OAO Northern Shipping Co v Remolcadores De Marin SL (Remmar) [2007] APP.L.R. 07/26

JUDGMENT : Mrs Justice Gloster, DBE: Commercial Court. 26th July 2007

1. This was an application by the Claimant Buyers, OAO Northern Shipping Company ("Buyers") under section 68 of the Arbitration Act 1996 ("the Act") for an order setting aside, alternatively remitting for further consideration, an arbitral award dated 18 October 2006 ("the Award"). These are short reasons for the ruling which I gave on 15 June 2007.

2. Buyers relied on the grounds set out in their application notice, and the witness statement of Robert Wilson of Clyde & Co, both dated 14 November 2006.

3. The application was served on the Defendant Sellers, Remolcadores de Marin SL ("Sellers") and on the arbitrators themselves. Sellers did not respond to the application other than by acknowledging service, and the time limit for so doing has now expired. Sellers (who did not instruct English lawyers for the arbitration) did not attend to contest the application.

4. The Award relates to a dispute arising out of an agreement dated 21 June 2005 ("the Agreement"), for the sale and purchase of an ice classed tug ("the Vessel"). The Agreement was on the 1993 Norwegian Saleform with additions and amendments. Buyers sought damages on the basis that the Agreement had been induced by a misrepresentation as to the total power rating of the Vessel's engine. The alleged misrepresentation consisted of providing to Buyers' representative ("Mr Bogdanov") at the pre-purchase inspection on 7-8 June 2005, a Germanischer Lloyd certificate of class dated 28 June 2001 ("the GL Certificate"), which provided, so far as relevant: "Total Rated Power … 1265 kW".

5. The tribunal found that Buyers' case failed at the first hurdle. The tribunal concluded that there was no "material representation that the tug's engine power equalled 1265 kW". The tribunal concluded that Sellers had represented not that the GL Certificate was "true", but merely that it was "authentic": see the Award paragraph 41.

6. However, if there had been a representation, the tribunal went on to find that Buyers would have surmounted each of the remaining hurdles and established their case, namely:
   i) the representation would have been false; the actual power of the engine was "some 956 kW", which was 25% lower than the figure stated in the GL Certificate (paragraph 42);
   ii) the representation would have induced the contract; there was no evidence that the representation had been "superseded by Buyers' own enquiries" (paragraphs 43-4);
   iii) whilst Sellers in fact believed the 1265 kW figure to be true, they had not shown reasonable grounds for holding this belief (paragraph 45);
   iv) the right to damages for misrepresentation had not been excluded by the terms of the MOA, nor waived by Buyers (paragraph 46);
   v) the representation would have caused Buyers to suffer loss (paragraph 46).

7. Buyers' essential complaint before this court was that the case had been presented to the arbitrators on the basis that the "representation" point was no longer in issue between the parties (if it ever had been).

8. By the time of the hearing before the tribunal, Sellers' arguments were focussed on: (i) the "as is" nature of a NSF sale, giving no guarantees as to the Vessel's particulars (i.e. the issue of waiver / exclusion of reliance); (ii) the level of inspection carried out by Buyers (i.e. the question of inducement); (iii) whether Buyers had proved the 1265 kW figure was incorrect (i.e. whether the representation was false); and (iv) quantum. This was clear from Sellers' skeleton argument before the tribunal.

9. Whilst, as a small claim, no transcript would have been taken, Mr Wilson's evidence before this court confirms that "no argument or discussion whatsoever was directed towards [the issue] at the hearing". The arbitrators therefore found against Buyers on a ground which had neither been raised nor seriously disputed by Sellers, but Buyers were not invited to address this ground whether by way of submissions or further evidence.

10. Sellers initially pleaded that the true engine power of the Vessel was indeed 1265 kW, and was represented so to be, (inter alia by virtue of the GL Certificate). They alleged: "the power of the vessel is 1,265 kW", and that this was "reflected in all the vessel's documentation".

11. Whilst Sellers eventually chose to put Buyers to proof of the Vessel's engine power, they continued to defend the GL certificate they had provided by stating in paragraph 6 of their skeleton argument that: "there is no proof that the engine power is not the one which appears in the last GL certificates". In these circumstances, it is not surprising that Buyers were under the impression that Sellers accepted that they had indeed represented the truth of the 1,265 kW figure when Sellers themselves were convinced of its truth from the outset.

12. Sellers' Defence Submissions were later clarified in a letter to the tribunal dated 29 March 2006 and thereafter in their skeleton argument.

