Essex County Council v Premier Recycling Ltd [2006] APP.L.R. 03/09

JUDGMENT : Mr. Justice Ramsey : TCC. 9th March 2006.

1. In this arbitration claim, Essex County Council ("the Council") seeks permission to appeal the final award, save as to costs, of the arbitrator, dated 12 August 2005. The arbitration arose out of an agreement between the Council and Premier Recycling Limited ("Premier"), dated 27 June 2003 ("the contract"), under which Premier agreed to provide services relating to the management of civic amenity and recycling centres during the period between 1 July 2003 and 30 June 2007. The contract related to the North area of Essex; there was another contract with a different contractor for the South area.

2. The dispute resolution clause is contained in clause 30 of the Contract and provides a two-tier process. Clause 30.1 provides:

   'The parties will use their best endeavours to resolve by agreement any dispute, difference or question between them with respect to any matter or thing arising out of or relating to the contract, including a reference to conciliation by an independent person.'

   The second tier has two alternatives in clauses 30.2 and 30.3. Clause 30.2 provides:

   'Any dispute, difference or question between the parties to the contract with respect to any matter or thing within the expertise of a technical expert, arising out of or relating to the contract, which cannot be resolved under sub-condition 30.1 within a period of six weeks beginning with notification by either party that it requires resolution under sub-condition 30.1, shall at the insistence of either party be referred to a person agreed between the parties.

   And it then continues:

   Such a person shall be appointed as expert and not as arbitrator, and his decision shall be final and binding.'

   That is evidently an expert determination clause expressly outside the provisions of the Arbitration Act.

3. Clause 30.3 then provides:

   'Any dispute, difference or question between the parties to the contract with respect to any matters or thing arising out of or relating to the contract, which cannot be resolved by negotiation or conciliation under sub-condition 30.1 within a period of six weeks, beginning with notification by either party that it requires resolution under sub-condition 30.1, but is not within the scope of sub-condition 30.2, including a dispute as to whether any such dispute, difference or question does fall within the said scope, shall be referred to arbitration under the provisions of the Arbitration Act 1996 by a single arbitrator to be appointed by agreement between the parties.'

   That is evidently a reference to arbitration within the Arbitration Act 1996.

4. In this case, disputes arose between the Council and Premier on the legal interpretation of the wording of the specification contained in schedule 12 of the Contract, relating to the inclusion or exclusion of soil and hardcore in the calculation of the waste minimisation bonus payments. In these circumstances the parties agreed the basis of the appointment of the arbitrator in the following terms:

   'Subject to confirmation, Essex County Council and Premier Recycling Limited would like to jointly appoint an arbiter [that is a reference to an arbitrator in Scotland] to resolve the above dispute. This will be in accordance with general conditions of contract and specification, condition 30, disputes and arbitration. This request follows extensive discussions between the above parties aimed at resolving this dispute. It is now jointly agreed that an expert third-party is needed to provide a final and binding decision.'

5. It then says: *'The suggested procedure is that of written representations as follows...'* It sets out that each side would submit a statement of case, would then comment on the other statement of case. The arbitrator would then be entitled to raise questions and those would be responded to, and he would then deliver the award within a 105 working days from appointment.

6. In April 2005 the parties confirmed the appointment of the arbitrator, who has both a technical and legal background. The arbitrator made his award, dated 12 August 2005, in which he held that soil and hardcore was to be excluded from the total measured tonnage for the purpose of calculating the waste minimisation bonus payable to the claimant. On 7 September 2005, the Council sought permission to appeal the award and the matter was transferred from the Commercial Court to the Technology and Construction Court, as being the appropriate court to deal with the application.

7. On consideration of the application, it was apparent that Premier was contending that the agreed terms of the appointment of the arbitrator amounted to an agreement which excluded the right of appeal under section 69 of the Arbitration Act 1996. The Council, on the other hand, were asserting that the wording:

   'It is now jointly agreed that an expert third party is needed to provide a final and binding decision'

   was used in error.

8. In addition, the terms of appointment were potentially relevant to considerations under section 69(3)(d) of the Arbitration Act, which provides that leave to appeal shall be given only if the court is satisfied as to the matters set out in in (a), (b) and (c), and then,

   '(d), that despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.'

9. As a result, although applications for permission to appeal are usually determined without a hearing, a hearing was directed to consider the arguments and in particular, whether the agreed terms amounted to an exclusion clause and/or were relevant to considerations under section 69(3)(d) and reference was made to the commentary ***MacKinnon Arbitration Law***.

