Majorboom Ltd v National House Building Council [2008] APP.L.R. 10/24

JUDGMENT : THE HONOURABLE MR. JUSTICE COULSON: TCC. 24th October 2008.

A. Introduction

1. This is an application for permission to appeal on various alleged questions of law arising from the Award of the Arbitrator, Mr. Allan Wood, dated 11th March 2008.

2. The background is this. The applicant developed a property at Stonebridge House, Coburg Street in Manchester, converting it into flats. Following completion of the works a separate company, Stonebridge House Management Company Limited ("SHMC") was set up by the applicant to manage that property. Mr. Barry Angel, a director of the applicant company, was also a director of SHMC and indeed the director of another company, Invoke, who owned one of the flats at Stonebridge House.

3. There were defects at Stonebridge House for which, pursuant to the rules governing the relationship between the applicant and the respondent, the respondent held the applicant liable. The respondent had various rights against the applicant in those circumstances. It is unnecessary to set out all of the rules because, for the purposes of this application, the only rule that matters is rule 27h. That provided:

   "NHBC may apply this Rule …

   (ii) after the expiry of the period in subparagraph (i) above where notice has been given by any person during that period under an NHBC Scheme Document in respect of Defects or Damage to which the notice relates."

4. In the arbitration between the parties, the applicant contended that "*no notices falling under rule 27h(ii) were given during the Initial Guarantee Period in respect of the alleged defects or damage. Thus Majorboom has no liability to the NHBC under rule 27".* This issue, therefore, raised fair and square the nature of Mr. Angel's duties and obligations in his various roles and the extent, if at all, to which there was overlap between them, such that notices written or received by one of his companies might be regarded as notices received by another. This crucial issue was dealt with by way of a preliminary issue before the Arbitrator. I note that the applicant chose not to adduce oral or written evidence from Mr. Angel at the one day hearing which preceded the Award.

5. In his Award, the Arbitrator concluded that the applicant was wrong and that there were notices falling under the rubric of rule 27h(ii). The relevant findings are scattered throughout his Award and it would be unnecessarily wearisome for me to set out all of the relevant paragraphs in this judgment. However, in order to give a flavour of the Arbitrator's findings, I set out some of the paragraphs of his Award as follows.

   "*37. I find that the (Rule 27h(ii)) provision for notice in writing **'by any person'** during the Initial Guarantee Period, of Defect or Damage is clear and express, and subject to the caveat that the notices may be given **'by any person'** and what is set out below regarding actual or constructive notice, I accept the claimant's first proposition (as stated at paragraph 24.1 of its statement of case) that for the purpose of Rule 27h(ii) notices of alleged Defect or Damage must be in writing for the respondent to be able to apply Rule 27 to any alleged Defects or Damage to homes at Stonebridge House.*

   …

   39. Dealing first, however, with paragraph 5.1 of its statement of case, the respondent stated that SHMC acted as agents for and on behalf of the owners and SS were employed by SHMC and acted on behalf of SHMC and the Owners. Whilst the claimant did not admit such relationship I find no proper basis for such non-admission. I note that each Home Owner at Stonebridge House also became a shareholder in SHMC and that SHMC had appointed SS as its managing agents during a period when the claimant company (through Mr. Angel) had directorial involvement and/or responsibilities in SHMC. After a consideration of the submissions I find that both SHMC and SS were the agents of and acted for and on behalf of the Home Owners in dealings with others including the claimant and AHL.

   …

   48. After a consideration of the submissions of the parties and the documents provided in support of their respective cases, I find that the documents and facts relevant to this case are not of a limited public availability (they affect potentially 46 properties) and could possibly be categorised as of a general character, such that Mr. Angel (as an ex director of SHMC and/or on behalf of SHMC), is unable to claim protection through any alleged confidentiality as between SHMC and the claimant. Further, I find that Mr. Angel, as a director of SHMC and coextensively a director of the claimant with obligations and duties in respect of the construction of the Stonebridge House development, was in a position where he knew and/or should have known about the allegations/notices of Defect or Damage to Homes. To the extent that he did not know of certain specific notices/allegations, I find he is deemed to know of such through his position as a director of SHMC in the period he was a director of SHMC. I also find that this is not a case where posting or delivering a notice to a company address is relevant.

   *49. In respect of the cases referred to and relied upon by the claimant, I find that whilst the **'common officer'** in this case (Mr. Angel) was, in his letter dated 20th June 2000 to SS, acting in the interests of Invoke Properties in respect of Flat 4G, he was not acting solely in Invoke Properties' interests in this period when he was also a director of SHMC and that the said letter was sent to SS on the basis, and with the intention, that SS/SHMC should require the claimant to rectify the water leak into Flat G4 ['my flat' as Mr. Angel referred to it in his letter to SS dated 20th June 2000] as part of its obligations in the Initial Guarantee Period.*

   50. Further, I find that Mr. Angel had a duty as an officer of SHMC to notify the claimant of correspondence/notices of alleged Defects or Damage (i.e. the allegations of defective works and damage arising from the claimant's

works) and further I find Mr. Angel was under an equal duty from the claimant to receive such information in his capacity as a director of the claimant company. I find it is open to me to impute to the claimant the knowledge acquired or deemed to have been required by Mr. Angel as director of SHMC and I did [do] so.

