United Tyre Company Ltd v Born [2004] APP.L.R. 07/16

CA on appeal from QBD Mercantile Bristol Court (HHJ Havelock-Allan QC) before Mance LJ; Mr Justice Munby. 16th July 2004

LORD JUSTICE MANCE:

1. This is a renewed application for permission to appeal in respect of a decision of His Honour Judge Havelock-Allan QC, sitting in the Mercantile Bristol Court, on 18 March 2004, reflected in an order of the same date. The issue which he decided was a preliminary issue agreed between the parties, whether the claimant was entitled to a determination of the defendant's costs owing to the claimant's delay in bringing a claim and he determined that despite such delay the claimant was entitled to such a determination.

2. The application is one under Section 28 (3) of the Arbitration Act 1996 which relates to the liability of parties to arbitrators for fees and expenses. It provides, first, in sub-section (2):

   "(2) Any party may apply to the court upon notice to the other parties and to the arbitrators which may order that the amount of the arbitrator's fees and expenses shall be considered and adjusted by such means and upon such terms as it may direct.

   (3) If the application is made after any amount has been paid to the arbitrators by way of fees or expenses the court may order the repayment of such amount, if any, as is shown to be excessive but shall not do so unless it is shown that it is reasonable in the circumstances to order repayment."

   That therefore is the context in which the issue before the judge arose.

3. It is true, as counsel submits, that the whole of the Arbitration Act is imbued with the principles stated firmly in Section 1 (a). According to this Section the provisions of this Part of the Act, which include Section 28, are founded on (inter alia) the following principle and should be construed accordingly:

   "(a) The object of arbitration is to obtain a fair resolution of disputes by impartial tribunal without unnecessary delay or expense ..... "

   That, in its terms, is directed to the speedy resolution of disputes before the arbitrator, and not in terms to disputes with an arbitrator regarding his fees. But I accept that the underlying principle that disputes should be speedily initiated and resolved also applies in relation to an arbitrator's fees and is an important consideration when one comes to apply the actual test in Section 28 (3), which involves consideration of whether or not it is reasonable in the circumstances to order repayment. In the normal case one would expect a judgment on that test to be formed in the light of all the circumstances including a consideration of the nature of any suggested excess in the fees charged. However here the parties agreed that one issue should be segregated and tried as the preliminary issue, and that issue was whether the claim was doomed to failure because of the claimant's slowness in mounting it. The judge expressed his attitude to that in terms which have not been criticised by counsel. He said: *"I do not consider that I should disallow relief in this case unless I were equally prepared summarily to dismiss the claimant's application on the ground of delay."*

   By that, I think, as counsel also accepted, that he was indicating that he should assume that the claim might be good, and should concern himself with the question whether it must fail, however good it was, because of the excessive delay.

4. Counsel submits that the judge made certain errors of principle which undermine his exercise of judgment under Section 8 (3). Before going to them, I shall set out a brief chronology to indicate the nature of the delay in this case which was certainly in excess by a considerable amount of what one would expect or regard as reasonable.

5. The applicant was appointed as arbitrator on 30 November 1999. On 3 December 2001 he made his award save as to costs and raised an invoice for fees incurred. He had previously, on 30 September, raised an interim invoice for £2,500 plus VAT. The invoice which required to be paid in order to take up his award on 3 December 2001 was for the sum of £44,900 plus VAT which included, on his part, 282 hours at £150, secretarial assistance of 170 hours at £30 an hour and the hire of rooms for five days at £500 a day.

6. The dispute was between United Tyre Company Ltd and Ego Computers Ltd and was, as the applicant has said in correspondence and as is no doubt true, a complicated dispute which involved some detail. In the event it appears that the respondent only succeeded in respect of one small matter involving a sum of £15,000 against an amended claim of over £140,000. The result was that issues as to costs were obviously likely to arise. When the respondent paid the applicant's fee in order to take up the award, it did so on 4 December 2001 under express reservation of a right to apply to the court to determine reasonable fees which it expressed as arising under Section 64. That was a misconception but not one the applicant ever corrected. It has subsequently been corrected and the application was ultimately pursued under Section 28.