10. Mr. Robert Clay, on behalf of Premier submits that, first, the terms of the appointment of the arbitrator and the reference to an agreement that an expert third party should provide a final and binding decision, showed that the parties required more finality than they would have required by an arbitration under clause 30.3. Secondly, the parties agreed terms of appointment of the arbitrator which required a quick determination on the basis of documentary submissions, not oral submissions. Third, the word 'final and binding' has to be read in context. He referred me to the decision of Judge Havelock-Allen QC in ***AHT v Tradigrain*** [2002] 2 LLR 512 and 521. Fourth, the word "final" means final. He referred me to the decision of the Court of Appeal in ***Italmare Shipping v Ocean Tanker*** [1982] 1 WLR 158 and 162(f). Five, the word 'final' is of significance, and he referred me to the Canadian decision in ***National Ballet of Canada v Glasco*** 186 DLR (4th) 347 at 362, where Swinton J considered a clause which used the word "binding" but not the word 'final,' and he submitted that that case gave support for the significance of the phrase 'final and binding'. He also referred me to the New Zealand case of **Gold & Resource Developments Limited v Doug Hood Limited** [2000] NZCA 131, where it was held that although a final and binding provision is not determinative, such a clause is an important consideration militating against appeal.

11. As a result, Mr. Clay contends that there was an agreement to exclude appeal; alternatively, the agreed terms of appointment are a matter to be taken into account under section 69(3)(d) of the Arbitration Act 1996. On that aspect he referred me to the DAC report set out in ***Mustill and Boyd,*** Commercial Arbitration, companion volume, at page 442, where it said this in relation to the addition of the requirement in subsection (d) of section 69(3):

> *'We propose a further test, namely, whether despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question. We have been asked why we suggest this addition. The reason is that we think it desirable that this factor should be specifically addressed by the court when it is considering an application. It seems to us to be the basis on which the House of Lords acted as it did in* ***The Nema****. The court should be satisfied that justice dictates that there should be an appeal and in considering what justice requires the fact that the parties have agreed to arbitrate rather than litigate is an important and powerful factor.'*

He also referred me to commentary on that section in the earlier part of that companion volume.

12. Mr. Jonathan Swift, who acts on behalf of the Council, contends, first, that the significance to be attached to the use of the words 'final and binding' must be assessed in context, the context being an arbitration under clause 30.3. Secondly, the use of the words 'final and binding' is not of itself determinative. He referred me to ***Gold & Resource Developments v Hood*** at paragraph 54(7), ***National Ballet of Canada v Glasco*** at paragraphs 36-39, and ***Raguz v Sullivan*** [2000] NSWCA 240 at paragraphs 87-88. Thirdly, he referred me to the Canadian decision in ***LIU of America v Carpenters & Allied Workers*** [1997] 34 OR (3rd) 472, in which the final and binding provision was found to exclude an arbitration appeal. He submitted that this has to be read in the context of the facts of that case. He submits that the judgment of Finlayson JA shows that it was not the words 'final and binding' which excluded the appeal, but the overall wording.

13. As a result, Mr. Swift submits that the use of the words 'final and binding' should not be regarded as a matter which prohibits appeal. In relation to section 69(3)(d), he contends that the exercise of the discretion to give permission must be based on the cumulative effect of the matters in section 69(3)(a) to (d), rather than an approach which regards each as a threshold to be crossed. He submits that if the wording would not be sufficient to preclude leave for permission to appeal under Section 69(1) it would not be sufficient to exclude an appeal under section 69(3)(d).

14. I now consider these arguments. However, first I turn to the commentary in ***Merkin on Arbitration Law*** which was raised by the court. At paragraph 22.10(g), the author deals with various wordings and considers whether they are sufficient to exclude an appeal under section 69(1). He deals with an agreement that the award of the arbitrators is to be final and/or binding, and says this:

> *'The efficacy of this wording was not tested under the Arbitration Act 1979 and its effect under the 1996 Act remains unclear. The argument in favour of the phrase 'final and binding' operating as an exclusion agreement, is that the position of the arbitrators only qualifies as an award when it is final and binding, so that unless the phrase operates as an exclusion agreement it can only be regarded as declaratory and devoid of all real meaning.'*

He then refers to the various cases, and says this:

> *'In practice, it may not matter if the words 'final and binding' do not amount to a formal exclusion agreement, as the New Zealand Court of Appeal has held in* ***Gold v Hood*** *that their use is a powerful reason for the court not to exercise any discretion that it may have to give permission to appeal.'*

15. First, I consider it significant that instead of simply referring the matter to arbitration under clause 30.3, the parties entered into a further agreement and expressed themselves in terms which indicated that they were seeking a determination from a third party expert, and one which was final and binding. I do not accept that those words can be described as having been used in error. Rather, interpreting the agreement to arbitrate, I

consider that those words, together with the others, must be given their proper meaning; see ***ICS v West Bromwich Building Society*** [1998] 1 WLR 896 and the later decisions of the House of Lords.

