

Application for leave to appeal : CA before Morritt LJ; Phillips LJ. 2<sup>nd</sup> September 1997

**LORD JUSTICE MORRITT:**

On 12th June 1997 Laws J dismissed the application of Mr and Mrs Ahmed for orders under Section 23 of the Arbitration Act 1950 to remove an arbitrator and to set aside his award made on 23rd July 1996. This is an application by Mr and Mrs Ahmed for leave to appeal from that order. The respondent, the London Borough of Southwark, has attended at its request and we have heard counsel on its behalf.

The facts in summary are as follows. On 30th July 1989 Mr and Mrs Ahmed took a tenancy of a one-bedroom flat on the fifth floor of 71 Honor Oak Rise, Forest Hill, London SE23, a block containing forty-four flats and owned by the Southwark Borough Council. The standard conditions of such a tenancy contained a provision in Condition 30 for arbitration for the resolution of the disputes of the nature there specified which include the question whether the council was in breach of its repairing covenant. The tribunal rules provide in Rule 34: *"The Arbitration Tribunal can adopt whatever procedure seems appropriate as long as the Tribunal allows both sides to put their case fully and makes sure that both sides have a fair and reasonable hearing. In particular, the Tribunal must allow both sides to attend, to be represented, to be accompanied by a friend or adviser, to bring witnesses and to put questions to witnesses brought by the other side. A Member of the Council may not be the adviser, friend or representative of either party."*

On 11th April 1995 Mr and Mrs Ahmed submitted to arbitration under that provision their claim in respect of the disrepair, as they alleged, of that flat. The claim states:

*"We would like the tribunal to order the council to carry out the repairs needed within a specific time limit by doing the following:*

- 1. Re plastering the concrete above the window.*
- 2. To re seal the window.*
- 3. To carry out the damp treatment as assessed by the housing inspector in 1991."*

On 2nd June 1995, having conducted a hearing in accordance with the rules, the tribunal ordered the necessary repairs, as identified in the building inspector's report dated 20th April 1995 to be carried out. It stated in paragraph 4 of the award: *"The housing officer told us that there were two building inspectors' report[s] on the issues. The more recent report dated 20/04/95 identified the work which needs to be done essentially to deal with condensation. He told us that the computer print out confirms that the council has tried in the past to remedy the situation unsuccessfully. With the present state of occupancy, it was unlikely condensation would be eliminated."*

They asked the tenants if they were seeking compensation and understood from their answer that they were not and ordered the council to carry out the work identified in the inspectors' report of 20th April 1995 in the next 28 days. Mr and Mrs Ahmed were not satisfied with that award because, contrary to the understanding of the tribunal, they did wish to claim compensation for the failure of the council to carry out repairs punctually. They applied therefore to the court for an order for remission and obtained on 7th March 1996 an order from Judge Rich remitting to the tribunal the question: *"..... what if any compensation should be awarded for delay in carrying out repairs since first complaint in respect thereof on the 10 October 1991."*

That issue came before the tribunal on 27th June 1996. They recorded the claim which had been made by Mr and Mrs Ahmed in relation to the three categories of repair to which I referred earlier.

In their award dated 23rd June 1996 they stated:

*"Having heard all the evidence and considered all the documents, we find that the tenant is entitled to compensation for the disrepair with regards to the replastering of the concrete above the window and re seal of the window. The disrepair, in our view, was of a minor nature.*

*With regards to the bedroom, there is no doubt that the council should have displayed greater diligence, there was undue delay and the tenants' complaints should have been dealt with more efficiently and quickly. However we have read the building inspectors' reports, we find that the bedroom was affected by condensation, compounded by inadequate use of ventilation and exacerbated by the family all sleeping in one bedroom. In those circumstances we do not find that the council has breached its repairing covenant under the tenancy agreement as there is no disrepair.*

*We therefore award compensation for the failure to comply with the tribunal's order within the time scale in the sum of £100. We award general compensation for the disrepair in the sum of £400. The total sum of £500 must be paid within the next 6 weeks, the sum maybe off set against arrears of rent if any."*

