Barclays Bank Plc v Kent County Council [1997] APP.L.R. 11/24

CA on appeal from order of Sir Peter Webster before Kennedy LJ; Judge LJ. Chadwick LJ. 24th November 1997.

LORD JUSTICE KENNEDY:
This is an appeal by Kent County Council against part of a judgment of Sir Peter Webster, sitting as a judge of the High Court, which relates to interest on costs of proceedings before the Lands Tribunal.

BACKGROUND FACTS
The outline chronology of this matter is significant. It is as follows. On 25th January 1983 Kent County Council made a compulsory purchase order in respect of some land owned by a Mr Batchelor which has become known as the Order land. On 20th January 1984 Mr Batchelor served notice on the council requiring the council to buy some adjoining land which has become known as the Adjoining land. The council then took possession of both parcels of land. The question of compensation was referred to the Lands Tribunal. On 19th February 1988 the tribunal made an award ("the first award"). In respect of the Order land the sum awarded was £500,000 and in respect of the Adjoining land the sum awarded was £150,000. The council was ordered to pay the costs on the High Court scale.

The council then appealed by way of case stated against both legs of the award. Although the case stated procedure did not allow for service of a respondent's notice, counsel for Mr Batchelor, in his skeleton argument and by letter, made it clear that he wished to challenge the adequacy of the award of £500,000. When the matter came before the Court of Appeal he was allowed to do so.

On 26th July 1989 the Court of Appeal determined that neither leg of the award was satisfactory and both were sent back for redetermination by the Lands Tribunal. In fact, nothing very much was said about costs before the Lands Tribunal except that, when submissions were being made as to what should be the order for costs in the Court of Appeal, counsel for Mr Batchelor said that Mr Batchelor received his costs in the Lands Tribunal which factually was entirely correct. The Court of Appeal decided to reserve the costs of the appeal until after the Lands Tribunal made its further determination, so paragraphs 2), 3) and 4) of the order made by Court of Appeal read as follows:

"2) In respect of the assessment for the adjoining land this be remitted to the Lands Tribunal.

3) In respect of the value of the Order land this be remitted to the Lands Tribunal.

4) That the costs be reserved to the Court of Appeal to be determined after the Lands Tribunal has dealt with the said matters remitted."

On 28th October 1991 a different member of the Lands Tribunal made a fresh award ("the second award"). The reason it was a different member of the tribunal was because the original member had retired. So far as the Order land was concerned, the sum awarded in the second award was £2,150,000. The sum awarded in respect of the Adjoining land was £10,000. The tribunal also ordered that the council pay Mr Batchelor's costs of the reference "including those related to the initial hearing in 1987" which was the hearing leading to the first award. Mr Batchelor then assigned the benefit of the awards to the present respondents, namely Barclays Bank.

The bank appealed against the award of 28th October 1991. On 1st July 1994 the Court of Appeal dismissed that appeal. It also awarded Mr Batchelor three-quarters of his costs of the hearing in the Court of Appeal in 1989. Since then the council has paid the compensation ordered and interest. It has also made payments in respect of costs. It disputed its liability to pay interests on costs. So on 22nd May 1996 the bank issued a writ claiming interest on costs. The matter came before Sir Peter Webster on 9th December 1996 as a summons under Ord.14A of the Rules of the Supreme Court and was treated, by consent, as an application for summary judgment which led to the decision from which this appeal lies. Most of what the judge decided is no longer in issue. The only point now being pursued by the council in this appeal is the council's liability to pay interest on the costs attributable to the first hearing before the Lands Tribunal in respect of the period from the date of first award in 1989 to the date of the second award in 1991. It is put very succinctly in the grounds of appeal thus: *"The learned Judge was wrong in law in holding that interest was payable in respect of the costs of the first hearing before the Lands Tribunal as from the 19th February 1988. The learned Judge ought to have held that interest was only payable on costs as from the conclusion of the reference namely 28th October 1991."*

APPELLANT'S CASE AND LAW
The case for the appellant is really quite simple. The Lands Tribunal is a statutory tribunal which has power under Section 3 (5) of the Lands Tribunal Act 1949 to award costs. Neither the 1949 Act nor the Lands Tribunal Rules give the Lands Tribunal power to award interest on costs and such a power is not inherent, it must be expressly conferred (see ***Legal Aid Board v Russell*** [1991] 2 AC 317.)