7. On 8 February 2002 the applicant notified the parties that his award as to costs was available on payment of fees. That award is in the bundle. It is a very short award, just stretching to two pages, and, on the face of it, a simple award which ordered the respondent to pay one-tenth of the claimant's costs of the reference and the claimant to pay nine-tenths of the respondent's costs of the reference. That is not perhaps the type of order that the court might warm to, because it involves a double taxation, but, be that as it may, that was the arbitrator's award. He accompanied it with another fee note indicating that it had taken him 20 hours to prepare this award at £150 an hour and, in addition, four hours of secretarial assistance at £30 an hour. On the face of it, that figure does raise one's eyebrows, at least as regards the time taken. The respondent paid additional fees on 23 February, and the award was duly issued to the parties.

8. A month later on 20 March the respondent made its first request for a breakdown seeking the applicant's file notes. On 21 March the applicant responded, somewhat surprisingly in my view, to the effect that he was functus officio, whatever that may have meant, and also indicated his belief that a time limit which he did not define had expired. On 11 April the respondent replied that it was unaware of any time limit and at no subsequent point did the applicant explain precisely to what time limit he was referring. On 15 April the applicant did provide a general breakdown of fees which consists of a number of pages listing units of hours spent on matters. From that, it appears that his minimum charging unit seems to have been a quarter-of-an-hour, that he spent a very substantial time making a précis of trial bundle documents before trial, reviewing files and reading the respondent's skeleton argument (for which 10 hours at a weekend are claimed), preparing a draft of his award (for which five days are claimed) and attending and hearing the argument (for which another five days are claimed).

9. The respondent then delayed until 24 June before complaining again about the level of fees, having, it said, considered the position with its clients and taken instructions. It set out as its four most notable worries the fact that letters had taken up to two hours to prepare, the fact that drafting the award took five days, the fact that reading the skeleton took ten hours and the fact that there was a requirement for 170 hours of secretarial assistance. It sought a print-out, ie, the documentary basis from which the typed list of time spent had been derived.

10. On 28 June the applicant gave a general response rejecting the complaints without going into any of the matters raised by the respondent. That was a five-line letter and it also notified the respondent: *"In reply to your specific question, I do not have a print-out."*

Subsequently - in the context of the present proceedings before the judge - it has apparently been said that there had been documentation from which the typed list was prepared but it was destroyed when the typed list was produced.

11. The respondent, on 26 July, a month later, wrote in more detail having taken instructions, saying that it had particular difficulties with the breakdown in certain areas, being (1) the charging of fifteen-minute units rather than the usual six-minute units; (2) the excessive secretarial assistance which, to some degree, would usually be part of general overheads; (3) the cost of rooms, in view of the fact that one of the rooms was the arbitrator's own usual room and would thus be part of his own usual overheads within his charging rate; (4) the time noted as spent on the trial which (it was said) was not correct and did not reflect the start and finish times; and (5) the excessive time spent in the review of evidence and, most notably, in the review of apparently every trial bundle, a great proportion of which simply contained invoices issued. In the circumstances, the respondent said that there were only two options, one being to apply to have the costs taxed, the other being to accept the £15,000 plus VAT refund in full and final settlement.

12. There was no response to that letter and no further correspondence coming directly from the applicant. He, it appears, retired from the partnership of the firm of chartered accountants in which he was the senior partner on 2 August 2002, leaving the firm on 15 August 2002 to reply: *"We would advise you that Mr G I Born has now retired from the practice and the current senior partner is on annual vacation. A reply will be actioned shortly after his return."*

That is a little surprising since clearly the matter was a matter for Mr Born personally, not his former firm. Be that as it may, on 7 October, after some delay by the applicant or his firm, the applicant's firm did reply saying that they had now spoken to the applicant and -

"We summarise briefly Mr Born's position:

1 The matters to which you refer in the second paragraph of your letter are misconceived and factually incorrect."

That is a reference to the respondent's letter of 26 July. No explanation was given as to each or any of the suggested misconceptions or errors.

