Turner v Stenenage Borough Council [1997] APP.L.R. 03/06

CA on appeal from Chancery (Mr Grabiner QC) before Stuaghton LJ; Pill LJ; Mummery LJ. 6th March 1997.

LORD JUSTICE STAUGHTON:

On 26th October 1982 Stevenage Borough Council granted a lease of a shop at 7 Austen Paths in Stevenage to Mr John Christofis. The present appellant, Mr Chris Turner, is the successor in title to Mr Christofis. The lease was for a term of 21 years from 16th June 1982, and the rent £1500 a year. But there was a provision for rent review, upwards only, after every 3 years of the term. The new rent, if not agreed, was to be determined by an arbitrator as: "*The then current market annual rental value of the demised premises*".

That was defined as the annual rent at which the demised premises might, at the appropriate date of review, reasonably be expected to be let in the open market by a willing landlord to a willing tenant, with certain modifications.

The parties failed to agree on a revised rent to take effect after 9 years of the term, on 16th June 1991. Thereupon the provisions relating to arbitration came into operation: the arbitrator was to be a person appointed by the President for the time being of the Royal Institution of Chartered Surveyors. On 15th February 1993 the President appointed Mr D W Clark BA, Bsc, FRICS, IRRV, ACI Arb. He practised, or had practised in the past, as a member of the firm of Croziers, chartered surveyors in Hertford. His qualifications indicate that he had some interest in arbitration.

The rent applicable immediately before the rent review date was, as I understand it, £3500 a year. Mr Turner proposed that it should stay at that figure. The council proposed a new rent of £6100. So the difference between the parties was £2600 a year. For 3 years the total amount in dispute was £7800. But of course the new rent fixed on this review might continue to have an effect after 3 years had expired as subsequent reviews were to be upwards only.

Seeing that there was only a modest amount involved, one might have thought that the arbitration would have been concluded swiftly and without undue expense. There could have been a written report from a surveyor on each side, citing comparable cases, a visit by Mr Clark to the premises and perhaps a hearing lasting half a day. There would no doubt have been mention of the fact that many small shops have closed down recently and that shop premises have remained empty, as we can all see. The whole process might have been concluded in 3 months, with very modest expenditure on costs all round. It was not to be.

After a preliminary meeting on 12th March Mr Clark wrote to the parties "to confirm the procedures agreed". He included this paragraph:

"1. Confirmation of my appointment as set out in the introduction to this letter and verbal agreement by the parties that my charges be based on an hourly rate of £100 per hour to cover all time involved in the Arbitration procedures to include all outgoings but excluding VAT which would be charged at the standard rate. The minimum fee was stated at £500 irrespective of whether the matter is settled by agreement or by arbitration. In the event that separate legal advice is required I would propose to provide the parties with an estimate of the additional costs before taking such advice."

The parties confirmed their agreement. One should note that the minimum fee was £500. Another paragraph of the letter said this:

"vii. The award to be made by Friday 30th June 1993 -- assuming that the arrangements for the inspections of the subject properties and the comparables have been made in sufficient time and that the fees required prior to the release of the award have been paid."

That, incidently, confirms my impression that the parties contemplated, or appeared to contemplate, an arbitration that proceeded with all deliberate speed and reached a conclusion in 3 months or so.

Instead of that happening, there were five preliminary hearings on the following dates in 1993: 12th March; 24th May; 10th June; 23rd September; 25th November. There was also much lengthy correspondence, mostly emanating from the solicitors for Mr Turner. The principal topics canvassed were:

(1) discovery of documents (in great detail);

(2) amendment of written submissions; and

(3) admissibility of evidence.

Topics (2) and (3), so far as I can detect, did not need to be dealt with at a preliminary hearing at all. They could have been decided summarily at the hearing of the arbitration itself, if indeed it was appropriate to argue either topic instead of allowing in all the evidence and all submissions for what they were worth.

The arbitrator twice gave the parties a warning about the consequences of what was going on. On 14th July 1993 he wrote: *"In view of the protracted nature of the preliminary matters affecting this Arbitration, and in consequence the costs to the parties themselves, I write to request that the parties' legal representatives meet in order to agree between themselves the scope of the written representations and hopefully to reach agreement on as much detail as possible, in order that the way is clear for the Arbitration Hearing to take place as soon as possible after my Directions have been given on the matters in this letter*".

