Sealand Housing Corporation v Siemens AG [2002] APP.L.R. 07/02

CA : Application for permission to appeal and stay of execution before Sir Andrew Morritt VC; Rix LJ. 2nd July 2002.

LORD JUSTICE RIX:

1. This is a renewed application for permission to appeal to this court from the judgment of His Honour Judge Michael Dean QC. The judge was dealing with applications made by Sealand Housing Corporation ("Sealand") under Sections 67 and 68 of the Arbitration Act 1996.

2. Sealand was seeking under those sections to challenge the award of Messrs Blessing and Hans van Houtte in an ICC arbitration. Their final award is dated 1st August 2001. Sealand's challenge to the court was that the arbitrators had wrongly exercised jurisdiction over it - that was a challenge under Section 67 - and also that they had been guilty of a serious irregularity (that was the challenge under Section 68) in that they had failed to record in writing and inform Sealand directly of the result of a telephone conference held on 9th February 2001, at which they had decided that a forthcoming hearing of the tribunal on 6th March 2001 would deal not only with questions of jurisdiction, the identity of parties and illegality but also, if appropriate, with the ultimate merits of the arbitration claim itself.

3. The factual background of this application is as follows. Sealand is a Turks and Caicos Islands company of which the principals and shareholders are two brothers, Barry and Stuart Hansen. Sealand is a 60 per cent shareholder in another Turks and Caicos Island company called SLEC and that company is parent of a Chinese company SPNA. SPNA has been developing a large-scale project in the environs of Shanghai in China. SPNA employed as contractors for the purposes of that development two companies - Bouygues SA and Herve-Pomerleau International Inc (B and HP). B and HP employed Siemens AG as their sub-contractor.

4. In March 1998 SPNA terminated the main construction contract and commenced an ICC arbitration under that contract against B and HP alleging breaches of that contract. To ensure completion of specialist sub-contract work Sealand then entered into five separate letters of intent with Siemens AG. The letters of intent expressed themselves to be intended to be binding contracts and included an arbitration clause, but also anticipated the making of a definitive contract between SPNA and Siemens. In the event Siemens completed its work before any definitive contract was entered into and it commenced arbitration proceedings under the letters of intent for payment against Sealand, SLEC and SPNA. Those are the arbitration proceedings arising out of which there came the final award to which I have referred, and ultimately these proceedings which challenge that award.

5. Under provisional orders for directions made by the arbitrators it was contemplated and directed that the three respondents' preliminary issues as to jurisdiction, parties bound by the letters of intent and illegality would be treated in advance of the ultimate merits of Siemens' claim at a hearing in March 2001. At the telephone conference of 9th February 2001, to which I have referred, it was decided to extend the March 2001 hearing to incorporate the final merits of Siemens' claim. That decision was taken against a background in which Sealand and SPNA had taken no part in the arbitration and were simply not responding to any of the events within the arbitration, whereas SLEC had gone into receivership. SLEC as represented originally by Allen & Overy and ultimately, when Allen & Overy left the scene, solely by the receivers KPMG. It had initially brought a counterclaim, but had failed to support it as required under the ICC terms applicable to the arbitration by the payment of appropriate fees.

6. It was against that background that at that telephone conference on 9th February 2001 it was decided, no doubt anticipating that the respondents would not turn up at the March hearing, that that hearing would go on if necessary to consider the final merits of the claim. It was typical of the conduct of Sealand and SPNA they were not participants at that telephone conference. SLEC was a participant, through KPMG, its receivers. Unfortunately, although the arbitrators appear to have been meticulous both previously and thereafter in entering their procedural decisions into writing and ensuring that the parties to the arbitration were formally notified in writing of those decisions, on that occasion the arbitrators erred and overlooked the need to inform Sealand of their decision at that telephone conference. Nevertheless the Hansen brothers resolved that they would turn up at the hearing of 6th March 2001 and that is what they did, albeit they did so wholly unannounced.