16. In my judgment, the words 'final and binding' do not of themselves, in isolation, give rise to an exclusion of a right to appeal. Section 58 of the Arbitration Act deals with the effect of an award when it states at Section 58(1):

'Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement, is final and binding both on the parties and on any persons claiming through or under them.

(2) This does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this part.'

In ***AHT v Tradigrain*** at paragraph 34, His Honour Judge Havelock-Allen QC said this in relation to a clause which included the words final and binding:

'These difficulties of construction are reason enough to be cautious in attributing to the last sentence of Rule 22 the status of an agreement excluding the right of appeal. There are certain Commonwealth cases in which it has been considered whether the words 'final and binding' in an arbitration agreement operate to exclude the right of appeal.'

These cases are referred to in ***Merkin on Arbitration Law*** at paragraph 20.10(g). In ***Ontario*** they have apparently been held to have effect but in ***New South Wales*** they have not. Much must depend on the context. The fact that the words 'final and binding' of themselves are not an exclusion and that context is important is, in my judgment, borne out in four Commonwealth authorities.

17. In the Ontario Court of Appeal Case of ***Labourers International Union of North America v Carpenters and Allied Workers,*** the agreement provided for final and binding arbitration in order to achieve the speedy resolution of any dispute. In giving the judgment of the court at page 478, Finlayson JA said this:

'In my view the proper approach to the problem of agreements containing arbitration clauses that overlap the provisions of the former and present Arbitration Act, is to analyse each agreement within the context that it was written. In the case in appeal, the parties could have provided for an appeal if they had wanted one, but failing that affirmative decision, one was not available to them. The argument now made that they did not intend to exclude an appeal because they failed to employ the language of exclusion of the later statute, is not persuasive. An examination of the language of the agreement and the circumstances surrounding its making, is necessary in order to determine the parties' intentions. Looking at the agreement in appeal from this perspective, it is apparent that the parties intended to exclude to the fullest extent possible under the law, any review of the resolution of their dispute.'

Later he says this:

'Furthermore, the parties agreed that this "speedy resolution" would be reached by "final and binding" arbitration. Although a final and binding clause does not necessarily preclude judicial review, it does reflect an intention to exclude a right of appeal. In the context of judicial review, the Supreme Court of Canada has held that a "final and binding" clause is only a limited privative clause. Although such a clause may reflect some notion of deference, it does not preclude judicial review.'

And continuing later on:

'Judicial review, however, is different from an appeal, and consequently a "final and binding" clause has a different privative effect in the context of an appeal. In this, case although the complaint is that the arbitrator made an error of law within the jurisdiction, the attack on the decision is made by way of appeal rather than by judicial review. At minimum, a final and binding clause reflects an intention to exclude the statutory right of appeal.'

And later on, the finding:

'Accordingly, the parties' use of the words "final and binding" in paragraph 23, referring to their agreement to resolve disputes by arbitration, indicated an intention that there would be no right of appeal.'

18. In the second case, ***The National Ballet v Glasco,*** in the Ontario Superior Court of Justice, Swinton J was considering whether under section 3 of the Arbitration Act 1991, there was an agreement expressly or by implication to vary or exclude any provision of the Act, including section 45(1), which dealt with appeals on questions of law. At paragraph 35 he said this:

'Pursuant to section 3 of the Arbitration Act 1991, the parties may expressly or by implication vary or exclude the right to appeal an arbitrator's award on a question of law, with leave.'

He then referred to the ***Labourers*** case. He said:

*'In the **Labourers** case, the Court of Appeal looked at the language of the arbitration agreement, which stated that disputes would be solved by final and binding arbitration. The words 'final and binding' were held to reflect an intention to exclude a statutory right of appeal.'*

He then continued:

'The parties here have used the term 'binding,' but not the words 'final and binding,' with respect to the submission to arbitration in paragraph 1 of their agreement. Elsewhere in the agreement, they state that the OLRB application will be withdrawn and the matter fully and finally disposed of in the mediation/arbitration, and that the grievance will be withdrawn and "fully and finally determined" in the mediation/arbitration. The agreement also states that the court action will be discontinued.

