North Range Shipping Ltd. v Seatrans Shipping Corp. [2002] APP.L.R. 03/17

CA on appeal from QBD (David Steel J.) before Peter Gibson LJ; Aldous LJ; Tuckey LJ. 17th March 2002.

Lord Justice Tuckey: This is the judgment of the court:

1. S. 69 of the Arbitration Act 1996 severely limits the right of appeal to the courts. Unless all parties to the arbitration agree, the appeal must be on a question of law and with the leave of the court which:

"*(3) ... shall be given only if the court is satisfied –*

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that on the basis of the findings of fact in the award –

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(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."

There is no right of appeal to the Court of Appeal without leave of the court of first instance:

" *(8) .... which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.*"

2. S. 69 (5) enables the court determining an application for leave to appeal to do so without a hearing. In ***The Antaios*** [1985] AC 191 the House of Lords said that in granting or refusing leave to appeal under the predecessor provision to s. 69 contained in the Arbitration Act 1979 the court should follow the practice of the House and say no more than that leave was granted or refused. In a lecture given in October 1987 (Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award) [1988] 4 Arb. Int. 141) Bingham L.J. said he personally regretted that Commercial judges (to whom all applications for leave to appeal to the High Court are initially assigned) should have been enjoined against giving reasons in this way. In fact over the years the practice of commercial judges has varied. In ***Mousaka Inc.v Golden Seagull Maritime. Inc.*** [2002] 1 WLR 395 David Steel J. at p. 404 said that his practice was:

"*To go further than merely refusing leave (with or without express reference to the statutory criteria) and to give some reasons why I had concluded that the arbitrators were correct (or at least not prima facie wrong) on the merits.*"

However, having discovered a substantial variation in practice amongst commercial judges he said he had decided to adopt a common approach which was simply to refer to the statutory criteria.

3. The question which arises in this case is what the practice should now be in the light of Article 6 ECHR, although we first have to decide what if any jurisdiction we have to consider this question.

4. The way in which this question comes before the court is as follows. The applicant is the owner of the MV Western Triumph which it chartered to the Respondent on the NYPE form. It purported to terminate the charter for non-payment of hire and withdrew the vessel. The charterer contended that it was not entitled to do so because it had not given proper notice under the anti-technicality clause in the charter. This clause said:

"*When hire is due and not received, the Owners, before exercising the option of withdrawing the vessel from the Charter Party, will give Charterers three banking days' notice ....*"

5. The dispute was referred to arbitration. The arbitrators (Sir Christopher Staughton, Alexander Kazantzis and Sir Brian Neill) found that the notice had been sent before the hire became due. It had been sent by e-mail but, because of some fault in the system, it did not enter the charterer's mailbox until after the hire became due. One of the issues which the arbitrators were asked to decide was:

"*When did the notice become effective?*"

The possibilities were when it was sent, when it entered the recipient's mailbox or when it was first read. This, the arbitrators said, was a question of considerable general importance. However, they said:

"*On the facts of this case we consider the crucial matter to be determined is whether the Owners were entitled to give the notice at the moment when it was sent.*"

They answered this question by saying:

"*It is established as a matter of law that one cannot give a notice that hire is due and not received until the hire has become overdue: see* ***The Afovos*** *by Lord Hailsham at p.339.*"

They therefore concluded that the notice was invalid because it was premature.

6. The Applicant appealed to the High Court contending that the appeal raised three questions of law, the first two of which were said to be of general public importance. They were:

1 Is a notice *given* pursuant to an anti-technicality clause in a time charter party at the time that it is sent or at the time that it is received?

2 Assuming that the answer to the first question of law is "at the time that it is received" at what time is a notice sent by e-mail received by the recipient?

3 Is an exercise of discretion to refuse an application for permission to amend, on the basis that the case sought to be raised by way of amendment is bound to fail, an exercise of discretion which is erroneous in law in circumstances where the tribunal is wrong in law to conclude that the case sought to be raised by way of amendment is bound to fail?

7. The application for leave to appeal was determined without a hearing by David Steel J. His written decision refusing leave dated 6 February 2001 says:

"*1 The first question of law with its emphasis on the verb "given" tends to beg the underlying question determined by the arbitrators. They concluded that, whether or not the notice was received and/or reached the mind of the charterer at a time when hire was due, thereby becoming effective and initiating the three-day notice period, the notice was nonetheless premature because it was given (in the sense of sent or despatched) when hire was not yet due. This underlying issue is not one of general public*

importance. In any event the conclusion of the arbitrators is not open to serious doubt given the decision of the House of Lords in ***The Afovos.***

2 The second question, whilst clearly a matter of general public importance, does not thus arise and accordingly, its determination will not substantially affect the rights of the parties.