51. I find the claimant had actual or constructive notice of Defects or Damage to the extent that SHMC and SS received notices in writing from owners, including Mr. Angel of Invoke Properties, or to the extent that there was written evidence of such notices having been given by owners to SHMC/SS and I find that such actual or constructive notice and knowledge was acquired by Mr. Angel in the period he was a director of SHMC (i.e. in the period to 27th January 2002.)"

In paragraph 52 of his Award, the Arbitrator identified the notices that fell into that first category. Thereafter, at paragraph 53, the Arbitrator dealt with a second, stand-alone notice of 26th July 2001. He concluded that the notice in question fell under Rule 27h(ii), and was evidence of either actual notice or constructive notice. He then went on to deal with the third and final category of notice:

"54. In respect of the wider issue regarding any notice or knowledge of Defects or Damage that SHMC or SS had, I find that it similarly followed (as above) that through Mr. Angel's involvement as director of SHMC (in the period Mr. Angel was director of SHMC) Mr. Angel and the claimant had either actual or constructive knowledge of the matters of Defect or Damage that were known to SHMC or SS.

55. I find that the claimant had been actually or constructively notified in writing of Defect or Damage to Homes to the same extent as SHMC or SS had set out any such matters of Defect or Damage in writing to others or there is evidence of such notice(s) having been given by owners to SHMC/SS in the period Mr. Angel was a director of SHMC."

That third category of notices was then the subject of detailed findings by the Arbitrator at paragraph 56 of the Award. Paragraph 56(d) dealt with a letter from SS to the residents of certain flats, which letter was dated 18th July 2002.

6. The questions of law in respect of which the applicant seeks permission to appeal under section 69(3) of the Arbitration Act 1996 are set out in the arbitration claim form. I should set out those questions in full:

"A. Whether by reason of Mr. Barry Angel being, as the Arbitrator found, a director of Stonebridge House Management Company ('SHMC') in the period up to his resignation on 27th January 2002 and also a director of the claimant during that period, the claimant had actual, constructive or imputed knowledge of written notices of Defects or Damage referred to in paragraphs 52 and 56 of the Award from or on behalf of Owners to SHMC or its managing agent, Stevens Scanlon ('SS'). Also, in so far as necessary to determine that question, the following questions of law:

A1 whether such notices were confidential to SHMC such that if Mr. Angel had actual, constructive or imputed notice of them he had a duty as a director of SHMC not to disclose them to others;

A2 whether through his position as a director of SHMC Mr. Angel is deemed to know of such notices;

A3 whether through his position as a director of SHMC Mr. Angel had a duty to notify the claimant of such notices;

A4 whether through his position as a director of the claimant and/or of SHMC Mr. Angel had a duty to receive such notices, that is notices from Owners to SHMC or SS in his capacity as a director of the claimant; and/or

A5 whether, if such duties are imposed on Mr. Angel, such actual, constructive or imputed knowledge of such notices as he had is to be imputed to the claimant.

B. Whether by reason of Mr. Barry Angel being, as the Arbitrator found, a director of Stonebridge House Management Company ('SHMC') in the period up to his resignation on 27th January 2002 and also a director of the claimant during that period and having regard to the Arbitrator's decision that notices for the purpose of Rule 27h(ii) had to be in writing by or on behalf of an Owner, the claimant was 'actually or constructively notified in writing of Defect or Damage to Homes to the same extent as SHMC or SS knew of matters of Defects or Damage and/or had set out any such matters of Defect or Damage in writing to others' by the letters referred to at paragraph 56 of the Award. Also, insofar as necessary to determine that question, the questions of law referred to under A1 to A5 above.

C. Whether if, contrary to the claimant's case, the Arbitrator's decision on Question A and Question B is correct, such actual, constructive or imputed knowledge can encompass the SS letter of 18th July 2002 and/or if contrary to the claimant's reading of Award the court concludes that the Arbitrator has found that this letter evidences written notices from Owners to SHMC or SS, such notices."

