

CA on appeal from Brighton County Court (HHJ Hammerton) before Otton LJ; Hutchison LJ; 31st July 1997

LORD JUSTICE OTTON:

This is an application for leave to appeal the decision, given on 17 January 1997, of His Honour Judge Hammerton, sitting in the Brighton County Court, whereby he refused leave to appeal against an arbitration award.

The background of this matter can be briefly stated. Mr Orchard, the plaintiff, and his wife lived in a house in Reigate. They decided to build a conservatory. The defendant, the applicant, who is a builder, agreed to build the conservatory. There was a dispute as to the quality of the work. This resulted, on 14 November 1996, in an arbitration being conducted in the Haywards Heath County Court before Deputy Judge Hooper. He heard the parties to the dispute, including their expert witnesses. He had before him a number of drawings of the conservatory. It is not necessary to set out the dispute between the parties as to whether or not the conservatory, as built, conformed with the terms of the contract. It is sufficient to record that the District Judge, in a long, careful and model award, identified various defects. He accepted, and found, various costings for remedial works, and awarded the plaintiffs the sum of £1,950 in relation to their claim. There was a Counterclaim and the judge awarded £200 to the defendant. Thus there was a balance of £1,750 due from the defendant to the plaintiff.

Mr Hutchings was dissatisfied with that award and the procedure which led to it. His grievance is that in the course of the hearing itself the plaintiff produced a plan or drawing which Mr Hutchings claimed he had never seen before. It was the plaintiff's case that Mr Orchard had himself drawn, or caused to be drawn, this vital drawing. It was before both of them when they discussed how the work was to be carried out and what it was to cost. Mr Hutchings would wish me to note that he instructed his own engineer, Mr Blacker, to make drawings for this work to be produced. It was necessary to modify the original scheme because Mr and Mrs Orchard wanted the conservatory to be larger than originally envisaged and there was an adjustment upwards of the contract price to encompass the additional work.

The drawing which the plaintiff produced took Mr Hutchings by surprise. It was his case, and he adhered to it throughout the arbitration proceedings, that he had never seen it before and that it had never formed the basis of the contract for the construction of the conservatory. It is true that the arbitrator did not make any specific finding on that dispute. The arbitrator, having heard all the evidence, preferred the recollections of Mr Orchard to that of Mr Hutchings. By implication he found that the drawing had been shown by Mr Orchard to Mr Hutchings. Mr Hutchings has never accepted that that to be the case, which is why he went before the County Court judge on 17 January. He pointed out to the judge that this was an irregularity; the drawing was produced late (which it was), and he was never supplied with it, or a copy of it, in preparation of his defence to the case that he sought to present to the arbitrator. He also pointed out that, as this was a fundamental document, it affected his credibility as a witness before the arbitrator, and, consequently the arbitrator preferred Mr Orchard's evidence when it was unfair for him to do so.

The Circuit Judge, having heard argument on the matter, pointed out to the applicant that there was no basis for having a re-hearing of the dispute between the parties, that the award of the arbitrator was a final award and that it could only be set aside in exceptional circumstances. He said:

"The judgment deals with the matter in a completely different way. It deals with the circumstances as the learned District Judge saw them; the evidence that was given by the parties, and the expert evidence that he had before him. This was a case which because of the amount involved was an arbitration. An arbitration has the effect that the arbitrator's judgment is final unless he misconducted himself in law. That misconduct is either a failure to apply the law properly, or in some ways a refusal to give cognizance to evidence, or prevent a witness from giving evidence, or taking evidence, or accepting it, when it is challenged, without giving the other side the opportunity to challenge it.

Mr Hutchings states that the second plan, to which he refers, was a document that he had no opportunity to challenge. Nevertheless, according to Mr Orchard, no point was raised before the learned District Judge that that was so and it does not seem to me that on the judgment as such the learned District Judge's decision was really influenced by it. His view was based upon hearing the evidence, particularly the evidence of the experts. His view was that essentially the work had not been carried out in accordance with proper workmanship and the way the expert said it should have been. That was a matter that was in no way affected by the question of plans."

The judge made it clear that the application to set aside the arbitration award should fail and that the application had to be dismissed. The applicant now seeks to leave to appeal that decision. Mr Hutchings, in a very courteous manner, has addressed his grievance to this court and asked us to relieve him of the award. He contended that the award should be set aside and that he should have a further opportunity to dispute this claim within the light of all the evidence that is available and which, if he had a proper opportunity, would show that his case, or version, was the one that should have been preferred by the District Judge.

The County Court judge had very limited powers. When he pointed out the limited basis upon which an award could be set aside, he had in mind the language of Order 19 rule 8(1) (Part 1 - County Court Arbitration) of the County Court Rules which states: *"Where proceedings are referred to arbitration, the award of the arbitrator shall be final and may only be set aside, pursuant to paragraph 2, or on the ground that there has been misconduct by the arbitrator or that the arbitrator made an error of law."*

I am satisfied that the County Court judge correctly identified the law on the subject and then proceeded to apply it correctly. He concluded that, even if Mr Hutchings had the grievance which he claimed, that could not amount to misconduct or an error of law upon the part of the arbitrator. In this he was clearly right. Although there may have been a material irregularity in the course of the proceedings before the arbitrator, that was a matter which the arbitrator was able to deal with and did deal with properly. The matter was brought before the County Court judge who, in turn, made no error in the manner in which he dealt with the matter.

In those circumstances there is no basis upon which we could grant leave to appeal. There are no realistic prospects of successfully pursuing this appeal on the basis which Mr Hutchings wishes, and in those circumstances I would disallow this application.

LORD JUSTICE HUTCHISON: I agree.

Order: Application dismissed.

MR N HUTCHINGS appeared in person.

The Respondent did not attend and was not represented.