** [2002] EWCA Civ 605, have said that it may even be appropriate at the stage of permission to appeal being sought for additional reasons to be added by the judge. I therefore, for my part, must put on one side this aspect of Mr Craig's amount and concentrate on the question whether his clients have any prospect of succeeding before a full court in an attack on the exercise of the judge's discretion by reference to the reasons the judge gave as per the transcript ultimately corrected by him.

5. The relevant facts are these:

   "Bulk Shipping S.A" or the Claimants "as nominees of Bulk Shipping" chartered vessels for the carriage of ten cargoes of steam coal from Moeller pursuant to a COA made in January 2002. Clause 33 of that COA provided, so far as material is followed:

   "Notices of ETA of fixing and thereafter 10/7 (if applicable) 5/3/2/1 days to ... 1. Bulkshipping Ltd, Switzerland -- Telex 841286 BULK CH -- Fax +41 91 6104 355 ... loading and sailing from loadport to cable following information:

   ... to:

   2. Bulkshipping Ltd, Switzerland -- Telex 841286 BULK CH -- Fax +41 91 6104355."

6. For the fifth voyage Moeller nominated Motor Vessel Race and after completion of the voyage a dispute arose concerning demurrage.

7. On 18th August 2003 a defence Club on behalf of Moeller sent a fax to the fax number set out in the two places in clause 33 notifying Bulk Shipping that Moeller claimed a sum for demurrage.

8. An agent Ferpandi was then instructed to deal with the matter by Bulk Shipping. Faxes over a period were exchanged between Ferpandi and the defence club. Ferpandi, it seems, contemplated that he was acting for Bulk Shipping & Trade International Ltd and when one looks at faxes at page 49 and 51 of the bundle, that seems to be a different entity altogether.

9. Arbitration was threatened in a fax to Ferpandi on 18th November 2004 and Ferpandi was asked to agree a nominated arbitrator by fax of 18th February 2005. There was simply no response from Ferpandi at all.

10. On 12th September 2005 Moeller, acting through Danish lawyers, initiated the appointment of an arbitrator in respect of its dispute with "Bulk Shipping S.A, Manno, Lugano Switzerland" or, "Bulk Trading S.A, Manno, Lugano Switzerland as a nominee of Bulk Shipping," copying the same by fax to the same fax number as set out inclause 33, but not to Ferpandi or to any other fax number.

11. It seems that almost a year earlier, in September 2004, Bulk Shipping ceased trading and it seems that its business was "transferred" to Bulk Chartering and Management S.A. That, it seems, happened simply by virtue of the fact that a Mr Massimo Maggioli, who had previously been effectively (as Mr Nicholas Craig accepted) Bulk Shipping in operating its business had moved to Bulk Chartering. Bulk Chartering was, it seems, simply on the floor below. It was on the first floor of the same building from which Bulk Shipping had operated its business. Furthermore when Bulk Shipping operated its business it was on the same floor as Bulk Trading. Bulk Trading it seems continued to trade from that second floor, occupying most of that second floor after Mr Maggioli's move. Bulk Chartering and Management S.A acted for Bulk Trading S.A in exactly the same way as Bulk Shipping had done up until that time. Mr Maggioli in his statement placed before the judge said this:

"*In October 2004 Bulk C&M [that is Bulk Chartering] notified all of Bulk Shipping's commercial partners that it would be handling all of Bulk Shipping's matters. AP Moeller were not advised because I believed that all operational matters between Bulk Shipping and themselves had been concluded. All correspondence relating to the dispute arising out of the charterparty dated 18th January 2002 had been handled by Ferpandi. Accordingly, I was satisfied that everything was catered for in this regard and there was no need to advise AP Moeller of the change. There was nothing operational outstanding between AP Moeller and Bulk Shipping.*

"Since the cessation of trading, Bulk Shipping has retained a small office space on the second floor of the building at Via Vedeggio. In fact, all that it amounts to is a single desk, phone line and computer tucked away in a corner. In contrast, when it was operational the floor space occupied by Bulk Shipping was about 60 to 70 square metres. Bulk Trading occupied the remainder space available on the floor. Bulk Trading occupies the remainder of the space available on this floor.