Rule 38 of the Lands Tribunal Rules 1975 S/I No 299 (now Rule 32 of the 1996 Rules) provides that - *" ..... (subject to any enactment which prescribes a rate of interest) Section 20 of the Arbitration Act 1950 is to apply to all proceedings in the Lands Tribunal as it applies to an arbitration ..... "*

Section 20 of the 1950 Act provides that - *"A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt."*

Here there is no issue about the rate of interest or the sum at stake; it is £57,044.73 as at 23rd January 1997, being interest at 15% on £97,000 for the period from 1988 to 1991.

What Mr Spence QC, for the Kent County Council, contends is that once the Court of Appeal made its decision on 26th July 1989 the first award of the Lands Tribunal ceased to have any effect including, in particular, the award in relation to costs and with it inevitably there was set aside that particular part of the award. For the purposes of Section 20 of the Arbitration Act, there was then no award of compensation, no award of costs. The only award which now exists, Mr Spence contends, is the award made by the Lands Tribunal on re-determination on 28th October 1991. Whatever may

be thought to be the merits of the position, there is simply no power to award interest on costs as opposed to interest on compensation for any period before the date of what he contends to be the only surviving award.

In support of that submission Mr Spence points out that first, and perhaps most importantly, the Court of Appeal remitted the entire matter which was before it, both legs of the compensation award, for re-determination. It is perfectly possible to conceive of cases, particularly in the field of arbitration, where only a part of an award is remitted. But this is not such a case. Second, the 1991 award, when the Lands Tribunal came to make that award, did expressly deal with the costs not only of the hearing in 1991 but also of the hearing in 1987-1988. The 1991 award might, at any rate in theory, have been less than the original Kent County Council sealed offer, in which event a curious situation to say the least would arise if the original order in relation to costs were preserved and the council, at a re-determination of the sum appropriate for compensation, was unable to recover the costs attributable to the period after the sealed offer was made because of the existence of the earlier order. What happened was that because a new comparable had been discovered by those acting on behalf of Mr Batchelor, the second award was, as I have already indicated, very substantially more than the first.

Mr Spence invited our attention to the decision in ***Johnson v Latham*** [1851] 20 LJQB 236 where costs had been taxed before an original arbitration award which was then sent back for re-determination. After a second award was made the defendant demanded the same costs without any new taxation. It was held that by the reference back the allocatur became void. That proposition was accepted by Erle J who said (page 240): *" ..... although the arbitrator might not alter his first award upon any matter not referred back, still he must make a fresh award repeating the first award as to those matters, and deciding anew that which was so referred back; that the discretion of the arbitrator is to be exercised at close of the reference, and at the time of making the award; and that as the first award so became null by the reference back, the allocatur made thereon was also null*."

Our attention was also invited to the decision of Mr Michael Wheeler QC, sitting as a Deputy Judge of the Chancery Division, in ***Shield Properties & Investments Ltd v Anglo Overseas Transport Co Ltd (No 2)*** [1986] 2 EGLR 112. He held that once the second award was given it completely replaced in that case the original award which from that time on ceased to have any effect. We were also invited to look at Mustill and Boyd on the Law and Practice of Commercial Arbitration in England, 2nd Ed (page 566) which says: *" ..... where the order [of the High Court or Court of Appeal] embraces all the matters referred, the arbitrator resumes all his authority over the dispute, and the original award completely falls away*."

That, Mr Spence, submits must in reality have been the position here.

RESPONDENT'S CASE

Mr Gaunt QC, for the respondents, submits that the award of costs in 1989 was in fact unaffected by the decision of the Court of Appeal and remained, for the purposes of Section 20 of the Arbitration Act, the relevant award. He submits that it is possible for this court to arrive at that conclusion by looking at the form of order made by the Court of Appeal to which I have already referred. He points out that this form of order did not, on the face of it, simply require a new trial. It sent back two substantial matters to be re-determined. The difficulty about that submission, as it seems to me, is that nothing in reality was left save, if Mr Gaunt is right, for the order in relation to costs to which reference was not expressly made. He submits that no one thought it necessary to re-consider the order in relation to costs. But in the normal course of events if the whole substance of the dispute is sent back to be re-determined, the whole question of costs must, by implication, be referred for re-determination also because one cannot know in what way the matter is going to be determined on the next occasion.

Mr Gaunt points out, rightly, that in arbitration proceedings it is possible to remit part of an award for reconsideration and part of the award in those circumstances will stand. That, although entirely correct as a proposition of law and supported not only by ***Johnson v Latham*** but also by ***The "Vimeira "*** [1985] 2 Lloyd's Law Reports 410, to which he invited our attention, is a matter which in the factual circumstances of this case is not of any particular significance. Of course it is possible to say, as Mr Gaunt submits, that the result in a general way, if Mr Spence's submissions are correct, can be said to be unfair because the claimant having succeeded in increasing the amount of the award is nevertheless deprived of a certain amount of interest in relation to costs. That is a peculiarity of the circumstances of this case.

