Whiting v Halverson [2002] APP.L.R. 10/08

CA on appeal from High Court Newcastle upon Tyne Country Court (HHJ Behrens) before Laws LJ. 8th October 2002

LORD JUSTICE LAWS:

1. This is a renewed application for permission to appeal against a decision of His Honour Judge Behrens given on 19 July 2002 in the Newcastle upon Tyne County Court when he held that the district judge had correctly ordered a stay of proceedings instituted by the applicant under section 9 of the Arbitration Act 1996; though I may say at this stage Judge Behrens held that the district judge had arrived at that result for a wrong reason.

2. The proposed appeal to this court is thus a second appeal within CPR Part 52.3, and accordingly permission is not to be given unless the court considers that there is an important point of principle or practice, or there is some other compelling reason for the court to hear the matter. Tuckey J refused permission to appeal on the papers on 3 September 2002.

3. Here are the facts, and the course of the proceedings in briefest outline, taken from the opening paragraphs of Judge Behrens' judgment:

   "On 5th June 2000 Mr Whiting became a member of Wallsend Rotary Club. On 7th November 2001 the Council of Wallsend Rotary Club took a decision to terminate Mr Whiting's membership under the constitution.

   On 20th March 2002 Mr Whiting issued proceedings in this court in which he sought a declaration that the resolution to expel him was null and void. In addition he sought an injunction restraining the Council from enforcing the resolution or interfering with his use and enjoyment of the Club.

   On 14 April 2002 the solicitors for Wallsend Rotary Club - Hammond Suddard Edge ("HSE") issued an application for a stay of the proceedings under section 9 of the Arbitration Act 1996. *... District Judge Alderson acceded to the application, granted a stay of the action and ordered Mr Whiting to pay the costs of the action subject to a detailed assessment. ...*

   On 13th May 2002 McKeags, the solicitors for Mr Whiting, submitted a notice of appeal including an application for permission to appeal. In section 7 of the notice 3 grounds of appeal are relied on: 'the District Judge erred in law and/or misdirected himself on the facts in granting a stay ... under section 9(4) of the Arbitration Act 1996.

   The District Judge was wrong to find the matter in dispute ... was the subject of an arbitration agreement.

   ... the District Judge erred in failing to hold that the arbitration agreement was null and void or inoperative in that it contravened Article 6(1) of the Human Rights Convention.'"

4. I should say that the point on the Convention was plainly rightly later abandoned on appeal before the circuit judge. The circuit judge granted permission to appeal from the district judge on the first of the two grounds set out. When the applicant came to issue proceedings, as Judge Behrens noted, he made no allegation that the Wallsend Rotary Club lacked good cause to terminate his membership. The judge said this: *"The sole challenge is based on the allegation that some of the persons who took the vote were not eligible to do so."*

5. Before me this morning Mr Ashton has filled out that assertion somewhat by reference to the documents in the case showing that a past president of the club, a Mr Hall, should not, or at the very least arguably should not, have participated in the decision having regard to certain provisions in the court's constitution; yet he did so. It is not necessary to say any more about that; it goes only to the prospects of success that Mr Whiting might enjoy if he is allowed to prosecute his action in court.

6. The learned judge below proceeded to set out various extracts from the rules of the rotary club. Articles XI and XV are important. Article XI(6) is headed: "*Right to Appeal or Arbitrate Termination*", and then it provides in part as follows:

   "(a) Notice.

   Within 7 days after the date of the Council's decision to terminate membership, the secretary shall give written notice of the decision to the member. Within 14 days after the date of the notice the member may give written notice to the secretary of the intention either to appeal to the club or to arbitrate as provided in Article XV."

   The judge then went to (c) Arbitration:

   "In the event of a request for arbitration, each party shall appoint an arbitrator and the arbitrators shall appoint an umpire. Only a member of a Rotary club may be appointed as umpire or as arbitrator."

7. There is then a provision about the alternative means of challenge by way of appeal, and it is said:

   "If an appeal is taken, the action of the club shall be final and binding on all parties and shall not be subject to arbitration.

   (e) If arbitration is requested, the decision reached by the arbitrators, or if they disagree the umpire shall be final and binding on all parties and shall not be subject to an appeal."