"2 In any event, any application for taxing costs would be and would have been on 26 July 2002, hopelessly out of time."

13. On 10 October the respondent said: *"We point out that it is perfectly usual for the court to provide permission for a taxation to continue where sensible negotiations have taken place beforehand. In this case we have been attempting to reach some form of agreement with you and in view of your particularly unhelpful stance, we have little doubt that the Court will provide such permission in any event."*

On 31 October the applicant's former firm confirmed its belief that any application would be hopelessly out of time and said it was quite untenable to suggest that "sensible negotiations have taken place". Nonetheless it seems to me that the respondent was approaching the matter, albeit slowly, in a sensible attempt to identify the position and to reach some agreement, whereas the applicant's attitude was at all times a general denial and no more.

14. On 21 November the respondent wrote: *"Once again you have failed to provide any authority for your continued insistence that a request for taxation is out of time -* "and asked again for any such authority. It went on - *"We shall also be exhibiting the correspondence since February of this year which we consider displays a most unhelpful attitude. It is also apparent that our client has been charged for time which quite simply was not chargeable. The last day of*

the hearing is quite clearly an indication of this and in that respect, if a court is with us, we shall be making a report to the Chartered Institute of Arbitrators as well as a report to the Chartered Institute of Accountants."

The applicant's former firm replied to that only on 3 January 2003, saying: *"Mr Born and we have reviewed the matter fully and we have nothing to add to our letter dated 31 October."*

15. There was a substantial delay by the respondent until 14 May 2003 when the claim under the Arbitration Act was issued, initially under the wrong section but now corrected so as to be under the right section. That delay, on the evidence, is attributable to solicitors and counsel. It may be that the issue before the judge below and before this court if it came to this court, is to some extent as to whether the original claim should be allowed to proceed as against the arbitrator or whether there might not be some subsequent substitute recourse against lawyers. That is however only a matter of background.

16. Counsel, in his submissions before us, recognises the difficulty of any challenge to a first instance judge's exercise of discretion or judgment in this court, but submits that there is more to this application for permission to appeal than that. He submits that, although the judge identified the correct factors, he failed to apply them in his reasoning. The judge, in particular, quoted the Departmental Advisory Committee Report which preceded the Arbitration Act which, in reference to Section 28 (2) and (3), states, amongst other things: *"However, the court must be satisfied that it is reasonable in the circumstances to order repayment. Thus an applicant who delays in making the application is likely to receive short shrift from the court, nor is the court likely to order a repayment where the arbitrator has in good faith acted in such a way that it would be unjust to order repayment ..... "*

The judge summarised that and the defendant's case in the light of it as follows: *"The defendant's case is, first, that the claimant has been guilty here of unwarranted delay in bringing the present application and on that ground alone, even if the delay cannot be shown to have caused prejudice to the defendant, the claimant should be given 'short shrift' and the application should be refused. Alternatively and secondly, the defendant has altered his position in the intervening period. He has retired from practice with the partnership and his fees have been distributed amongst his partners. For that additional reason, it would be unreasonable now to order repayment. If it would not be reasonable to order repayment, then it follows that the court ought to refuse the application for an adjustment of the bill."*

17. The judge went on to deal with the question of prejudice, ie the second point. After considering the facts, he roundly rejected the suggestion that there was or would be any prejudice at all in allowing an assessment of the applicant's costs. After doing so, he said at page 11D: *"I come therefore to the question of the overall delay. Here, in my judgment some legitimate criticism can be made of the claimant and its legal advisers."*

He then referred to the facts which he had already set out in some detail. It is apparent from the account which I have given that what he said was entirely correct, that there was here unreasonable delay. He went on: *"Mr Knight is in some difficulty in showing that any real prejudice has arisen as a result of the delay ..... So this case raises in a stark form whether the court will exercise its discretion to decline relief under section 28 (2) and (3) of the 1996 Act where there has been delay in bringing the application, but the delay has caused no identifiable prejudice. I have no doubt that it will. If it were otherwise, then a party to an arbitration will be under no constraint in bringing an application under section 28, other than the six-year time limit that would apply under the Limitation Act."*