"Bulk C&M occupies the entirety of the first floor of the same building at Via Vedeggio. I certainly have never had any reason to go upstairs to the second floor and check the Bulk Shipping computer."

12. On 20th September 2005 notice of Mr Scott being appointed as sole arbitrator was given to Moeller's lawyers following an application by them to have an arbitrator appointed and that notice was copied by fax to the machine at the desk in the corner of the second floor. The judge found that Mr Maggioli did not go and check the fax at the desk and he found thus that the claimants (ie. Bulk Trading) had no notice of the arbitration.

13. The arbitration proceeded and an award was made. That award was sent by post to the claimants at their address and it was in those circumstances that the application was then made under Section 72. The application was made on two grounds: the first on the basis of lack of notice and, second, on the basis that it was uncertain because it did not make clear which of Bulk Shipping S.A or Bulk Trading S.A was liable.

14. The judge found in the claimant's favour on the notice point. He found that the fax number given in the CAO was given for "certain purposes" (by implication not as an agreed method of service.) He found there was no relevant distinction between Bulk Shipping and Bulk Trading. He found that those entities did not have actual notice in the sense of opening an envelope. He also found that "they" only had themselves to blame for keeping the line open for commercial reasons; if the line had been closed down he found no one would have been able to get through and it would have been known that the notice had not been given, but he found there was no effective notice because he found that Ferpandi had had conduct of the claim delegated to them and there was no reason for Bulk to be anxiously reviewing the fax machine.

15. But, having made those findings, he also made clear his provisional view on costs. He did that by paragraph 25 of his judgment, where he said that he would have to discuss the formal order with the advocate:

"... but I should before finishing make clear a provisional view which I have formed as to costs. The claim for uncertainty fails and should not have been raised. The Claimants, it seems to me, have to a significant extent brought this problem upon themselves by the unorthodox practice of maintaining a fax which was kept alive against the possibility of future business but not for operational reasons and because they are responsible for Ferpandi's failure to answer correspondence. Against that the Defendants have fought the claim and lost the crucial point. It seems to me that the costs burden caused by this unusual series of events should be equally shared between the parties, and that the best way to reflect that will be for me to make no order for costs on this claim."

16. Following the handing down or following the delivery of the judgment there was some debate on the costs question when Mr Craig was not there and so written submissions were made as to costs and, following those written submissions, the judge adhered to his view.

17. The question is whether this Court should grant permission to appeal. This was a small claim, in respect of which Moeller obtained an arbitration award. The fact that it is a small claim has some relevance. It also relates to a judge's decision on costs, notoriously an area in which the judge is exercising a discretion where a court of appeal is reluctant to intervene. The judge, having found that he should set aside the award, has taken the view that, to a significant extent, it is the claimant's conduct which has led to them being in a position of having an award made against them. Mr Craig, in his written submissions to the judge and before us, has emphasised that the decision to leave the fax machine in operation was a decision of Bulk Shipping and not Bulk Trading. The difficulty with that submission is that it really has no sufficient regard to the realities and to the fact that Bulk Shipping was originally a party to the charterparty and the agent acting for Bulk Trading in relation to the charterparty. Unsurprisingly, indeed, the judge held, even when setting aside the award, that no distinction should be drawn between those two entities. Bulk Shipping and Bulk Trading operated from the second floor of this building and this desk is in the corner of that second floor of the building where Bulk Trading were operating. I would add, although this was not relied on by the judge, it does seem to me strange that when the business moved no notification was given to Moeller, unlike other persons with whom the Bulk entities were in business.

18. Whatever the position may be in relation to the fax machine and even if technically that has to be construed as the act of a third party, the judge's second reason is also very compelling. If the correspondence had been continued by Ferpandi for example, if Ferpandi had attempted to make a compromise or if no compromise was possible had agreed to the appointment of an arbitrator, and there is no reason why he should not have done that, then what ultimately became an abortive arbitration would never have taken place and to a large extent that has to be down to conduct of the claimants.