3 The third question does not raise an issue of law."

8. The Applicant applied to the judge for him to reconsider his decision and/or grant leave to appeal to the Court of Appeal. At an oral hearing on 3 April 2001 the judge said that he was not sure that it was appropriate for him to be asked to review his earlier decision but if it was, having listened to leading counsel's submissions, he reaffirmed his earlier decision. He then said:

"*I do not propose to add to the short reasons that I gave in writing. Indeed I somewhat doubt as to whether it was appropriate for me to have given any reasons at all. That is an issue for another day and another case.*"

He also refused leave to appeal to the Court of Appeal without giving reasons for that decision.

9. The judge soon had to deal with another case, *Mousaka*. He refused leave on paper saying:
"*If and to the extent that the questions posed by the applicants are questions of law (and in my judgment the second question is not):*
(i) the questions are not of general public importance;
(ii) the decisions of the arbitrators are not obviously wrong (or even open to serious doubt)."

At an oral hearing the applicant asked the judge to give full reasons for his decision. He refused to do so. So the applicant applied for permission to appeal to this court and that application was listed for hearing with the present application. But the parties have recently settled their dispute; so it is no longer before us, although we are aware that this court has very recently received another application raising exactly the same points as were raised in ***Mousaka.*** It was not possible to hear this latest application with the present application but as this has now been outstanding for nearly a year Lord Justice Tuckey decided that it should proceed in the hope that our decision in this case would be determinative of all cases where the same or similar points arise.

10. The applicant's Notice of Appeal asks this court to give leave to appeal from the arbitrators' award. This court has no jurisdiction to make such an order as their counsel Mr. Plender Q.C. conceded. However, his primary submission to us was that we should allow the appeal from the judge's refusal to give leave and remit the application for rehearing by a different commercial judge because David Steel J.'s reasons were inadequate.

11. The first question therefore is whether we have jurisdiction to deal with the case on this basis. What is clear is that there is no appeal from the Judge's refusal to give leave on the merits. This follows from the language of the statute and was confirmed by this court in *Henry Boot Construction (U.K.) Ltd. v Malmaison Hotel* [2001] QB 388. Nor could the judge have given leave to appeal to this court because s. 69 (8) only applies if there has been a decision of the court of first instance "on an appeal". There was no appeal because the Judge refused leave to appeal.

12. Mr Plender however relied on the provisions of the HRA 1998. S. 6 of the Act makes it unlawful for a court to act incompatibly with a Convention right. A party's right to complain of an unlawful judicial act is restricted by s. 9(1) to the exercise of a right of appeal. The court, he said, was therefore required to give the applicant a right of appeal to enable it to complain that the process by which the judge reached his decision was unfair and contrary to Article 6. Unfairness was, he said, to be equated with misconduct. In ***Aden Refinery v Ugland Ltd***. [1987] QB 650 this court recognised that it had a residual jurisdiction under the 1979 Act where the judge had:

"*in truth never reached "a decision" at all on the grant or refusal of leave but had reached his conclusion, not by any intellectual process, but through bias, chance, whimsy, or personal interest.*" (Mustill L.J. at p. 666).

There is of course no suggestion of misconduct in this case but unfairness and misconduct both relate to process. The House of Lords recognised that it had jurisdiction to reopen an appeal where a party had been subjected to unfairness in the ***Pinochet (no. 2)*** case ([2000] 1AC 119 at p. 132). So, Mr Plender submitted this court, which has a duty to act compatibly with the Convention, has jurisdiction to consider whether the judge's reasons in this case were adequate and if not to set aside his decision for that reason. This does not involve a direct challenge to the correctness of the Judge's decision on the merits of the application for leave to appeal.

13. Mr. Godwin for the Respondents relied on s. 8 (1) of the HRA which in relation to an unlawful judicial act confines our jurisdiction to "*grant such relief or remedy or make such order within [our] powers*". As we have no power to allow an appeal from the Judge's refusal to grant leave, he said that we could only remit the case to the Judge to enable him to give further reasons which was the relief claimed in ***Mousaka.***

14. We accept Mr. Plender's submissions on the question of jurisdiction. If, as is accepted, there is a residual jurisdiction in this court to set aside a judge's decision for misconduct then there can be no reason in principle why the same relief should not be available in a case of unfairness. Each is directed at the integrity of the decision-making process or the decision-maker, which the courts must be vigilant to protect, and does not directly involve an attack on the decision itself. This court has of course the general power to set aside decisions under CPR 52.10 (2)(a) and we do not think in the exceptional circumstances envisaged by such a case that the court's powers are circumscribed by s. 69 of the 1996 Act. We shall have more to say about the circumstances in which it would be appropriate to invoke this jurisdiction in cases of this kind later in this judgment.