I interpose that it seems to me, and counsel accepted, that the judge was not stating there that he had no doubt the court would in every case where there was unreasonable delay reject the application, but that he was indicating that he had no doubt that it would in fact be "*likely*" to (to echo the words of the Departmental Advisory Committee Report),

18. The judge went on to ask himself -

"Is this an appropriate case for the court to decline to grant relief on the grounds of delay? Mr Knight submits that if the claimant's application were allowed to proceed here, the court's decision would be authority that a fifteen-month delay in commencing an application under section 28 is permissible. That would drive a coach and four through the policy underlying the 1996 Act. I disagree. It seems to me that each case must depend on its own facts. This is a case which falls very close to the borderline, but I have come to the conclusion that the claimant has not lost its entitlement to an adjustment of the defendant's fees by reason of delay in this case.

The question is finally" **(that must be "finely"**) *"balanced but I have come to that conclusion by a narrow margin because, first, there is an absence of any real prejudice to the defendant by reason of the delay that has elapsed, and secondly, because the fact is that the claimant gave notice at a fairly early stage of its intention to challenge the defendant's fees and of its intention to apply to the court if its offer of compromise was not accepted, even if it did not issue the challenge as promptly as it should have done. I do not consider that I should disallow relief in this case unless I were equally prepared summarily to dismiss the claimant's application on the ground of delay."*

19. Counsel submits that there were two grounds on which this application could have failed pursuant to the preliminary issue: (1) prejudice, and (2) unreasonable delay. He submits that having held that there was no prejudice the judge was then wrong to re-introduce that consideration into the second ground on which he could have refused relief - delay. He submits that unreasonable delay should itself have been regarded as a bar; as I understand it, in effect, an automatic bar to relief under Section 28. Lack of prejudice should have been disregarded as irrelevant because unreasonable delay itself means that it could not be reasonable to order repayment.

20. That does not seem to me to be correct. It does not seem to reflect the Departmental Advisory Committee's intentions. What they said was that it was "likely" that short shrift would be given to applications which were not made within a reasonable time. The test under Section 28 (3) is not whether the application is made within a reasonable time. There is no time limit stated under Section 28 (3). The test under Section 28 (3) is one which allows the court to order repayment but states that it shall not do so unless it is shown that it is reasonable in the circumstances to do so. No doubt, delay is a factor. But it seems to me that in the light of the facts regarding the fees and the correspondence which I have outlined, which are all part of the relevant circumstances of the case, the judge was bound to conclude that it would require either clear evidence of prejudice, of which there was none, or a strong case of delay before he refused relief on that ground alone. That, as I take it, is the general gist of his statement that he should disallow relief unless he were equally prepared summarily to dismiss the application on the ground of delay.

21. The judge regarded this case, understandably, as finely balanced, in other words, as very close to the border. He formed a judgment that he should not regard the application for assessment as barred by the undoubtedly unreasonable delay.

22. The applicant also submits that the judge erred in the second factor which he took into account, that is the fact that the claimant gave notice at a fairly early stage of its intention to challenge the defendant's fees and sought, in correspondence, to pursue its inquiries and to obtain sensible answers from the applicant. The applicant submits that, far from assisting the respondent, that exacerbates the respondent's position because it shows that the respondent knew that it had a potential claim which it did nothing to pursue, at least formally. However the point that the judge was making was not just that the respondent knew, it was that the respondent knew and put the applicant throughout on notice of the issue regarding the fees and regarding its intention to challenge them. It seems to me clear that until early 2003 the applicant could never have thought that that intention was abandoned, however much the applicant's firm was asserting that the respondent was too late to pursue its undoubted intention.

23. There was delay from January 2003 to the issue of the claim, but there is nothing to indicate that during that period of delay the applicant was ever lulled into thinking that this challenge had gone away and was not going to come to fruition.