The Ahmeds were not satisfied with that award either. On 19th August 1996 they applied for the order which Laws J refused. They sought to set aside the award on the ground of misconduct and because of an error on its face and because of delay. Laws J treated the application when it came before him on 12th June 1995 as based on the allegation that Mr and Mrs Ahmed had not received a fair hearing. He rejected that allegation on the basis that the nature of the issue for determination had been put before Mr and Mrs Ahmed and they had received a sufficient opportunity to address the tribunal on it. In the transcript of his judgment (page 9 E) Laws J said: *"The question is whether Mr and Mrs Ahmed were not accorded a fair hearing. It became clear in the course of the proceedings before me that Mr Ahmed's particular complaint was that he had no notice of the possibility of an adverse finding to the effect that the condensation in the bedroom was caused, or principally caused, not by disrepair attributable to the Council's fault, but by, as it was put in more than one of the documents, the applicant's own lifestyle. Whether such a point was put to the applicant at the hearing in the Summer of 1996 was not at first clear from the affidavits and at one stage I was minded to adjourn these proceedings for further evidence. However, on being shown further documentation, I was and am satisfied that this aspect of the matter, which was at the heart of the authority's case was fully within the contemplation of the applicants."*

The judge then referred to a document headed Report to Arbitration dated May 1995 where the problems of condensation caused by the failure to open the windows was referred to. I think there was before the tribunal an earlier letter of 1991, but it does not appear to have been referred to by the judge. His conclusion (page 11 F) was - *"Whether or not the Tribunal Chairman himself questioned Mr Ahmed about these materials, it is plain in the end beyond any sensible doubt that the Council's case relied, fair and square, on this diagnosis of the problem; and that case was, as it seems to me, inevitably known to Mr Ahmed. It may be, and I mean no disrespect, that the procedure before the tribunal is not especially over-sophisticated. That is not to say that its duty to ensure a fair hearing is any less than such a duty owed by any other tribunal. But, in the present case, it seems to me that substantial justice was done. There is no case of misconduct here."*

In his case before Laws J Mr Ahmed had presented him with a list of issues which he contended arose on the hearing. That is at page 124 of the bundle. It is a list of some 12 issues which include in addition to the question of a fair hearing the question of why the arbitrators awarded no interest and why the arbitrators failed to deal with the question of costs. Those are but two examples of further issues that were raised in addition to the fair trial point. So far as they are concerned, the judge continued (page 12 of the transcript) by saying: *"I have looked at the other complaints in Mr Ahmed's skeleton. There is, as I see it, nothing in them. Mr Ahmed accepted in terms, and rightly, that the case was about whether he had a fair hearing. In all the circumstances, I have concluded that he did and this motion must be dismissed."*

In their application for leave to appeal the contentions of Mr and Mrs Ahmed have been changed. The first point they take is the fair hearing point but in a different guise. What they say is that the finding of the tribunal on the second hearing was not within its jurisdiction. They contend that at its first hearing the tribunal had concluded that the condensation was due to a failure to repair by the council in breach of its covenant, but at the second hearing they had reversed that finding, and that they had no jurisdiction to do so because the matter remitted then by Judge Rich was the assessment of damages and not the question of liability.

We invited counsel for the Southwark Borough Council to deal with that point as it seemed to us on reading the papers that it would otherwise merit granting leave to appeal. Miss Marshall's contention is that at the second hearing before the tribunal the papers put in by Mr and Mrs Ahmed made it plain that they wished the tribunal to go further than the matter remitted by Judge Rich. To that extent therefore they were seeking to extend the jurisdiction which the tribunal would otherwise have and that it would not be appropriate for Mr and Mrs Ahmed, having obtained the benefit of that enlargement, now to rely on the point which they seek to raise. It is contended that that would be unconscionable because, having agreed to an extension of jurisdiction on one point, they cannot complain if it is exercised on the other. We have not heard extensive argument on other points because it is accepted by counsel for Southwark that that is the bald point. If that is arguable leave will be granted generally and if it is not it will be refused.

It is true, as counsel for Southwark had pointed out, that there are aspects of the papers which indicate that Mr and Mrs Ahmed did seek a decision from the tribunal going beyond the bare matter that was remitted to it by Judge Rich. It seems to me that it is arguable that whatever they did in those papers did not go so far as to warrant the assumptions that they were consenting to an extension of jurisdiction so as to enable the tribunal to reverse its previous finding of liability rather than to reach its conclusions on compensation rather wider than the matter remitted to it by Judge Rich.

For the reasons I have attempted to explain, in my view that is an arguable point that Mr and Mrs Ahmed should be entitled to raise before the full court and accordingly I would grant leave.

**LORD JUSTICE PHILLIPS:** I agree.

**Order:** Application allowed.

THE APPLICANT appeared in person.

MISS I MARSHALL (instructed by Head of Legal Services, London Borough of Southwark) appeared on behalf of the Respondent.