15. Mr. Plender has not relied on developments in domestic law about the duty to give reasons in support of his argument about unfairness. But it is worth noting that the trend of the law has been towards an increased recognition of the duty to give reasons. Nevertheless what Lord Diplock said in ***The Antaios*** still stands as guidance (not binding authority) and there is nothing in s. 69 or any other part of the 1996 Act which suggests that Parliament intended to alter the position. Lord Diplock's reasons for what he said were that the judge was not deciding the question of law arising out of the award but merely whether the case should be admitted to appeal and to avoid the reporting of decisions on applications for leave. He could see no good reason why the judge should do no more than say that the application was granted or refused.

16. So we turn to Article 6 and the cases to which we have been referred where the European Court of Human Rights and the Commission have had to consider the giving of reasons.

17. Article 6 itself does not say anything about reasons. So far as relevant it simply says that:

"*In the determination of his civil rights .... everyone is entitled to a fair and public hearing ....*"

Parties to a consensual arbitration waive their Article 6 rights in the interests of privacy and finality. It is not contended that the limitations on the right of appeal to the courts themselves offend Article 6, but it is common ground that this Article does apply to the statutory appeal process and can be invoked by the Applicants albeit that they are a company registered in Cyprus.

18. Thus in *Tolstoy v UK* 20 EHRR 442 at para. 59, where one of the issues was whether the Court of Appeal's order that the applicant should provide security for the other party's costs of the appeal, the court said:

"*It follows from established case law that Article 6 (1) does not guarantee a right of appeal. Nevertheless a Contracting State which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees of Article 6. However the manner of application of Article 6 to proceedings before such courts depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein.*"

19. This case followed the earlier case of ***Monnell and Morris v U.K***. 10 EHRR 205 where the court had to consider the CACD's procedure for dealing with applications for leave to appeal at a hearing at which they were neither present nor represented. At paras. 56 to 58 the court said:

"*... in order to determine whether the requirements of fairness were met in the present case, it is necessary to consider matters such as the nature of the leave to appeal procedure and its significance in the context of the criminal proceedings as a whole, the scope of the powers of the Court of Appeal, and the manner in which the two applicants' interests were actually presented and protected before the Court of Appeal ... On an application for leave to appeal, the Court of Appeal does not re-hear the case on the facts, and no witnesses are called, even though the grounds of appeal involve questions of fact as opposed to questions of law alone. The issue for decision in such proceedings is whether the applicant has demonstrated the existence of arguable grounds which would justify hearing an appeal. If the grounds pleaded are in law legitimate grounds for appeal and if they merit further argument or consideration, leave will be given; if one or other of these conditions is lacking, leave will be refused .... The limited nature of the subsequent issue of the grant or refusal of leave to appeal did not in itself call for oral argument at a public hearing or the personal appearance of the two men before the Court of Appeal.*"

20. Neither of these cases considered the court's obligation to give reasons. But it is common ground that the right to a fair hearing generally carries with it an obligation to give reasons. Statements of this general principle are to be found in similar terms in a number of the cases to which we were referred. Thus in ***Hiro Balani v Spain*** 19 EHRR 566 at para. 27 the court said:

"*The Court reiterates that Article 6 (1) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that the litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case.*"

That case concerned the failure of the Spanish Supreme Court to deal with one of the applicant's submissions. The later case of ***Garcia Ruiz v Spain*** 31 EHRR 589 concerned a decision by the Madrid Audiencia Provincial dismissing an appeal for the reasons given by the court of first instance. The court said at para. 26

"*... An appellate court may, in principle, simply endorse the reasons for the lower court's decisions.*"

21. Finally we should refer to two decisions of the Commission. The first of these, ***X v Federal Republic of Germany*** [1981] 25 DR 240 concerned the rejection of an appeal by the Federal Court which gave no reasons for its decision. The Commission said at p. 241:

"*If the domestic law subjects the acceptance of the appeal to a decision by the competent court whether it considers that the appeal raises a legal issue of fundamental importance and whether it has any chances of success, it may be sufficient for this court simply to refer to the provision authorising this procedure. This has been done in the present case and the applicant was thereby given to understand that the Federal Court of Justice found no objection with the [lower court's decision]. The Commission considers that in these circumstances there is no appearance of the proceedings having been unfair and contrary to the requirements of Article 6 ....*"