B. The Relevant Principles Under Section 69

7. Pursuant to section 69(3) of the Arbitration Act 1996, the applicant has to satisfy the court:

(a) That the question is one of law based on the Arbitrator's findings of fact (section 69(3)(c));

(b) On which question the Arbitrator was obviously wrong (section 69(3)(c)(i)), unless it can be shown that the question is one of general public importance, where the test is that the decision is "*at least open to serious doubt*" (section 69(3)(c)(ii));

(c) The determination of the question will substantially affect the rights of one or more of the parties (section 69(3)(a));

(d) The question is one that the Arbitrator was asked to determine (section 69(3)(b));

(e) That it is just and proper for the court to determine the question, section 69(3)(d).

8. Despite the clear warning at paragraph 286 of the DAC report which preceded the 1996 Act, applications under section 69 can still have the effect of dressing up findings of fact as an issue of pure law. A mixed question of law and fact *may* be the subject of a section 69 application, although in such circumstances the courts have repeatedly said that there can be no error of law if the solution reached by the arbitrator is within the permissible range of solutions open to him in the circumstances: see ***The Matthew*** [1992] Lloyds Rep 323 and ***Foleys Limited v. City and East London Family and Community Services*** [1997] ADRLJ 401.

9. The interplay between law and fact in this context is the subject of a detailed analysis at paragraphs 50 to 65 of the judgment of Ramsey J in ***London Underground Limited v. Citylink Telecommunications Limited*** [2007] EWHC 1749 (TCC). He confirmed that a court cannot interfere with a finding of fact made by an arbitrator on an application under section 69, and that such findings of fact had to be the accepted basis for an appeal on a point of law under section 69(3)(c).

10. The only other principle which perhaps should be restated at the outset is that, as a general rule, the courts try to uphold arbitral awards; see the judgment of Bingham J (as he then was) in ***Zermalt Holdings SA v. Nu-Life*** [1985] 2 EGLR 14.

11. With those principles in mind, I turn to consider the detail of this application. I do so by making two general observations first before going on to address the specific issues raised by the three questions of law identified by the applicant.

C. General Observations

12. First, I am in no doubt that, to the extent that the issues raised by the applicant are properly described as matters of law, they are not matters of general public importance. The operation of one sub-rule concerned with the administration of the relationship between the NHBC and its members is unlikely to excite general interest, even in legal circles. In addition, I reject the suggestion that the duties and rights of a person who is a director of more than one company at the same time is a point of law of general interest. In my experience such issues are almost entirely dependent on the facts, and the authorities to which I was taken only serve to bear that out (see paragraph 17 below).

13. Secondly, following on from that first point, I conclude that the questions of law that I have set out in paragraph 6 above are, in reality, no such thing. The questions raised are principally, if not exclusively, matters of fact. It seems to me that the applicant is seeking to reverse the entirety of the Arbitrator's findings on a whole raft of factual matters, in particular those relating to the various different notices which the Arbitrator carefully considered in his Award, and in respect of which he set out clear conclusions. In my judgment, the applicant is not entitled to proceed in that way; these were findings of fact made by the Arbitrator and cannot now be challenged.

14. Section 69 requires the identification of clear, crisp questions of law. It obliges an applicant to contend that, in view of the arbitrator's findings of fact A, B and C, his subsequent finding of law at X was obviously wrong. The syntactically challenging issues set out in paragraph 6 above do not, I think, begin to meet that test, and their detailed nature only serves to demonstrate that they are not, in reality, questions of law at all. That said, however, I do recognise that, when arguments are refined, it can sometimes be the case that an applicant will be able to identify rather more clearly in argument the issue(s) of law on which he seeks permission to appeal. To an extent, that has happened in this case, and I have been grateful to Mr. Aeberli for setting out orally, in much clearer terms, the issues of law which he says arise from the Award. It is to those issues that I therefore turn.

D. Question A

(a) Actual Knowledge

15. It is submitted on behalf of the applicant that the Arbitrator did not make findings of fact as to actual knowledge because, on analysis, the Award only sets out what was necessary for such findings of fact to be made, and does not go on actually to make them. Having set out the relevant paragraphs of the Award in paragraph 5 above, I reject that submission in its entirety. It seems to me clear beyond any doubt that the Arbitrator made a series of findings of fact, and those include particular findings of actual knowledge.

16. Mr. Aeberli engaged in a deconstructive analysis of the words in paragraph 51 of the Award to try and persuade me otherwise. It was an analysis which would not have found favour with F.R.Leavis and it did not receive a very much warmer welcome from the court. His principal complaint was that the Arbitrator wrongly had recourse to a formulation of "*actual and/or constructive knowledge*". It is true that in certain circumstances that may not be a very helpful formulation, but I have considerable sympathy for the Arbitrator in this case; because Mr. Angel did not give evidence, there were always going to be occasions when the Arbitrator might not be able to say for sure into which category the relevant knowledge fell.