Mr Gaunt puts an alternative submission. He submits that if the Court of Appeal, when the matter was before the court, was inviting the Lands Tribunal to reconsider the question of costs, the fact is, in reality, that in 1991 the Lands Tribunal did not change the original order for costs which must therefore be regarded as having continuing validity. That, as it seems to me, is not an appropriate way to look upon what the Court of Appeal did or what the Lands Tribunal did. The jurisdiction which the Court of Appeal conferred on the Lands Tribunal on the second occasion was not to revive an existing order for costs but to make an order for costs extending across the whole period of the litigation. Mr Gaunt points out rightly that ***Johnson v Latham*** is a decision at first instance. He submits that in the passage which I have already cited Erle J went further than was necessary for the determination of that particular case. He submits that in arbitration proceedings if part of the award is set aside the rest may remain. Here he submits there were two awards available for consideration and there was, in reality, a third award, that is to say an award in relation to costs.

In my judgment, there really is no doubt when one looks at what happened before the Court of Appeal in 1989 but that on that occasion the court set aside the award in relation to compensation. It remitted the matter to the Lands Tribunal to determine. The effect of that decision was that the original order of the Lands Tribunal in relation to costs simply fell away. The only effective award which now exists, as Mr Spence contends, is the award of the Lands Tribunal in 1991 which carries with it the right to interest on costs. There is no other award.

I do not regard this case as a case in which it is necessary to place a construction upon Section 20 of the Arbitration Act. It seems to me that the terms of the Section are clear enough. All that has to be determined is what is the award. I would determine it in the way that I have indicated.

For that reason I would allow this appeal.

LORD JUSTICE JUDGE:
For the reasons given by Lord Justice Kennedy, I agree that this appeal should be allowed.

In my judgment, for the purposes of Section 20 of the Arbitration Act 1950, the award in this case was not made until 28th November 1991. The order for costs made after the first hearing before the Lands Tribunal in February 1988 follow decisions in relation both to the "Order" land and to the "Adjoining" land. In July 1989 both were remitted for reconsideration by the Court of Appeal. Accordingly, the basis for the original order for costs ceased to have a relevance and in reality nothing of the original decision survived. It so happened that the result of this process was that after a second hearing by the Lands Tribunal Mr Batchelor ended up with a lower award in relation to the Adjoining land and a much increased award in relation to the Order land which, taken together, meant that the total award to him was very much greater. Whether the result was an increased or a reduced total award, this was the award which reflected the outcome of these protracted proceedings by Mr Batchelor for compensation from the Kent County Council. Save in a temporal sense, this was not in truth a second award. In law it was the award.

I shall express no concluded view on the principle to be applied if the Court of Appeal had remitted part only of the award made at the first hearing, leaving another discrete part or parts untouched, nor about the correctness and proper impact in such circumstances of ***Johnson v Latham.*** I cannot at present see why discrete unremitted parts of the award should not be enforceable, but these issues do not arise for decision in the present appeal.

LORD JUSTICE CHADWICK:
I also would prefer to leave open for decision on another occasion the question whether, following an original decision and award and the remission by the Court of Appeal of discrete issues for further consideration by the Lands Tribunal, the award under the original decision - including any relevant award as to costs in relation to other issues not so remitted - could stand as an independent award for the purposes of Section 20 of the Arbitration Act 1950. Upon a true understanding of the order of the Court of Appeal made on 26th July 1989 that point does not arise on this appeal.

I am satisfied for the reasons given, both by Lord Justice Kennedy and by Lord Justice Judge, that the effect of the order of 26th July 1989 was that the original decision as to the costs of the first hearing before the Lands Tribunal was open to review on the second hearing before the Lands Tribunal. Accordingly, in this case the only relevant award in relation to those costs is the award of 28th October 1991. It is from that date that interest runs under Section 20 of the 1950 Act.

I agree that the appeal must be allowed.

Order: Appeal allowed

MR MALCOLM SPENCE QC and MR JONATHAN EASTON (Instructed by Sharpe Pritchard of London - London Agents for Kent County Council) appeared on behalf of the Appellant
MR J GAUNT QC (Instructed by Burgess Salmon of Bristol) appeared on behalf of the Respondent