22. The second Commission case is ***Webb v UK*** [1997] 24 EHRR CD 73 where the applicant complained that the Privy Council had given no reasons for dismissing her application for leave to appeal against her conviction in Bermuda. At p. 74 the Commission said:

"*The Commission recalls that the manner in which Article 6 (1) applies in relation to appeal proceedings depends on the special features of the proceedings involved. Account must be taken of the entirety of the proceedings in the domestic legal order and the role of the appeal court therein: in the case of leave to appeal proceedings, the nature of those proceedings and their significance in the context of the proceedings as a whole must be considered, together with the powers of the appellate jurisdiction and the manner in which the proceedings are actually conducted.... Further, where a supreme court refuses to accept a case on the basis that the legal grounds for such a case are not made out, very limited reasoning may satisfy the requirements of Article 6.... The Commission .... notes that special leave to appeal to the Privy Council will only be given where a case raises a point of "great and general importance" or in cases of "grave injustice". In the context of appeals to the Privy Council, where there has been a full appeal before the Court of Appeal, it must be apparent to litigants who have been refused leave that they have failed to satisfy the Privy Council that their case involves either a point of "grave and general importance" or "a grave injustice". The factual position is therefore similar to the position before the Federal Constitutional Court in Germany, where no detailed reasons for rejection of a case are given. The Commission, having considered the proceedings as a whole, considers that there is no indication of unfairness in the present case such as would constitute a violation of Article 6.*"

23. Before turning to the parties' submissions it is convenient to refer now to David Steel J.'s decision in ***Mousaka.*** He summarised the effect of the Strasbourg jurisprudence in an uncontroversial way, noting at p. 403 that:

> *"(4) If a right of appeal is rejected, the applicant must be made aware of the grounds on which the decision was reached; in many cases this may take the form of an endorsement of the lower court's decision. (5) Where there are legitimate restraints on the right of appeal, such as the need for it to be a matter of general importance, it is sufficient for the court to refer to these limitations."*

He then concluded that ***The Antaios*** restraints on the provision of reasons for refusing leave to appeal (it being common ground that reasons did not need to be given for granting leave) were fully compliant with the Strasbourg jurisprudence. The parties had agreed to arbitrate their disputes and after a substantial hearing the arbitrators had produced a detailed reasoned award on the merits. Whilst the applicant for leave to appeal was entitled to know why he had lost, given the terms of s. 69 and, if necessary by reference simply to the relevant statutory criteria, he could be in no doubt why he had failed to obtain leave. The provision of reasons might satisfy some degree of curiosity but in fact would be completely worthless. It might also be subversive of the arbitral process if the judge's reasons were expressed in different terms or at least with a different emphasis to those of the arbitrators. In reality the High Court was the last resort in arbitral proceedings and its position was analogous to those of the appellate courts concerned in the two Commission cases to which we have referred.

24. Mr. Plender submits that the Judge was wrong in ***Mousaka***. ***The Antaios*** guidance cannot withstand the requirements of Article 6. Reference to the statutory criteria was essential, but it was not enough for the judge simply to identify which of the threshold tests the applicant had failed by reference to those criteria alone. The applicant was entitled to know why he had failed those tests and this required further reasons to be given.

25. Mr. Godwin conceded that ***The Antaios*** guidance could not withstand the requirements of Article 6. Reasons had to be given. It was not possible to say what reasons needed to be given. That depended upon the circumstances of each case but there was a proper analogy between decisions of the judge under s. 69 of the 1996 Act and the decisions of the appellate courts in the cases to which we have referred. The judge might not have to go further than identify the statutory criteria as long as this enabled the applicant to know on what basis leave had been refused.

26. So it can be seen that there was a good deal of common ground in the submissions made to us. Whilst in an adversarial system a judge will usually gratefully accept and adopt the common ground, we do not think such an approach is possible in this case. Our judgment is intended to give guidance and we know that there is at least one other case where the decision in ***Mousaka*** is under challenge in this court. So it seems to us that we have to consider, despite Mr. Godwin's concession, whether ***The Antaios*** guidance still holds good.