17. That left the possibility that the findings of fact led to or arose out of an erroneous application of a legal principle. During the course of his submissions, Mr. Aeberli said that there was a principle of law that a director of both X and Y companies was not automatically obliged to notify X company of information he received whilst acting as a director of Y company. In support of that submission he relied on the Court of Appeal decision in ***El Ajou v. Dollar Land Holdings*** [1994] 2 All ER 685. Having considered that decision, it seems to me that it is, in the main, a decision on its own particular facts, a conclusion which Mr. Aeberli accepted. The highest that it can be put is that ***El Ajou*** is authority for the proposition that, without more, the mere fact of twin directorships did not, on its own, impose a duty on a director of two companies to disclose information learned in one capacity to the other company.

18. The sting, of course, is in the words "*without more*". In the present case the Arbitrator made clear findings, in the paragraphs which I have set out above, about the duties and obligations owed by Mr. Angel in these particular circumstances. I have in mind particularly paragraph 50. Those, it seems to me, were clear and unambiguous findings of fact. On the basis of those findings he found that, via Mr Angel, the claimant company did have actual knowledge of the notices which he identified. It seems to me that the applicant is therefore bound by those findings and there can be no basis for any appeal.

(b) Deemed Knowledge

19. I accept Mr. Townend's submission that, if the applicant does not obtain permission to appeal on the complaint in respect of actual knowledge, then the issues as to *'deemed knowledge'* probably fall away in any event. But given the difficulty that the Arbitrator had in the absence of Mr Angel, and his use of the *'and/or'* prefix, it is appropriate for me to deal separately with the question of deemed knowledge.

20. Mr. Townend accepted that the mere fact that a person is the director of a company is not enough to fix that person with constructive knowledge of all documents sent to or retained by the company: see ***Re Wincham*** (1878) Ch. Vol. IX 329. But, he submitted, the Arbitrator did not adopt that approach here. He maintained that, although Mr. Angel did not give evidence – unlike the director in ***Re Wincham*** – the Arbitrator found as a fact on all the evidence that Mr. Angel, and therefore the claimant, did have deemed knowledge of the defects set out in the notices.

21. Based again on the paragraphs of the Award that I have set out above, I accept Mr. Townend's submission. On the findings made by the Arbitrator, in particular the findings which I have indicated, this was a conclusion that the Arbitrator was reasonably entitled to reach. This ground of appeal must therefore fail.

22. Finally, it seems to me that, not only was the Arbitrator probably right in reaching his conclusions as *to 'deemed knowledge',* but that also his decision was an appropriate and fair conclusion to be drawn from the material which he set out in his Award. This is not a case in which it could be said that the Arbitrator's Award encompassed some sort of glaring injustice. Indeed, on my understanding of the issues and the material in the Award, an injustice would have arisen if any other conclusion had been reached on the issues of actual or deemed knowledge.

E. Question B

23. The question repeats essentially all the points that I have already considered under Question A, but is limited to the Arbitrator's conclusion that his findings of actual and/or constructive knowledge also apply to notices *from* SHMC and SS to third parties. For the same reasons that I have already set out I consider that even if – which I do not believe – this was a finding of mixed fact and law, it was a conclusion which, based on his other findings of fact, the Arbitrator was reasonably entitled to reach.

F. Question C

24. This issue raised a separate and stand-alone point arising from paragraph 56(b) of the Award. Mr. Aeberli said that, given that the notice identified there was dated 18th July 2002 (which was six months after Mr. Angel ceased to be a director of SHMC) he, and therefore the applicant, could not be said to have actual or constructive knowledge of it.

25. It seems to me that the answer to that complaint can be found in paragraph 55 of the Award. The Arbitrator found that the applicant had actual or constructive knowledge of defects "*to the same extent*" as SHMC or SS had set out such matters in writing to others. The knowledge was not confined to a set date or constricted to a specific period. Mr. Townend acknowledged that the six months between the resignation of Mr. Angel and the writing of this particular letter dealing with the leak and the flooding was a long time, but he submitted that the finding (that the claimant had actual or deemed knowledge of the defects and damage in January, even though the letter was not written until July) was one which the Arbitrator was reasonably entitled to reach. I accept that submission. It was a finding of fact; further, to the extent that it matters, I consider that it was a finding which the Arbitrator was entitled to reach given his other findings.

G. Conclusion

26. It is unnecessary for me to go on and consider the other matters required by section 69 (was it an issue that he was asked to decide; does it affect the rights of the parties etc), although it does seem to me that, had I been persuaded that there was a finding of law on which the Arbitrator was obviously wrong, I would not have refused permission to appeal on those other grounds. However, since I have concluded that these are not points of law and that, in any event, the Arbitrator was not obviously wrong and was very probably right, I refuse this application for permission to appeal.

MR. PETER AEBERLI (instructed by Messrs. Howard Kennedy) for the Claimant
MR. SAMUEL TOWNEND (instructed by Messrs. Reynolds Porter Chamberlain LLP) for the Defendant