CA on appeal from Chancery Division (Mr Justice Sher QC) before The M.R.; Waller LJ; Vice-President of the Court of Appeal, Civil Division; Sedely LJ. 21st March 2007

Lord Justice Waller : This is the judgment of the court.

Introduction

1. By order dated 20th May 2004 Jules Sher QC, sitting as a deputy high court judge, refused to set aside an arbitration award in favour of the Solicitors' Indemnity Fund dated 22nd November 2003. The application to set aside had been made under s.68 of the Arbitration Act 1996 by Mrs Shuttari and the deputy judge refused permission to appeal. By an application dated 19th July 2005 Mrs Shuttari sought permission to appeal the order of the deputy judge out of time. That application faced major difficulties. First, the deputy judge, had refused permission to appeal. Unless the application fell with the principles in ***North Range Shipping Ltd v Seatrans Shipping Corporation*** [2002] EWCA Civ 405, the Court of Appeal would have no jurisdiction to entertain an appeal. Second, the application was well out of time, without any good reason for the extensive period of delay. Chadwick LJ was prepared to assume that there might be jurisdiction to entertain the appeal, but refused permission on the merits. He further made clear that, although it was unnecessary to consider whether time should be extended, since no good reason for the extensive period of delay had been shown, he would have refused an extension of time. The application was renewed orally before Chadwick LJ. Once again he dealt with the merits of the grounds of appeal as drafted, holding there was no merit in the application. He further indicated once again that there was no ground for extending time. However, at the oral hearing, Mr Diamond, for Mrs Shuttari, sought to raise a submission by reference to Article 6 and to argue that there was no valid arbitration, and thus that the decision of the deputy judge was a nullity. Chadwick LJ, by reference to the new points, said this:-

   "Whether those are points which can be raised on appeal in this court at this stage seems to me to open to most serious doubt. But, in the light of the decision of this court in North Range . . ., I cannot be confident that they cannot be."

   In the circumstances he gave permission to Mrs Shuttari to make a further application to the Court of Appeal to raise the point that had been raised orally in argument.

2. In the result a fresh application for permission to appeal was drafted by Mr Diamond, under which he sought permission to appeal based on the premise that the determination of the arbitrator, dated 27th November 2003, was a nullity. Having regard to the view we have formed as to whether permission should be granted to argue the new point, **even if** the Court of Appeal had jurisdiction to consider the same, we shall deal with the matter as though the nature of the point might fall within the *North Range Shipping* exception.

Background

3. By letter dated 11th May 1999 the Solicitors' Indemnity Fund had refused to indemnify Mrs Shuttari, a solicitor, in relation to claims made against her and notified in 1997. The basis for declining cover (under SIF Rule 14) was dishonesty. The dishonesty alleged was that she had signed a report in which she confirmed that she had investigated the title and that she had read and would comply with the mortagee's instructions to solicitors in all respects, when, as she subsequently acknowledged, she had not in fact investigated the title and had not complied with her mortgagee's instructions. Her case was that she had relied on a partner and had thus not acted dishonestly.

4. By a letter of 13th May 1999 Mrs Shuttari's firm invoked the arbitration procedure provided for under SIF's Rules (Rule 20), stating that Mrs Shuttari wished to refer the matter to arbitration. By letter dated 13th July 1999 Mrs Shuttari indicated that she wished Mr Philip Naughton QC to be appointed as arbitrator. Thus, it was Mrs Shuttari who invoked the arbitration procedure and it was not a case where she sought to commence High Court proceedings, but found herself subject to a stay.

5. After various adjournments at the instigation of Mrs Shuttari an arbitration award in favour of SIF, including a finding of dishonesty, was made on 26th November 2003.

6. On 23rd December 2003 Mrs Shuttari commenced High Court proceedings in the Chancery Division, pursuant to s.68 of the 1996 Act, challenging the award on the basis of serious irregularity. The alleged irregularity was the arbitrator's refusal to admit further expert psychiatric evidence from Dr Harris as to Mrs Shuttari's mental state at the time of the relevant transaction.