7. At a three-day hearing which then ensued the Hansen brothers, although unrepresented by lawyers and not being lawyers themselves, did what they could to argue all matters before the tribunal, namely not only those matters concered with the preliminary issues of jurisdiction, parties and illegality but also with all issues relating to the merits. In the course of such argument they produced - presumably, because they had brought them - documents of which no previous disclosure had been given. They were given every opportunity to address the tribunal and to meet the submissions of Siemens, and they were given further opportunity to file post-hearing submissions, of which they availed themsevles. Ultimately, the final award was the result of that hearing. Sealand, but not SPNA, sought to challenge that award on the two grounds I have mentioned by their claim form of 11th September 2001. That was already out of time but the judge took no point on that.

8. The hearing of Sealand's applications under Sections 67 and 68 was due to be heard on 13th and 14th February 2002. Some two weeks before that date Sealand sought to amend their claim form to raise an entirely new issue of jurisdiction which had never previously surfaced, to the effect that Sealand, SPNA and Siemens had reached a new definitive contract under which the letters of intent were superseded and a new contract on new terms, and including its own different arbitration provisions, had superseded the letters of intent between SPNA and Siemens. The judge, as he was entitled to do, made severe criticisms of the merits of that new point seeing that it was founded entirely on the allegation of a brief telephone conversation to which no reference was subsequently

made in correspondence going backwards and forwards between the parties and which had not surfaced until just two weeks before the February 2002 hearing. He therefore refused permission to Sealand to amend its claim form to introduce this new challenge to the arbitrators' jurisdiction. Since Sealand did not seek to rely upon the previous grounds argued before the arbitrators relating to issues of jurisdiction, it followed that the Section 67 challenge necessarily failed.

9. Today, Mr Nicholas Dennys QC, who appears with Mr Connerty on behalf of Sealand, has not sought to revisit the failure of that Section 67 challenge.

10. As to the Section 68 challenge, there again a new case - new as of the first day of the hearing before the judge below - was raised as to allegations which Sealand suggested it had been unable to raise before the arbitrators as a result of their failure to inform Sealand of their intention to go on to decide the merits of Sealand's claim.

11. For these purposes, despite the lateness of this new case, the judge allowed the amendment and fully considered Sealand's challenge under Section 68. He did so over a hearing which lasted two days and resulted in a judgment which enters fully into all the evidence and the submissions raised. It runs to 34 paragraphs over 21 pages. It would give a flavour of the way in which the judge dealt with this challenge under Section 68 if I refer to the last few paragraphs of his judgment, starting with paragraph 31 under the heading "Conclusions". In that paragraph, after finding that the arbitrators had been guilty of a procedural irregularity in failing to record formally in writing the decision which they had made at the telephone conference of 9th February and in failing to notify all the parties of that decision, the judge nevertheless went on to find that Mr Stuart Hansen had, as he admitted in his evidence, been in telephone contact with KPMG following that decision and therefore to infer that the Hansen brothers had been informed of the tribunal's decision by KPMG. He said: *"I consider that this is probably correct even though there is no direct evidence to support this."*

12. The judge then went on to consider the critical question as to whether that irregularity could be described as serious. The jurisprudence on Section 68 indicates that for a serious irregularity to be shown there must be a clear case of substantial injustice. The judge directed himself by that test and said he was perfectly satisfied that the answer was an unequivocal "No" to the proposition that Sealand had made out its case of substantial injustice. He then went through the various claims which Sealand submitted, on the evidence of the Hansen brothers, were matters which they would have raised at the hearing of 6th/8th March and which they were prevented from raising. He dealt with each one in terms. Some he rejected on the basis that they were seeking to raise a new case of defective work by Siemens done under the letters of intent following conclusion of the main contract. He was able to point out that any such defects as at that time had been disavowed by the brothers at the arbitration. Similarly, he went through the various points one by one giving detailed reasons for rejecting them. He concluded at the end of paragraph 32 as follows:

13. *"I have the gravest doubts as to whether the tactics pursued by Sealand would have been any different if they had been formally notified by the tribunal of the results of the telephone conference on 9th February 2001. Any active response or responsible participation in the arbitration would have been quite inconsistent with their established course of inaction. They certainly have not satisfied me on a balance of probability that they would have acted differently, or that they had the means to do so, and this failure of proof in the proceedings before the court makes it quite impossible for them to establish that they have suffered any injustice in consequence."*

14. In paragraph 33 the judge said that the decision of the arbitrators not to give still further time to Sealand to advance its claims, with the propsect of consequent delays, uncertainties and expense, was an entirely justified position. He continued in this fashion:

"If this course had been taken the nature of the arbitration would have altered radically. Sealand would have to have pleaded its case, give discovery, engage expert witnesses and produce witnesses of fact. If the proceedings as they had developed by March 2001 had been in court I have no doubt that any judge would have made a similar decision. The tribunal encapsulated the true merits of the position at page 69 of the award,

`To permit respondents to ignore proceedings and then ask for more hearings would be grossly unfair to the other parties. The ICC Rules and English arbitration law are both premised on fairness to all parties. The most elementary notions of due process require that arbitrators show respect for the rights of both sides in a dispute. A respondent cannot ignore an arbitration until the last moment, and then expect to be permitted to file new counterclaims that required the other side to begin again almost at ground zero.'

In my judgment these considerations are equally apposite to all the matters which Sealand now wish to raise before the court."

15. In conclusion at paragraph 34 he said: *"I have little doubt that Sealand have engaged in a course of conduct calculated to disrupt and delay the fair hearing of Siemens' claims in the arbitration and that this course of conduct has been repeated in these applications to the court in a cynical abuse of the procedures of both the arbitration and this court. Each of Sealand's challenges to the award is dismissed with the consequence that the award is upheld in its entirety."*

16. The judge went on to award indemnity costs against Sealand.

17. The judge was then asked to give permission to appeal to this court which he refused. A solicitor's note of his reasons refusing that permission is before us. It reads as follows:

"I have never seen a case where an application for permission to appeal was more inappropriate. The application follows the course that Sealand, or its directors, have pursued throughout. They studiously ignored the arbitrators and turned up at the arbitration without any pre-hearing preparation. They were given great latitude to put their case. Then came a brand new challenge that the arbitrators lacked jurisdiction based on a desperate last throw by Sealand with its back against the litigation wall. I've dealt with this in my award. The claim now sought to be raised is whether agreement [was] contained in letters of intent. On Day One of the arbitration on 6th March Barry Hansen said at page 64 of the transcript:

`It must be said that the work that these gentlemen did on behalf of Siemens is fantastic. It is better than fantastic. These are the finest, without question, the finest utility plants that have been built in the People's Republic of China. I know that because they have been independently evaluated by the Central Government in Beijing ..... '

Sealand had no complaints before the arbitration.

So far as serious irregularity is concerned, the arbitrators are criticised for not giving Sealand time to raise matters of defects which Sealand had denied in the above terms. The application for permission to appeal is refused. It is hopeless. There is no real prospect of success."

18. The matter of the judge's reasons was then further pursued in correspondence. On 18th June 2002 the judge gave what he described as duplicate reasons for refusing permission to appeal. He then gave the following *reasons:*

"2 None of the applications by way of challenge to the award raised any points of general principle. The applicants had failed to participate in the original arbitration until they appeared unannounced on the day fixed for the hearing. They were permitted considerable latitude by the tribunal in raising various issues, including arguments that Sealand were not parties to the contract containing the arbitration agreement. Having failed before the arbitrators, they applied to the Commercial Court seeking to challenge the jurisdiction of the tribunal on a completely novel ground, not raised before the arbitrators. This was based upon a disputed oral agreement alleged to have been made long before the arbitration hearing but which was raised for the first time about a fortnight before the hearing in the Commercial Court before me in February 2002, see paragraph 5 of my judgment. The alleged agreement was inconsistent with contemporary documents and was manifestly improbable. I refused leave to amend the application to raise this before the Court for the detailed reasons set out in paragraphs 18 to 21 of my judgment. The challenge to the jurisdiction of the arbitrators was dismissed.