The respondents argue that the right to appeal is, by implication, excluded because of the words of the agreement, coupled with the parties' express desire to proceed expeditiously and the nature of the disputes, which involved matters that would otherwise be before an arbitration board or the OLRB and protected from judicial review by privative provisions. I do not read the arbitration agreement as impliedly expressing an intention to exclude the right to appeal. Ms Glasco ,Equity and the Ballet were represented by experienced counsel when the agreement was drafted and it is telling, in my view, that they have used the word 'binding' in paragraph 1 of the agreement without adding the word 'final' when they conferred jurisdiction on the arbitrator.'

19. In ***Gold & Resource Developments v Douglas Hood Limited,*** the judgment of the Court of Appeal of New Zealand was given by Blanchard J. This was a case where there was a question of appeal under clause 5 of the second schedule to the Arbitration Act 1996, which provides for an application for leave to appeal on a question of law. In that case, the court was considering a first instance decision by McGechen J and there was a clause in the parties' agreement stating that the arbitrators decision was to be final and binding, which is a standard provision of clause 12.3.9 of the New Zealand standard conditions. However, in that case, the parties had amended these conditions by adding clause 12.3.10, which stated that,

'in respect of any arbitration the parties agree to irrevocably submit to the jurisdiction of the High Court of New Zealand.'

In a part of his judgment, which was not under appeal, McGechan J interpreted this clause as an intrinsic recognition of the continued full role of the court, which would include review of error of law. However, the Court of Appeal in considering the guidelines for the grant of leave to appeal, at paragraph *54.7*, considered whether the contract provides for the arbitral award to be final and binding, and said this:

'Where there is such a clause it will not be determinative, but it will be an important consideration. It will indicate that the parties did not contemplate becoming involved in litigation over the arbitral award. The High Court should lean towards giving effect to the stated preference of the parties for finality.'

20. Finally, in the Australian, New South Wales Court of Appeal case of ***Ragouz v Sullivan*** [2000] NSWCA 240, the Court had to consider section 40 the Commercial Arbitration Act 1984, which provided that the court would not allow appeals on questions of law if there was an agreement in writing excluding the right of appeal. The relevant clause in that case was clause was 7.1.3(g) which said:

'The decision of the tribunal will be binding on the parties and subject only to any appeal to the Court of Arbitration for Sport pursuant to clause 7.1(4) it is agreed that neither party will institute or maintain proceedings in any court or tribunal other than the said Tribunal.'

21. In dealing with that position, Spiegleman CJ and Mason P in their joint judgment said this:

*'Mere agreement that an award shall be final and binding would not be an exclusion agreement, especially in the light of the fact that section 28 of the Act provides this as a general rule in any event. See **Corner v C & C News Pty Ltd,** (Yelham J, 28 April 1989, unreported); **American Diagnostica**. Here there was much more; there were express stipulations by the prospective parties to a Court of Arbitration for Sport arbitration, that the Court of Arbitration for Sport decision by way of appeal would itself be "final and binding on the parties." However, to this was added the promise that "neither party will institute or maintain proceedings in any court or tribunal other than the said court."*

Insofar as Yeldham J suggested in ***Corner v C & C News Property Ltd*** that an exclusion agreement should expressly refer to the right of appeal under section 38, we are of the view that this reasoning is wrong. The matter falls to be determined as Giles CJ said in ***American Diagnostica***, page 333, as a matter of construction of the exclusion agreement. In our opinion, the formulation "institute or maintain any proceedings in any court," encompasses an appeal to the Supreme Court under section 38(2). And these words are sufficiently clear in their effect to exclude the right of courts to award appeal now invoked.'

22. On the basis of those authorities, it is in my view clear, that the words 'final and binding' have to be considered in the context of the other circumstances of the arbitration, and it is now necessary to turn to consider the specific provisions in this case. However, in summary, I conclude that the use of the words 'final and binding,' in terms of reference of the arbitration are of themselves insufficient to amount to an exclusion of appeal. Such a phrase is just as appropriate, in my judgment, to mean final and binding subject to the provisions of the Arbitration Act 1996.

23. In this case the parties referred in the context of a clause 30.3 arbitration, to the further requirements:

'It is now jointly agreed that an expert third party is needed to provide a final and binding decision.'

I consider that these requirements were intended to emphasise the wish of the parties to choose an expert to provide a final and binding decision, and used a phrase which was borrowed, to some extent, from clause 30.2, which related to expert determination. In this case, the parties wanted to have a comparatively speedy procedure, in circumstances where a contract was to run from 2003 to 2007 and disputes had arisen as to payment. The suggested procedure in the terms of reference to arbitration was largely adopted and led to a decision in the 100 days based only on written submissions.

24. Turning to section 69(1), this provides that,

'unless otherwise agreed by the parties, a party to arbitral proceedings may appeal to the court on a question of law arising out of an award made in the proceedings.'