8. Though not quoted by the judge I notice that section 7 of Article XI provides: *"Council action shall be final if no appeal to this club is taken and no arbitration is requested."*

9. The judge then proceeded to quote Article XV of the constitution, which provides: *"Should any dispute, other than as to a decision of the council, arise between any current or former member(s), and this club, any club officer or the council, on any account whatsoever which cannot be settled under the procedure already provided for such purpose, the dispute shall be settled, upon a request to the secretary by any of the disputants, by arbitration. The procedure utilised for such arbitration shall be as provided in Article XI, section 6, subsections(c) and (e)"*

10. The judge referred to the decision of district judge Alderson. The district judge had concluded that the claim should be stayed because the provisions of Article XV bit on the case and accordingly there was a compulsory arbitration procedure. His Honour Judge Behrens rightly, with respect, held that the district judge had fallen into error. That was because the decision to terminate the applicant's membership was "a decision of Council" so that Article XV had no application. The judge then proceeded as follows: *"However the matter does not end there. The decision was a decision to terminate membership and was thus governed by Article XI. I have set out above the terms of section 6 and shall not repeat them. To my mind it is clear that any challenge to the termination must be in accordance with section 6. Under section 6(a) the member may give notice to the Secretary of his intention either to appeal or to arbitrate. In my view, as a matter of construction, those are only 2 methods"*

11. - I think the judge means -

"those are <u>the</u> only 2 methods open to a disgruntled member. It is true, as Mr Ashton pointed out, that section 6(a) uses the word "may". However in my view it is used in the context of 2 options. Reading the rules as a whole it is to my mind quite inconceivable, as a matter of construction that the parties can have intended that the disgruntled members would by pass the options and challenge the termination by means of court proceedings.

In any event Mr Whiting exercised one of the options by giving notice of his wish to arbitrate on 16th November 2001."

12. The judge then proceeded to record what he understood to be Mr Ashton's argument, and that was to the effect that the agreement to arbitrate had been rescinded by mutual agreement. The judge referred to Mr Whiting's letter of 8 December 2001 and the club's letter of 31 January 2002. The judge proceeded thus:

"Mr Ashton recognised that rescission requires the consent of both parties. In effect he submits that the letter of 8th December was an offer to rescind the arbitration agreement. He further submits that the Club accepted the offer either by their inactivity or by the letter of 31st January 2002 which, he submits, clearly recognises the arbitration as being at an end.

...

Despite the ingenuity of the point I cannot accept it. In my view the letter of 8th December 2001 was not an offer to rescind the arbitration agreement at all. There was no proposal or offer contained in it at all. It was a unilateral decision by Mr Whiting to withdraw from the arbitration procedure. The letter of 31st January 2002 was not the acceptance of any such offer, nor was it evidence that such offer had been accepted. All the Club was doing was expressing an opinion of the effect of Mr Whiting's unilateral decision to withdraw from the arbitration agreement."

13. Mr Ashton now submits that the judge, with deference to him, has not accurately represented the case that he was making. The submission was not so much that there was an offer and acceptance constituted in these two letters of December 2001 and January 2002. Rather, it was said that the agreement that there should be an arbitration was rescinded effectively by conduct. The letter of 8th December 2001 (which I need perhaps not read) made it plain that the applicant was withdrawing his "request to invoke the arbitration procedure to enable the matter to be dealt with in court." So it was not so much a contractual offer as the taking of a unilateral stance. Then when one comes to the letter of 31 January 2002 one sees this passage: *"In deciding in his letter of 8th December 2002 to President Williams to withdraw from the Rotary International in Great Britain and Ireland process of arbitration, after invoking it, in relation to his differences with the Club ... your client decided for himself to terminate his membership irrevocably..."*

14. What Mr Ashton says is that that evinces, in effect, conduct on behalf of the Rotary Club by which it was accepted that any agreement to arbitrate was no longer effective was at an end.

15. It seems to me that there are really two points. The first point is whether the judge was right to hold that section 6 of Article XI established two methods and two methods only by which, under the contract of membership, a termination might be complained of - that is arbitration or appeal; and the second is whether Mr Ashton is right in submitting that at least by the letter of 31 January 2002 it had been clear that my agreement to arbitrate was at an end.

16. It seems to me that there are points that can be argued on both of these fronts. I would not, however, have given permission in the ordinary way because of the restrictions upon second appeals. However this is a case in which the first decision, that of the district judge, was taken on an erroneous basis, as Judge Behrens found; that seems to me to distinguish the case from one where both district judge and circuit judge below have held against an applicant for permission to appeal and for the same reasons. In those circumstances I am prepared to grant permission to appeal and do so.

(Application granted; costs to be costs in the appeal).

MR D ASHTON (instructed by McKeags, Newcastle upon Tyne NE3 1HN) appeared on behalf of the Applicant
The Respondent did not appear and was not represented.