**Pendulum Shipping Inc v P U Aspiration PTE Ltd** [2002] APP.L.R. 07/22

CA on appeal from Commercial Court (Mr Justice Moore-Bick) before Tuckey LJ. 22nd July 2002

**LORD JUSTICE TUCKEY**

1. This is a renewed application for permission to appeal from two decisions of Mr Justice Moore-Bick: the first on 20th November 2001 refusing the applicants, Pendulum Shipping Inc, leave to appeal under section 69(3) of the Arbitration Act 1996; the second on 15th March 2002 refusing leave to appeal against that decision under section 69(6) of the Act.

2. The arbitration arises out of a contract for the sale of a ship by the respondent sellers to the applicants on the Norwegian saleform. Each party alleged that the other was in repudiatory breach. The arbitrators found in favour of the sellers. The issue of law said to be raised by the appeal is the rights, if any, given to the buyer to terminate the memorandum of agreement before the cancellation date when the seller states that it cannot meet that date.

3. The judge refused leave on paper without giving any reasons following the guidance given in ***The Antaios*** [1985] AC 191. The applicants applied to the judge the following day for reconsideration of his decision, alternatively for leave to appeal from it at an oral hearing. The judge said that he did not consider there were sufficient grounds for reconsidering his decision at an oral hearing but on 6th December 2001 directed that there should be a short oral hearing of the section 69(6) application.

4. 15th March 2002 was the first available date this application could be listed to suit the convenience of everyone involved. On that date the applicants appeared by leading counsel, who had prepared a skeleton argument for the purpose of the hearing. This referred to the importance of the point of law at issue and developed the submissions about it. It did not however complain of the judge's failure to give reasons. But in the course of the hearing the judge said, by reference to section 69(3)(c)(ii) of the Act: *"You can assume that I did not consider that the decision of the arbitrators was open to serious doubt but was of general importance."*

5. Leading counsel then developed the point of law with a view to persuading the judge that the decision of the arbitrators was open to serious doubt, to which the judge responded (and we only have a short note of the hearing): *"I accept a lot of what is said but the Court has to work within the criteria given. The Award must be open to `serious doubt', which I read as a high threshold and not one that allows judicial development on important points of law."*

6. I read him to be saying that the threshold requires two things: the point must be of general importance and must be open to serious doubt. The judge had accepted the former but was not persuaded of the latter.

7. He refused leave to appeal against his refusal of leave under section 69(3), saying that section 69(6) did not give a broad right of appeal but was limited to exceptional cases, of which this was not one.

8. On 26th March 2002 this court handed down its judgment in ***North Range Shipping Ltd v Seatrans Shipping Corporation*** [2002] EWCA Civ 405, in which we gave guidance about the reasons to be given when refusing leave under the 1996 Act. It is not necessary to repeat what I said in that case. Suffice it to say for present purposes that this guidance supercedes the guidance given in ***The Antaios***, which the judge followed.

9. Following this decision the applicants appealed to this court on 3rd April 2002 against both the judge's decisions, raising for the first time the judge's failure to give reasons when he made his first decision. The appeal against that decision was over four months out of time, so the appellant requires an extension of time to appeal that decision.

10. The applicants' primary position is that they do not require permission to appeal against the earlier decision if permission to appeal is granted against the judge's refusal to give leave since an appeal on the refusal to give leave to appeal to this court will encompass the earlier refusal of leave under section 69(3). I am not convinced that that is right but for the purposes of today's hearing will assume that this is so.

11. The applicants' fall-back position is that an extension of time should be granted because the applicants followed the usual procedure, which was to apply first to the judge for leave to appeal, and it was not their fault that this application took so long to be heard. My response to that is that this would be a valid point if the applicants had complained about lack of reasons from the outset. But, as I have said, they did not do so, although this was a point which the profession were well aware of by the time the judge made his decision in this case. The inference is that the applicants chose not to take the point and have only done so now as a result of the decision in ***North Range Shipping***. Such opportunism does not justify extending time. The guidance was changed by our decision but this was not intended to open the way for anyone who had been the subject of a decision following ***The Antaios*** guidelines to appeal out of time to this court.

12. Turning then to the appeal under section 69(6), which was made in time, Miss Troy-Davies in her skeleton argument accepts that generally there is no right of appeal from the court of first instance's decision to refuse leave under that subsection: see ***Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*** [2001] QB 388. But she argues, by the same route as this court assumed jurisdiction in ***North Range Shipping,*** that it should do so in this case because the hearing before the judge in March was unfair on account of the fact that the applicants did not know upon what grounds the judge had refused leave under section 69(3) until the hearing itself and even then his reasons were inadequate.

13. In support of the first part of this submission she says that if the applicants had known in advance that the judge had refused leave on the grounds that he indicated at the hearing, they would have drawn his attention to passages in the case of ***Aden Refinery Co Ltd v Ugland Management Co Ltd*** [1987] QB 650. The passages which Miss Troy-Davies has referred me to this morning are to the effect that, where there are no judicial decisions at first instance but conflicting decisions by arbitrators, the judge in considering whether to give leave to appeal to the Commercial Court should give favourable consideration to doing so, so that there might be a decision binding all arbitrators and producing uniformity of decision. That point was not made in precisely those terms to Mr Justice Moore-Bick on this occasion, although he was informed, because it was part of the material put before him, that there was some doubt among the arbitrators as to what the right answer to the point at issue was.

14. It seems to me that this goes mainly to whether the point is one of general importance (which the judge accepted in this case) but not to whether the arbitrators' decision is open to serious doubt. The latter question does not depend upon whether the point at issue is of general importance. So I do not think this submission advances the applicants' case because the judge accepted that the point was of general importance.

15. I do not accept the submission based on general fairness either. It is clear from the note of the hearing that Mr Gruder was able to deal with this point on his feet. That is what counsel are trained to do. The legal issue had been identified and had been argued in advance in the skeleton argument. Mr Gruder is well able to handle himself in such a situation, as I know from my experience of him as an advocate. There was therefore nothing unfair about this hearing in that sense. I suppose one could add (although perhaps it is mean to do so) that if Mr Gruder had felt in any real difficulty in dealing with this point he could have asked the judge to adjourn to enable him to develop further submissions, and he did not do that.

16. So that leaves the complaint that the judge's reasons were inadequate. Should the judge have said why he thought that the arbitrators' decision was not open to serious doubt? His reasons were, Miss Troy-Davies submits, too little too late and they were given to an under-informed applicant because, whilst an applicant will know why he has applied for leave to appeal in the first place, he will not know until the judge gives reasons why he has been refused leave.

17. Again I am afraid I cannot accept this submission. It seems to me that the judge made it clear by saying that the decision was not open to serious doubt that he was accepting that the arbitrators had reached the right decision in this case. He did not say so in so many words, but that must be implicit in what he said; and, whilst paragraph 27 of ***North Range Shipping*** does not lay down any absolute rules as to when a judge should expand upon the language of the statute when dealing with cases like this, I do not think that the judge's reasons in this case offend against what we said.

18. For these reasons I remain of the view expressed when I dealt with this application on paper that permission to appeal should be refused.

**Order:** renewed application for permission to appeal dismissed.

Miss K Troy-Davies (instructed by Messrs Brookes & Co, London EC3) appeared on behalf of the Applicant Claimant.
The Respondent did not appear and was not represented.