It is therefore necessary to consider whether the parties have otherwise agreed so as to preclude such an appeal. To amount to such an agreement, sufficiently clear wording is necessary. Whilst I accept that no express reference to section 69 is necessary, the intention to exclude a process of appeal by the court must be clear. This was evidently the basis upon which the court held that the wording in what is now Article 28.6 of the ICC Rules that,

'the parties shall be deemed to have undertaken to carry out the resulting award without delay and have waived their right to any forms of appeal insofar as such waiver can validly be made'

were held to be a valid exclusion clause in ***Arab-African Energy Corporation Ltd v Ollyer Production (Netherland) BD*** [1983] 2 Lloyd's Reports 419.

25. In giving judgment in that case, Leggett J (as he then was) at 423, held that the wording, while far from perfect, achieved its purpose of excluding judicial review. He said this:

'The exclusion in effect of every right of appeal which can be excluded, not only achieves the result, but achieves it in a way which is harmonious with the 1979 Act and allows for those particular matters in which the right of appeal cannot be excluded.'

The 1996 Act has left that reasoning intact; see ***Sanghi Polyesters v International Investor KCSC*** [2001] Lloyd's Reports 480 at page 482.

26. In the present case, I do not consider that 'final and binding' and the reference to an expert, together with a speedy procedure, are sufficient to amount to an agreement that there should be no appeal under section 69. The phrase 'final and binding' alone is not sufficient, and the fact that the parties chose an expert as an arbitrator and wish a speedy procedure, cannot in my judgment change the position. Those requirements are ones that occur commonly in the context of commercial arbitration, and cannot amount to an exclusion agreement or convert the phrase 'final and binding' into such an agreement. If parties wish to enter into an agreement to exclude a right of appeal, I consider that a clear intention must be shown either from express words or from the context.

27. Having held that the right of appeal is not excluded, I therefore now consider section 69(3)(d). Whilst no authority has been found to assist on this aspect, I have already cited the DAC report setting out the background to that provision, and the commentary in ***Mustill & Boyd***, at the companion volume, is as follows:

'This requirement is plainly not satisfied simply by demonstrating that the requirements of subsection 69(3) are satisfied, for otherwise subsection 69(3)(d) would be unnecessary. Some further reason for intervention must be present. The court is likely to refuse leave to appeal if there are circumstances which indicate that the parties wish speed and finality to prevail, even if the tribunal decided a question of law in a way which was obviously wrong or at least open to serious doubt.'

In ***Merkin,*** at paragraph 21.44, it is stated that the authorities on discretion under the previous 1979 law, remain good law under 1996 Act. Two matters are set out in particular which are relevant here in respect of the court's general discretion. First, the author sets out:

'(a) The courts will be particularly reluctant to give permission to appeal where the parties have agreed to hold a quick arbitration so that their rights can be ascertained in order to allow the future performance of the contract.

He then continues:

(d) The overriding consideration is the need for finality and arbitration, particularly in a case which is a one-off. Thus, the courts will not, in a one-off case, treat as the most important consideration the fact that an appeal might give the court the opportunity to undertake a general review of an area of law.'

28. In the current case, I consider that whilst the use of the words 'final and binding,' the reference to an expert and the requirement of a quick procedure limited to written submissions, are not sufficient to exclude an appeal, they are matters of great weight in deciding whether it is just and proper for the court to decide the question. In the context of a one-off clause in a contract between the parties, where the question related to past and future payments, I consider that they are sufficient in themselves to preclude the grant of leave to appeal. In my judgment, it would not be just and proper in all the circumstances, for the court to determine the question, given the particular terms of the agreement of the parties to resolve this particular dispute by arbitration. A full appeal with oral submissions protracting the time to reach a final and binding decision is not, in my judgment, what the parties envisaged. This is all the more so in a case where the arbitrator had a narrow point of construction to decide with two meanings, one argued by Essex and the other by Premier.

29. In any event, having considered the submissions of the parties, I do not consider that the choice by the arbitrator of the one meaning can be said to be obviously wrong. In all the circumstances, having held that the parties did not exclude the right to appeal under section 69 on the question of law arising out of the award, I refuse permission to appeal on the basis, both under section 69.3(c) and (d). The arbitrator's decision was not obviously wrong, and it would not be just and proper in the circumstances for the court to determine the question, given the agreement of the parties in this case.

MR. SWIFT for the CLAIMANT (Instructed by Essex County Council)
MR. CLAY for the DEFENDANT (Instructed by Beavis Partnership, Chelmsford)