3 Numerous allegations of serious irregularity alleged to have caused substantial injustice were relied on by the applicants. None of these had any merit in law or in fact and I rejected them all, see paragraphs 22 to 34 of my judgment.

4 I formed a clear view, after a hearing lasting two days, that the applicants were determined to resist or delay the enforcement of the award by spurious devices and I made an order that they should pay the respondent's costs upon an indemnity basis."

19. In advancing this application for permission to appeal to the Court of Appeal on paper, the applicant Sealand did so prior to a recent decision of this court in ***Athletic Union of Constantinople v The National Basketball Association*** [2002] EWCA Civ 830 (28th May 2002). In that case the Master of the Rolls decided, in a judgment in which others members of this court agreed, that the reasoning of this court in ***Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*** [2001] 1 QB 308 relating to Section 69 (8) of the Arbitration Act 1996 applied with equal force to provisions of Section 67 (4) and Section 68 (4) of the Act. It followed that there is no jurisdiction in the Court of Appeal to grant permission to appeal in a case where the court below - in this case the Commercial Court - had itself refused permission to appeal. It follows that Mr Dennys accepts that there is no jurisdiction in this court to grant him permission to appeal on the merits of the judgment below.

20. Nevertheless Mr Dennys relies on another decision of this court, not cited to this court in ***Athletic Union of Constantinople v The National Basketball Association,*** called ***North Range Shipping Ltd v Seatrans Shipping Corporation*** [2002] EWCA Civ 405 (26th March 2002). There, this court was considering an application for permission to appeal in respect of a challenge under Section 69 of the Act, viz an application for permission to appeal to the first instance court from the decision of the arbitration award itself on the ultimate merits. In ***North Range Shipping*** the Court of Appeal accepted that although in the light of the ***Henry Boot*** case this court had no jurisdiction to grant permission to appeal on the merits, there was nevertheless the possibility of this court's residual jurisdiction to grant permission to appeal in a case where, in effect, no decision had been reached by the Commercial Court itself. The reasoning for their decision can be basically encapsulated in paragraphs 12 to 14 of the judgment of Lord Justice Tuckey as follows:

*"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 LJ at page 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] 1 AC 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."

21. That of course was a case concerned with the question whether a judge of the Commercial Court, in refusing leave to appeal from an arbitral award on the merits of that award pursuant to ***The Nema*** and ***The Antaios*** guidelines, was required to give reasons and, if so, the extent of the reasons required. That is very far from the background to this case where there has been a full scale challenge to the award, not on the ground of its ultimate merits but on the ground of serious irregularity. Nevertheless this has been the ultimate basis of Mr Dennys' renewed application today. He accepts that he cannot challenge the merits of the judge's decision but he seeks to bring himself within the scope, ratio and rationale of ***North Range Shipping*** and submit that in a case of procedural unfairness this court can arrogate a jurisdiction all to itself to overcome the jurisdictional bar created by Section 68 (4). In this connection he seeks to rely on Article 6 of the ECHR. It is very difficult for me, however, to understand even the basis of the submission by which he seeks to bring himself within the rationale of ***North Range Shipping***. He is not able to say, and does not say, that there has not been in effect, a decision of the judge below. As I mentioned, there has been a 21-page judgment running to 34 paragraphs dealing with all points in detail. He does not seek to say that no reasons have been given in that judgment. He does not seek to say in any way whatsoever that the judge was activated by bias, chance, whimsy, personal interest or anything of that kind. He does seek to say that the reasons of the judge for refusing permission to appeal were inadequate, but it seems to me that the reasons were entirely adequate. They addressed the test for giving permission to appeal to this court, such as whether there are matters of general principle suitable for this court to hear and whether there is a real prospect of success in this court. He gave trenchant reasons for dismissing those possibilities. Those reasons are to be found in greater length in his judgment itself.