19. Mr Craig at one stage was minded to argue that the conduct being relied on by the judge was conduct prior to the proceedings and therefore conduct that could not be relied on, but if one looks at the rules one sees that when considering costs, expressly by the CPR, it is all conduct that may be considered by the judge. It is reasonably clear that that was even pre-CPR. In any event the conduct relied on is very close to the conduct of the proceedings themselves.

20. It is also right to add, of course, that there was a point on which the claimants actually lost.

21. In my view, the judge was entitled to form the view that he did. This is an area in which he was exercising his discretion and he would have been well aware that Moeller would have incurred substantial costs in resisting the setting aside of the award. That was going to be something that they would have to suffer as a result of their failure as identified by the judge to make proper enquiries as to the proper address but, equally, the judge was entitled to take the view that significant blame should be placed on the claimants for the position they found themselves in.

22. In my view, there is no reasonable prospect of arguing that the judge acted outside the range of the discretion accorded to him in relation to costs and I would dismiss the application.

23. **LORD JUSTICE LONGMORE:** The short facts behind this application are that the charterers who were described in the contract as "Bulk Shipping S.A" or "Bulk Trading S.A as the nominee of Bulk Shipping" authorised their agents Ferpandi to discuss Moeller's claim for demurrage of $33,000. Negotiations took place but got nowhere after June 2004. Moeller's, the owners, had therefore to resort to arbitration proceedings. Their clients Skuld on 18th February 2005 sent notice of arbitration both to Ferpandi and to Bulk Shipping S.A at the fax number specified in the contract of affreightment for notices of ETA to be given, a number which was originally successfully used for notifying the claim and starting the negotiations through Ferpandi.

24. The judge accepted that as from September 2004 certain employees of Bulk Shipping left Bulk Shipping to form Bulk Chartering in September 2004 so that Bulk Shipping became dormant. The relevant employees notified Bulk Shipping's commercial partners of the decision, but not A.P Moeller because he had heard nothing since leaving the dispute in Ferpandi's hands in August 2003. However, Bulk Shipping's fax facility remained open in case Bulk Shipping decided to recommence trading.

25. Nothing was forwarded to Bulk Trading after October 2004, however, since by then all operational matters were being handled by Bulk Chartering. In those circumstances the judge held that the notice of arbitration had not been effectively served and that the arbitration had therefore proceeded in the charterers' absence and the award would have to be set aside. No question currently arises as to the correctness of that decision, although one might think that Bulk Trading had a comparatively lucky win on that point.

26. The judge then decided that had although the charterers had won, although Bulk Trading had won, he would not award them their costs because they had brought the problem upon themselves by the unorthodox practice of maintaining a fax for the possibility of future business but not for operational reasons. He later added in the approved transcript of his judgment a further reason, namely that Bulk Trading were responsible for Ferpandi's failure to answer correspondence. The permission to appeal was refused on paper, as it happens, by myself.

27. Mr Craig now renews his application for permission on the basis that Bulk Trading cannot be truly responsible for Bulk Shipping leaving this fax operative and, secondly, on the ground that judge should not have added a further reason to the approved transcript of his reasons for judgment. My Lord has now given reasons for saying that neither of these arguments has any real prospect of success and I entirely agree with my Lord on those matters.

28. I would only add that when I refused permission on paper I added these words:

    "In any event, an appeal on costs is disproportionate in relation to an underlying claim for $33,189, which is even now not resolved. The claimant should be getting on with defending the restored arbitration."

29. In his written material Mr Craig attacked that conclusion and said that Bulk Trading had no option but to come to Court to set aside the award made in respect of that arbitration of which, as the judge held, they had had no notice. I am persuaded by that part of Mr Craig's submissions but for the reasons given -- and I think I was too hasty in what I said about disproportion. However, for the reasons that my Lord has given, I agree that the renewed application must be dismissed.

MR N CRAIG (instructed by THOMAS COOPER AND STIBBARD) appeared on behalf of the Claimants
THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.