On 20th August 1993 the arbitrator wrote proposing a fee of £300 plus VAT for his legal adviser, Mr Tunstill, of the firm of Breeze & Wyles. That appears to have been for an occasion when Mr Tunstill would advise on certain specific matters. He asked the parties for agreement, but it is not clear whether agreement was later obtained. He continued: *"I would urge the parties representatives to consider whether or not it is possible to agree the issues between themselves since the Arbitration of this rent review has already become both protracted and costly to the parties*".

Eventually, on 10th May 1994, the arbitrator wrote again to the solicitors for Mr Turner and the Council on this topic. After referring to some procedural matters he continued:

"I have to point that the failure to respond to my previous letters is adding to the cost of this matter and I have previously mentioned my concern on this issue. In addition to my own costs fees are due to Mr Tunstill of Breeze and Wyles in his capacity as Legal Advisor on the issues of Admissibility, Amendment and Discovery and, following discussions with the RICS Arbitration Service and the Chairman of the Arbitration Skills Panel I propose that an interim account should be settled before proceeding to the stage of the Hearing. Naturally the payment of the interim monies becomes part of the costs, but the account has been drafted on the basis that each party should bear an equal part at the present stage.

I look forward to receiving confirmation of agreement to the time table set out in this letter and also to receiving payment in settlement of the interim account".

Attached was a two page document headed "*Interim Account*". The latter part of it read as follows:

"Fees of Arbitrators at agreed rate of £100.00 per hour - 47 hours £4,700.00
Fees of Legal Adviser as advised to Arbitrator 800.00
Plus VAT at 17.5% 962.50
Total due under interim account £6,462.50
50% payment due from Tenant £3,231.25

VAT NO. 388 8289 73

Note: This interim account requires equal payment from the parties but the issue of costs may be the subject of a separate Award following the Award of Rent".

At first sight it seems appalling that before the substantive proceedings in the arbitration had even begun, the arbitrator had devoted 47 hours to it at a cost of £4,700 plus VAT, not to mention the fees of his legal adviser (I would say that nobody has taken any point about those fees being £800 as opposed to the figure of £300 which was apparently forecast). And I suppose that at least a similar amount of expensive time had been spent by the legal advisors of the parties. But after reading the correspondence and the affidavits that are before us I am not surprised. Of course the propriety of Mr Clark's charges, at any rate in so far as they relate to the number of hours that he worked rather than the rate which he charged, may have to be assessed later either by a taxing master in taxation under the Arbitration Act, or in an action brought by Mr Clark against one or both of the parties to recover his charges and expenses. There was a time when it was doubted whether an arbitrator had a right of action or whether he had to rely solely on a lien which he could exercise on his award. I say nothing as to whether that is still the position today, nor about any other aspect of Mr Clark's claim if it comes to a dispute as to the amount.

When they received that letter from the arbitrator with the account Mr Turner's solicitors objected to the request. At any rate they wrote this letter:

"... without prejudice to my Client's rights to comment on both the quantum and principle of your purported interim account, are you saying that if your interim account is not paid in full you will not hear the Arbitration?

I look forward to receiving your clarification by return".

That was dated 26th May 1994. Mr Clark replied on 31st May; but he did not directly answer the question whether he would refuse to hear the arbitration if his interim account was not paid. He concluded a long letter:

"The first priority must be to fix the Hearing and to resolve the long standing dispute, but I hope the parties will agree that it would be reasonable that Mr Tunstill and I should receive interim payment for time expended on the matter and in this regard please let me know whether your letter indicates that you are not prepared to make an interim payment and elaborate on your comments of 'the quantum and principle' of my 'purported interim account'.

Please may I also have a courtesy of reply by return."