13. In the light of these contentions, Buyers' counsel presented the case to the Tribunal on the basis that: *"The Seller in their Defence Submissions appear to accept that they provided the particulars of the Vessel by way of her class certificates … **and have not denied that there was a representation** … The Seller's only contention as regards the documents handed over to the Buyer is that the documents revealing the true power of the engine were in fact given to the Buyer prior to delivery. It is presumed that the Sellers are therefore alleging that the Buyer did not rely on the representation that the engine's power to be 1,265 kW".* (emphasis added)

14. As Mr Paul Henton, counsel for Buyers submitted, the first they heard of the argument that Sellers had represented only the authenticity of the GL Certificate (rather than its truth) was upon publication of the award; the tribunal had invited submissions on each issue of the cause of action save for the one on which the tribunal actually decided the case. Conversely, the tribunal heard evidence and/or oral argument on each of the issues which it would have found in Buyers' favour had the tribunal concluded that there been a representation.

15. In order successfully to challenge the Award under section 68 of the Act, Buyers must demonstrate:
    i) that there has been a "serious irregularity", falling within the closed list of categories set out in section 68(2), and
    ii) that the serious irregularity "has caused or will cause substantial injustice" to Buyers.

    see ***Lesotho Development v Impregilo SpA*** [2006] 1 AC 221 at paragraph 28, per Lord Steyn.

16. The primary ground relied upon by Buyers in the present case is: "(a) failure by the tribunal to comply with section 33 (general duty of tribunal)". Section 33 provides as follows:

    "(1) The tribunal shall -
    (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
    (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
    (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

17. Alternatively, Mr Henton submitted that the application can be dealt with under ground (c), as set out in section 68(2), of "*failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties*".

18. Mr Henton recognised that the section 68 threshold is a high one, the aim being to eliminate technical and unmeritorious challenges and promote finality of dispute resolution. Section 68 must not be used for disguised challenges to the correctness of a decision on the facts or law, especially where (as here) the right of appeal under section 69 has been excluded by agreement. In the words of the DAC's Report on the Arbitration Bill (referred to in *Lesotho* at paragraph 27): *"[s.68] is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected".*

19. Having said that, the DAC, and their lordships in *Lesotho*, also recognised that a party's right to a fair and impartial hearing is a fundamental one. An inability on the part of the court to intervene could seriously undermine the international reputation of English arbitration.

20. Where the challenge is made under section 68(2)(a), the seriousness of the irregularity must be judged in accordance with the fundamental principles laid down in a series of cases which ante-date the 1996 Act, but which have been repeatedly upheld as reflecting the principles enshrined in section 68(2)(a):

21. Thus, Ackner LJ in ***The Vimeira*** [1984] 2 Lloyd's Rep 66, 76) stated:

    "The essential function of an arbitrator … is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point … then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it …

    the adequacy of the turning area was not at the conclusion of the evidence - even though it was a possible issue at the commencement of the arbitration - any longer a live issue. The arbitrators clearly thought otherwise. They should have so informed the parties …"

    and (per Bingham LJ) in ***Zermalt Holdings SA v Nu Life Upholstery Repairs Ltd*** [1985] 2 EGLR 14 at 15:

    "If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way, then that again is something that he should mention so that it can be explored. It is not right that his decision should be based on specific matters which the parties never had the chance to deal with, nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance …"

22. These principles apply to unargued points of law or construction as they do to unargued questions of fact. In such cases, whilst it is not necessary for the tribunal to refer back to the parties each and every legal inference which it intends to draw from the primary facts on the issues placed before it, the tribunal must give the parties *"a fair opportunity to address its arguments on all of the essential building blocks in the tribunal's conclusion"* (***ABB AG v Hochtief Airport*** [2006] 2 Lloyd's Rep 1, paragraph 70).

23. Here, the *"representation"* issue was one of the *"essential building blocks"* of the tribunal's decision. Counsel for Buyers had proceeded on the assumption that the point was no longer in issue (if it ever had been), and therefore did not need to be addressed. As Mr Wilson has stated, the tribunal did not invite submissions on the representation issue. This was not simply a case of a tribunal drawing a further inference on an issue which the parties had otherwise had the opportunity to address. Indeed, it is perhaps surprising that the tribunal received

written submissions after the hearing as to which of the GL Certificate and GA Plan were relied upon (if either) [pp. 302-3], but again did not invite submissions on its intended "no representation" point.

24. I accept Mr Henton's submission that the circumstances of the present case made it all the more important that the tribunal raised the "no representation" point they were considering, and gave Buyers a fair opportunity to deal with it, for the following reasons:

    i) It was a small claims arbitration. In such cases, time is usually short, and the parties are often expected to be selective with their oral advocacy, addressing only those key points which are really in dispute. See, by way of analogy, ***Pacol v Rossakhar*** [2000] 1 Lloyd's Rep 109 at 115 (per Colman J), in relation to paper arbitrations:

    "… It is particularly important in arbitrations which are conducted on documents alone that arbitrators should be alive to the dangers of introducing into their awards matters which have never been, or have ceased to be, matters in issue between the parties. This case is a particularly glaring example of the arbitrators simply ignoring the definition of issues which had been arrived at prior to the time when they had to determine the issues then referred to them.

