Agropol Trading Praha SRO v Podex SRO [1997] APP.L.R. 10/29

Application to CA for leave to appeal before Hobhouse LJ; Pill LJ. 29th October 1997.

LORD JUSTICE HOBHOUSE:

1. I do not consider this is a case for leave to appeal to this court, and I will shortly state why.

2. This is a renewed application for leave to appeal to this court from a decision of Mr Justice Timothy Walker on 2nd July 1997, leave having been refused on paper once by the judge and by Lord Justice Hirst. It relates to a GAFTA arbitration. The submission of the buyers is that the award of the appeal board should be remitted to them under Sections 22 or 23 of the 1950 Act. The ground relied upon is either misconduct or procedural mishap. I say at the outset that it is appreciated that the discretion of the court and the jurisdiction of the court in relation to procedural mishap is a wide one, and we have had useful reference made to what the Court of Appeal said in ***King v Thomas McKenna*** [1991] 2 QB 480.

3. The fact remains that, in approaching questions of the type which the buyers wish to raise, there is a general principle that arbitration proceedings must be treated as final unless something has clearly gone wrong. If a party believes that something has gone wrong they must raise it before the commercial judge, as they have done in this case. Likewise, the decision of the commercial judge on the matter should be accepted unless there is clearly something wrong with the decision at which he has arrived. Another point which should be mentioned is that GAFTA arbitrations have an element of informality about them. Parties are not represented by lawyers. Written submissions are used and representation of the parties is by lay representatives who are experienced in the trade. That is the way matters are conducted. Therefore, this application does not arise in quite the same context as some points of criticism of more formal arbitrations that have arisen.

4. The contract in question here was a contract providing for GAFTA arbitration. It was made in August 1995 and was for the sale of 30,000 tonnes of wheat by the sellers to the buyers, delivery to be at the Slovak border. The latest date for delivery was 31st October 1995. Delivery of the full quantity was not made by that date, and exchanges between the parties then subsequently took place to which it will be necessary shortly to refer. It is not accepted as a fact that on 2nd November there was a prohibition on export of wheat from Slovakia. That was the basis on which the appeal board decided in favour of the sellers. However, the buyers were not aware of the prohibition and they pressed the sellers to deliver. They did not hold the sellers in default until after the buyers had been informed of the prohibition on export. They held them in default on 14th December and they claimed damages as at that date. The claim was for non-delivery of the short delivered goods.

5. Before the first tier arbitration with representation of the character I have indicated, the first tier arbitrators were not satisfied that there was any prohibition on export. The most material document which supported the contention of the sellers was not placed before the first tier arbitrators. Consequently, the first tier arbitrators made an award for damages for non-delivery in favour of the buyers. They did so on the basis of the price as at 14th December 1995 which was the basis upon which the buyers were putting forward their case. They made an award of US$794 on that basis. The sum of money involved is substantial.

6. The award did deal in passing with the question of the affirmation of the contract during the intervening period. It recited a communication of 7th November 1995 in these terms: *" ..... Buyers sent a fax to Sellers in which they referred to earlier phone calls and faxes and informed Sellers that their Buyers were insisting on the immediate delivery of the balance of the contract failing which they would charge the full extension allowance of 1.5% and declare Buyers to be in default. In that event the damages based on price difference would amount to about US$685,000. Buyers therefore asked to be informed immediately of any further deliveries of the balance of the contract.*"

7. A further fax was sent on the following day which would lead to the same inference that the buyers were calling for delivery of the balance of the goods notwithstanding that the contractual delivery date had passed.

8. In a later paragraph in the first instance award they stated: *"Buyers had contended that even if the suspension of loading by the State Fund had constituted a valid reason for Sellers' failure to fulfil the contract, the suspension had not taken place until after the final date for delivery which was 31st October 1995 when Sellers were already in default. Although Sellers had not claimed extension of shipment, Buyers by their faxes of 7th and 8th November 1995 had clearly waived strict adherence by Sellers to the contractual delivery date. However, in view of our findings [that there was no embargo] this point is of no significance.*"

9. The point was clearly ventilated as regards the primary facts and as to the legal conclusion of them at first instance. We are told that no express arguments were specifically advanced before the first tier arbitrators on that point. No point was taken by the sellers about it. The fact remains that those are the terms on which the first material award was expressed.

10. The matter went, at the instance of the sellers, to the appeal board. The appeal board, in the light of the evidence of the 2nd November communication, were satisfied that there had been a prohibition on export, and they so found. But they also referred, in very similar terms to the first arbitrators, to the relevant communications which had taken place between the parties, and concluded: *"Although extension was not claimed by Sellers, from the evidence of 7th November when Buyers asked for immediate delivery and 8th November, when Buyers offered to increase the Contract price for the next 5,000 tonnes to US$ 135.00 per tonne it is clear that Buyers still considered the Contract as being alive. On 11th December Sellers, for the first time, informed Buyers that Food Wheat exports*

had been suspended until 10th January 1996 and, as a result of this, on 14th December Buyers held Sellers in default and considered this the default date from which they calculated their damages."

The appeal board accordingly held that the claim failed.

11. An affidavit was placed before the judge - it is before us as well - from the gentlemen who represented the buyers at both arbitration hearings. His affidavit is not contradicted by any other evidence and accordingly can be taken as being correct. He comments upon the limited argument or submissions that were advanced by both, it appears, the sellers and their representative. He says the question of waiver or affirmation was not raised or alleged during the hearing before the appeal board. He says: *"I did not believe there to be any issue as to waiver or extension of the contractual delivery period.*"

12. Under those circumstances he submits that there was either misconduct by the arbitrators intending to draw this point to the attention of the representative - it was going to form a basis for their decision - or, at the least, there was a procedural mishap. Those arguments were advanced before Mr Justice Timothy Walker, and did not persuade him. In a phrase he said: *" ..... the point was fairly and squarely on the table.*"

    Under those circumstances he considered that if the buyers wished to make submissions about it it was for them to do so.

13. The judge did not form the view that there was misconduct or a procedural mishap. I am of the same view. I do not consider that, on the matters placed before us, an injustice has been done to the buyers. They had a perfectly adequate opportunity to deal with this point.

14. The case they now seek to raise appears to be inconsistent with the primary case which they were presenting throughout the arbitration on the basis on which they were making their claim and to be inconsistent with the evidence of the documents which are not disputed.

15. In any event, this is, as I say, a case where informality in the conduct of the arbitration proceedings must be accepted. The principle of finality must be recognised, and parties must not be encouraged to contest the finality of the awards which are given in such arbitrations. They are entitled to raise the matter before the judge and in this case they have done so. If they fail to persuade the commercial judge, then, unless something has gone terribly wrong, that is where the decision should rest. In my judgment - both on the merits and on the general considerations of policy - this is not a case for leave to appeal to this court.

LORD JUSTICE PILL: I agree.

Order: Application refused

MISS JULIAN FLAUX QC (Instructed by Michael Robinson of London) appeared on behalf of the Applicant
The Respondents were not represented and did not attend