7. By order dated 20th May 2004 the Deputy Judge dismissed the proceedings and refused permission to appeal.

8. In November 2004 Mr Shuttari lodged a legal submission at the European Court of Human Rights, seeking to challenge the arbitrator's interpretation of the meaning of "dishonesty" and his refusal to admit the psychiatric report pursuant to Article 6 of the European Convention. The admissibility chamber of the ECHR rejected her application. Those acting for the SIF point out that a legal submission to the ECHR could only be made once all domestic remedies had been exhausted (see Article 35 of the ECHR) and thus, the respondents assert, that Mrs Shuttari would have had to have stated that she had exhausted all domestic remedies as a basis for making her submission.

9. In the meanwhile, the SIF, having an order for costs in their favour, both from the arbitrator and the deputy judge, took steps to recover those costs. That involved ultimately issuing a statutory demand and taking steps to have Mrs Shuttari declared bankrupt.

10. The Law Society furthermore commenced proceedings before the Solicitors' Disciplinary Tribunal. On 8th February 2006 the Solicitor's Disciplinary Tribunal struck Mrs Shuttari's name from the roll of solicitors. Mr Diamond, for Mrs Shuttari, asserts in his skeleton that the incident relating to the report on title, which dated back to 11th June 1991, was the primary cause of the application of the Law Society. It seems that the Disciplinary Tribunal admitted the evidence of Dr Harris and that a lesser charge of improper, alternatively reckless, conduct was proceeded with rather than a charge of dishonesty. Mr Diamond submits thus that two professional bodies established under the Solicitors' Act 1974 had arrived at various determinations on the same subject matter and he suggested "the comity of the Rule of Law and the integrity of the judicial process is weakened."

11. On 19th July 2005 Mrs Shuttari had lodged an appellant's notice seeking to appeal the decision of the Deputy Judge out of time. On 12th September 2005 Mrs Shuttari was granted permission to amend her appellant's notice. It was then on 7th November 2005 that permission to appeal was refused on paper and on 8th December 2005 that Chadwick LJ ruled as he did.

The new grounds of appeal

12. It is not easy to ascertain with any certainty how Mrs Shuttari, through Mr Diamond, would seek to argue a substantive appeal if permission were granted. But, in essence, the submission would appear to be that, because membership of the SIF was compulsory, Mrs Shuttari did not "freely agree" to the arbitration provision. The argument then is, being compelled to arbitrate rather than take her dispute to the courts, there has been an infringement of Article 6 of the ECHR. Thus the argument is that the court, as a public authority, should not recognise the award of the arbitrator. If the award of the arbitrator is a nullity then the submission is that the decision of the Deputy Judge would also be a nullity and the court should so declare.

Should permission to appeal be granted, including extending time?

13. We are clear that permission to appeal should be refused simply on the grounds that Mrs Shuttari could have no reasonable prospect of challenging the validity of the arbitration procedure applied in this case and has no basis for seeking any extension of time. First, it was she that invoked the arbitration procedure. If she were to contend that the arbitration clause was void or inoperative, she could and should have commenced court proceedings and challenged the validity of the same in resisting any application for a stay that might have been made (see s.9(4) of the 1996 Act). Second, even once an arbitration award had been made, she challenged the award under s.68 of the 1996 Act. That application confirmed the validity of the arbitration procedure as such, simply seeking to challenge the conduct of the arbitrator under s.68. Third, she actually invoked the arbitration procedure prior to the commencement of the Human Rights Act. The Human Rights Act came into force in the United Kingdom on 2nd October 2000 and although it is given a limited retrospective effect by section 22(4) it would not have been open to Mrs Shuttari to challenge the arbitration clause on the grounds that she now invokes at the time of commencing the same. Fourth, she has taken fifteen months following the order of the deputy judge to make any application to the Court of Appeal. It seems her only excuse for taking that time is that it is asserted that it took fifteen months to decide whether to challenge the Judge's conclusion. As Chadwick LJ himself stated, that is "no ground for extending time".

14. In the circumstances we dismiss the application for permission to appeal.

Paul Diamond (instructed by Shuttari Paul & Co, Solicitors) for the Appellant
Alex Hall Taylor (instructed by Beechcroft LLP) for the Respondent