    In a paper arbitration the temptation to arrive at a conclusion which may not have been envisaged by either party by reference to matters upon which the parties have not had the opportunity of addressing the arbitrators or in respect of which they have not had an opportunity of adducing further evidence, may be a particular temptation which arbitrators should be careful to avoid. It is important for the continuation of the standing and quality of international commercial arbitration in London, particularly in the commodity fields, that arbitrators should have this problem very clearly in mind".

    ii) Sellers had not instructed English lawyers and were likely to have been less familiar with English legal concepts than the Buyers' legal team. To an extent, therefore, the tribunal were putting the Sellers' points for them (see *the Vimeira*, cited above, at page 75).

    iii) The irregularity was clearly serious (as opposed to "technical"). Buyers were successful on each and every other issue and would have won substantial damages were it not for the "no representation" finding.

25. In the context of section 68(2)(a), the additional requirement of substantial injustice falls to be assessed as follows:

    "The element of serious injustice in the context of s.68 does not in such a case depend on the arbitrator having come to the wrong conclusion as a matter of law or fact but whether he was caused by adopting inappropriate means to reach one conclusion whereas had he adopted appropriate means he might well have reached another conclusion favourable to the applicant. Thus, where there has been an irregularity of procedure, it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity, he ***might well*** *never have reached, provided always that the opposite conclusion is* ***at least reasonably arguable****."* (***Vee Networks Ltd v Econet Wireless International Ltd*** [2005] 1 Lloyd's Rep 192 at paragraph 90, per Colman J).

26. The Court's task on this type of application is not to second-guess the tribunal's views on any additional submissions which Buyers might have made have made if called upon to do so. It is sufficient if Buyers have been deprived of the opportunity to advance submissions which were "*at least reasonably arguable*", or even simply something better than "*hopeless"* (per *Vee*, at paragraph 88).

27. The most recent word on this topic comes from ***BTC Bulk Corporation vv Glencore Intl*** [2006] EWHC 1957 (Comm), paragraph 26, in which Cooke J upheld a section 68(2)(a) challenge and found the relevant threshold for remission to be as follows: *"I have not had the benefit of full argument on those points and it would not be right for me to express any conclusion about it in the context of a s.68 application … Nonetheless … it does fall to me to decide that the point is not hopeless and that is something that I do decide. Without the benefit of full argument, the points appear to have a considerable degree of force …"*

28. In the present case, the tribunal's finding goes to the question of what representation was to be implied from Sellers' conduct in presenting the GL certificate. Implied representations are assessed objectively from the viewpoint of the reasonable representee (***Geest plc v Fyffes*** [1999] 1 All ER (Comm) 672, 683). Had the point been raised, it could have been explored with Mr Bogdanov (the actual representee) and submissions could have been made as to the impression which Sellers' conduct in presenting the GL certificate (albeit together with the GA Plan) reasonably conveyed.

29. These submissions would certainly have had an arguable prospect of success for the following reasons:

    i) It is at least arguable that the representee would look only to the most recent class certificate for the truth about the Vessel's actual engine power, and would expect that certificate to be presented as the truth.

    ii) This is supported by the fact that Mr Bogdanov was prepared to insert the 1,265 kW figure in his report to Buyers (in place of the higher figure provided by brokers, and without reporting back the lower figure in the GA plan).

    iii) The very fact that Sellers were found to have believed the 1,265 kW figure to be true rendered the conclusion that they had not represented its truth at the very least surprising.

    iv) This is all the more so when coupled with the reality that Sellers had initially pleaded both that the figure was true and that documents were provided to Buyers which confirmed that this was the case, and had stood by the accuracy of the GL figures throughout the arbitration.

30. Accordingly, in my judgment, Buyers have demonstrated to the requisite standard that there has been a serious irregularity under s68(2) and that such irregularity would, if not rectified, cause substantial injustice to them.

31. I also conclude that the issue of quantum should also be remitted for further consideration. In this regard, the tribunal found that, with some extra work, the engine could have been upgraded to the higher power rating. The tribunal would have assessed quantum based on the cost of making these upgrades, rather than based on the difference in value between the Vessel and that of other tugs on the market at the time. The tribunal assessed the cost of performing these upgrades at €57,500, but did not deal with the evidence of Buyers' expert that, on this basis, allowance had to be made for the time taken to effect such upgrades. This was contrary to ground (d), namely failure by the tribunal to deal with all the issues that were put to it.

Conclusion

32. For the above reasons I considered it appropriate to set aside the Award and remit it for further consideration by the tribunal.

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The Respondent did not appear, and was not represented