27. We do not think it does. S. 69 (3) contains a variety of threshold tests. At the very least we think an unsuccessful applicant for leave should be told which of those tests he has failed. This accords with what David Steel J. did in ***Mousaka*** and appears to be the current practice of commercial judges. But does the judge need to go further and explain in every case why the relevant threshold test has been failed? We think the answer to this question is "No". If the question is not one of law, does not substantially affect the rights of one or more of the parties or is not one which the tribunal was asked to determine, an adequate reason for the judge's decision will in almost all cases have been given simply by identifying the test or tests which the applicant has failed without the need to say more. The same applies we think to the question of general public importance. However, when one gets to whether the tribunal's decision was obviously wrong or not open to serious doubt, we do not think that it is possible to give an unqualified answer to the question we have posed. It may be enough simply to refer to the statutory test, but we do not think it is possible to say that this will always be so. It would be enough to say *"For the reasons given by the arbitrators"* if that was the judge's reason. Otherwise it may be necessary to go further. But any further reasons need only be brief so as to show the losing party why he has lost. Such reasons will of course be given against a background of a full hearing, a reasoned award and detailed submissions as to why leave to appeal should be granted. In other words, the judge's brief reasons are directed to a fully informed applicant.

28. These conclusions make some, but we do not think substantial, inroads into ***The Antaios*** guidance. If it is thought that the approach is still unduly restrictive, we think the answer is that there is a fair but not exact analogy with the Commission cases to which we were referred. The Judge was right to say that in reality the High Court is the court of last resort in arbitral proceedings. Resort to that court by way of appeal is severely limited by statutory provisions which do not offend Article 6. We reject Mr. Plender's submission that there is no proper analogy because, unlike the cases considered by the Commission, there have been no court hearings in the lower courts to which Article 6 would have applied. The arbitral process with its commercial advantages of privacy and finality does not involve such hearings but that is what the parties have chosen. In any event, s. 68 of the 1996 Act gives the court powers to intervene in the arbitral process in the event of serious irregularity. However we do not accept that the giving of reasons is pointless. It may be the end of the road for the applicant but he is entitled to know shortly why he has reached it. We do not think that this subverts the arbitral process; rather it might be said to strengthen it, particularly if the judge adopts the reasons of the arbitrators. With applications for leave being decided without a hearing and being disposed of by short reasons there is little risk of the kind referred to by Lord Diplock. Parties and their solicitors who regularly arbitrate in London may acquire a dossier of decisions but we very much doubt that they could be put to much use and we certainly do not think they could be used to undermine the arbitral process.

29. In all this we are conscious of the need for finality in arbitration and the need to avoid a return to the bad old days which resulted in the 1979 Act. We do not think the modest change in practice which we have explained will affect these objectives. Commercial judges who have followed this practice should be astute to resist attempts by parties pursuing requests for further reasons. This court will play its part by refusing permission to appeal in anything other than the very plainest case about which we will say more after considering the merits of the present application. The message in short must be that reluctance to honour an award should not be allowed to masquerade as a request for further reasons.

30. So we turn to the merits of the present application which we can deal with shortly although the argument took about half a day. Mr. Plender's criticism was confined to the way the Judge dealt with the first question. The Applicant's case, based on the first instance decision in ***The Pamela*** [1995] 2 Lloyd's Rep. 249, was that a notice under an anti-technicality clause was not effective until its content reached the charterer's mind. So, they said, it was not "given" for the purpose of the clause until it was received by the charterers after hire became due. It did not matter when it was sent. The Judge's reason, Mr. Plender submits, does not deal with this point at all. Nor does he say why the point was not one of general public importance and his reference to ***The Afovos*** is highly ambiguous.

31. We do not accept these criticisms. From the passage which we have quoted from the award it is clear that the arbitrators distinguished the validity of the notice at the time it was sent from the time at which it took effect which, if they followed *The Pamela,* was the time it reached the charterer's mind. Only the latter was of public importance because the letter was sent by e-mail, but the arbitrators did not decide anything about this. They did decide that the notice was invalid because no hire was due at the time it was sent and that is what Lord Hailsham said in the passage in ***The Afovos*** to which they referred. That was not a question of public importance. All the Judge did in dealing with the first question was to point out what we have said in three succinct sentences. By doing so he gave an entirely adequate reason for his decision.

32. We said we would come back to attacks on judges' reasons after dealing with the merits of this application. A good deal of Mr. Plender's argument in support of the merits was directed to showing that the arbitrators' decision was wrong. Much of his attack on the Judge's reasons was mounted on this premise although he maintained that this was not what he was doing. We are not at all critical of Mr. Plender for the way in which he put his case but it illustrates the dangers inherent in an attack on the adequacy of reasons. Only their adequacy is in issue; not whether or not they are correct.

33. We heard this case as an application for permission to appeal with appeal to follow if permission was granted. We have heard full argument from both sides. We think the appropriate disposal of the case is to grant permission to appeal, but for the reasons we have given we dismiss the appeal.

Mr. Richard Plender Q.C. (instructed by Messrs Ince & Co.) for the Appellant
Mr. William Godwin (instructed by Messrs Elborne Mitchell) for the Respondent