24. In the end it seems to me that the challenges as to principle fail and that the submission comes down to this, that the delay was so long that it must be unreasonable to order any investigation into the reasonableness of these very large costs, so that relief should be refused in limine pursuant to the preliminary issue. Since the parties have chosen to have a preliminary issue on one aspect of the factors which bear on Section 28 (3), I think one must approach the exercise of judgment, as counsel accepted, on the basis that the challenge to costs may succeed. The judge approached it on that basis and decided, as a matter of judgment, that he could not conclude that the claim must fail on that ground. The discussion after judgment indicates that everyone viewed that as the end of the challenge as regards delay and viewed the only issue that would follow from the judge's order as being one of the reasonableness and appropriateness of the fees claimed.

25. The question remaining is the one which was addressed by counsel for the applicant at the outset of his oral submissions, and which he accepted would be difficult to bring before this court, that is whether there is any real prospect of this court holding that the judge was so plainly or fundamentally wrong in the judgment he formed, that this court would interfere with it. I, for my part, would see no such real prospect once one concludes that he exercised his judgment on the basis of a correct appreciation of the principles and did apply the principles advanced as part of counsel's submissions.

26. I would refuse this renewed application for permission to appeal accordingly.

MR JUSTICE MUNBY:

27. I agree with my Lord. Against the background of Section 28 (3), it was for the claimant to establish two things. First, that the fees claimed were "excessive" and, secondly, that "it is reasonable in the circumstances to order repayment".

28. The parties had agreed that there should be tried by the judge a preliminary issue as to whether the claimant was entitled to the determination of those fees - "though delay was made in bringing the claim". As it seems to me appropriately and consistently, both with the underlying question in Section 28 (3) and the preliminary issue before him, the judge identified the question which he had to decide as being - "is *this an appropriate case for the court to decline to grant leave on the ground of delay",* adding "*it seems to me that each case must depend on its own facts."* The judge further directed himself that in the particular circumstances of the case - *"I do not consider that I should disallow relief in this case unless I were equally prepared to summarily dismiss the claimant's application on the ground of delay."*

That self-direction was not, as I understood Mr Knight's argument, challenged before us.

29. The judge recognised and took into account that, as he put it, "some legitimate criticism can be made of the claimant and its legal advisers" in relation to their responsibility for the overall delay. He also recognised that the claimant had "not issued the challenge as promptly as it should have done". Those were weighty factors to be placed in the scale against allowing the matter to proceed. The judge recognised, as he put it, that the question was finely balanced. He took the view that the case fell very close to the borderline. But his conclusion was that the claimant had not lost his entitlement to adjustment of the defendant's fees by reason of delay. For that

conclusion he gave two reasons. First, "there is an absence of any real prejudice to the defendant by reason of delay", and, secondly, "because the fact is that the claimant gave notice at a fairly early stage of its intention to challenge the defendant's fees and of its intention to apply to the court if its offer of compromise was not accepted". Those were the two factors which, in substance, he put into the opposing scale in the balance.

30. It was, as it seems to me, for the judge, in the exercise of a process of judicial evaluation and judgment, to decide how the balance fell. In my judgment, although, as the judge recognised, the case fell very close to the borderline and was finely balanced, it was open to him in the exercise of his judicial judgment to conclude that the balance fell as, in the event, he said it did.

31. Despite everything pressed on us by Mr Knight, I can detect no error of principle or approach in the judgment of the judge. His exercise of judicial evaluation fell within the generous ambit within which reasonable minds may differ. Despite everything pressed upon us, I do not see any prospect of this court concluding that the judge exercised his discretion in a way in which no court, properly directed, could have done.

32. Accordingly for those reasons, in addition to those given by my Lord, I would dismiss this renewed application for permission.

Order: Application dismissed

MR EDWARD KNIGHT (instructed by Dowse Baxter of London) appeared on behalf of the Appellant
The Respondent was not represented and did not attend