22. In my judgment, Mr Dennys has simply been unable to bring himself anywhere within range of the parameters of the ***North Range Shipping*** jurisdiction. This is a case in which, on particular facts dealt with in detail by the judge, a late and, as the judge found, wholly unmeritorious challenge to the arbitrators' award has been dealt with in full by the judge. It is not a case where the arbitrators' handling of the award has been left unconsidered on a challenge under the Act to the Commercial Court. It is not a case therefore in which Sealand is able to say that it has not had full access to the courts. It has under the Act a further opportunity of appeal to this court provided however that the judge grants permission. That is to cover cases, no doubt, where matters of law or of general importance are involved or where there is something in the factual circumstances or indeed in the legal circumstances such that the judge is concerned that this court should have a further look at the matter. It is against the whole background of the parties' autonomous choice for arbitration and, in that context, of the policy of the 1996 Act to respect the parties' choice and thus the finality of arbitration awards, subject to the limited opportunities laid down in the Act for review by the courts. In my judgment, Mr Dennys has not sought by any sustained argument to this court to clothe his bare submission that he can evade the provisions of the 1996 Act, which limit the opportunity to come to this court to a cases where the first instance judge has himself given leave, by bringing himself within the residual jurisdiction set out in ***North Range Shipping.***

23. For these reasons this application for permission to appeal must be dismissed. There is simply no jurisdiction in this court to grant it.

THE VICE-CHANCELLOR:

24. I agree. Because the matter relates to the jurisdiction of the court I add a few words of my own.

25. This court held in ***Henry Boot Construction Ltd v Malmaison Hotel (Manchester) Ltd*** [2001] QB 388 and ***Athletic Union of Constantinople v National Basketball Association and Others*** [2002] EWCA Civ 830 that the leave to appeal required by Sections 67, 68 and 69 of the Arbitration Act 1996 could only be granted by the judge in the court below. Further it was decided in each of those cases that the decision of the judge in the court below

refusing such leave was not itself a decision within Section 16 of the Supreme Court Act 1981 so as to be open to review by this court. In another decision of this court - ***North Range Shipping Ltd v Seatrans Shipping Corporation*** [2002] EWCA Civ 405 - it was recognised that this court does have jurisdiction to review and interfere with an apparent decision which, in truth, is not a decision at all. Thus the court cited with approval the dictum of Lord Justice Mustill in ***Aden Refinery v Ugland Ltd*** [1987] QB 650 where he said: *"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."*

26. In ***North Range Shipping*** the court has referred to ***Pinochet (no 2)*** [2001] AC 119 as exemplifying one of the matters described by Lord Justice Mustill which the court categorised as unfairness which vitiated the decision. In ***North Range Shipping*** the suggestion was that the judge below had given inadequate reasons for refusing leave and therefore, in effect, had not reached a conclusion at all. In this case Sealand seeks to do the same. It relies on four grounds: first, that the judge did not say whether he was giving judgment under CPR 3.4 or 24.2; second, the judge concluded there had been an irregularity but that he went on to hold it had not been serious or productive of injustice to Sealand; third, the judge should not in that respect at least have determined those issues, many of which were issues of fact, on a summary basis; and, fourth, the judge gave inadequate reasons for refusing leave to appeal.

27. It appears to me that the first three of those grounds are challenges to the merits of the underlying decision. Thus they are precluded by decisions of this court in ***Henry Boot*** and ***Athletic.*** The fourth ground seeks to exploit the residual jurisdiction recognised in ***North Range Shipping.*** But, as my Lord, Lord Justice Rix, has pointed out, the judge gave more than adequate reasons for refusing leave to appeal. To my mind, the suggestion that somehow those reasons did not amount to a decision at all is absurd. There is no doubt that the judge reached his conclusion to refuse permission to appeal by an intellectual process and it is not suggested that he was biased or affected by chance, whimsy or personal interest. The complaint of Siemens is that the judge was wrong. That is precisely the contention which the requirement for permission from the court below was intended to exclude.

28. I agree with Lord Justice Rix that there is no jurisdiction to grant this application and, accordingly, it should be refused.

Order: Application refused

MR NICHOLAS DENNYS QC (Instructed by Radcliffes Le Brasseur of London) appeared on behalf of the Applicant
The Respondent was not represented and did not attend