The solicitor for Mr Turner replied including this paragraph: *"I mean no disrespect when I say that the contents of paragraph 1 & 2 of your letter have no relevance to the question we raised in the third paragraph of our letter to you of 26th May ... I therefore look forward to hearing from you with a direct response to this question".*

On the same day, 2nd June 1994, Mr Barney of David Barney & Co, acting for Mr Turner, sent a copy of that letter to Mr Castledine, the borough solicitor for the Stevenage Borough Council. 11 days later the Stevenage Borough Council sent a cheque for one half of Mr Clark's interim account for his fees and expenses to Mr Clark. It was accompanied by a remittance note which the council had written on its usual form with no further observations. The explanation put forward on behalf of the council is that the letter asking for payment reached the chief executive's office and was directed from there, mistakenly, to the estates department. It should have gone to the legal department. The estates department then arranged for a cheque to be sent to the arbitrator. This is said to have been contrary to the wishes and to the instructions of the legal department. When that explanation appeared in the evidence for the council Mr Barney raised a number of questions about it. He claimed to find a number of aspects of the council's procedure difficult to understand. However that may be, it is not said today on behalf of Mr Turner that there was any deliberate impropriety by the council. At most if there was an error it was a mistake and no more.

Eventually, on 9th September, the arbitrator who had banked the cheque from the council sent back his own cheque in a like amount. He had in the meantime, it seems, taken legal advice. It may be that some of the delay in sending back the cheque arose because he needed time to obtain legal advise.

This episode resulted, eventually, in an application under section 23 of the Arbitration Act to remove Mr Clark from the post of arbitrator on the ground of misconduct. That application, as the rules require, was made in the first instance in the Commercial Court. As it related to a rent review arbitration it was transferred to the Chancery Division. Perhaps it was difficult at that stage to forecast what the issues were going to be. But for my part I would have thought that it was

concerned with arbitration law and practice rather than rent review, and ought to have stayed in the Commercial Court. But once it gets here we have both skills available, and others as well.

In the event it came before Mr Antony Grabiner QC sitting as a Deputy Judge of the Chancery Division. The first question he was asked to decide was whether the arbitrator, under the terms of his position, had a right to claim an interim payment together with the threat of a sanction in the shape of declining to continue further if it was not made. The deputy judge did not find it necessary to decide whether the arbitrator had a right to demand interim payment; he held that what the arbitrator had done was to make a proposal or a request and not a demand. He declined to hold that the making of that proposal or request was misconduct; nor did he find misconduct in what the arbitrator did by way of accepting a cheque from one party only, putting it in his bank and not returning it until some 3 months later. So the application was dismissed. There is now an appeal to this court.

We have to start with the case of ***K/S Norjarl A/S v Hyundai Heavy Industries Limited*** [1992] QB 863 .which has a considerable bearing on this dispute. The problem there was that the arbitrators were insisting on a substantial commitment fee, or at any rate two of them were, before they would agree to book a 12 week period in their diary 2 years ahead with a firm commitment. The application for relief failed and so did an appeal. Leggatt LJ, in his judgment, said at page 876: *"It seems to me that if arbitrators wish to insist on the payment of a commitment fee, the proper time to do so is before appointment. They can then decline the appointment if acceptable terms are not forthcoming. After acceptance of appointment parties are, in my judgment, entitled to object to insistence upon any particular fee on the ground that it would constitute a variation of the arbitration agreement, under which the arbitrators would be entitled to reasonable fees, but not without the consent of the parties to any commitment fee*"

Pausing there, one can imagine that it will not always be easy to devise a form of agreement providing for a commitment fee at the early stage when an arbitrator is appointed, but no doubt a suitable form of words can be dismissed. Leggatt LJ went on at 877: *"Once an arbitrator has accepted an appointment, no term can be implied that entitles him to a commitment fee, and the arbitration agreement cannot be varied in that way without the consent of all parties*".

He also said at page 880: *"In my judgment the mere proposal of a commitment fee cannot of itself constitute misconduct*".

So, the three points here are that if a commitment fee is not specified in the original appointment it will not be implied. Secondly, the arbitrator has no unilateral rights to change the terms so as to provide for a commitment fee. But thirdly it is not misconduct on his behalf, or was not, in this case, to propose one. Stuart-Smith LJ at 882 agreed with the second of those points: *"Once appointed an arbitrator cannot unilaterally change the terms of his appointment and demand a commitment fee any more than any other party to a contract can change the terms of the contrac*t"

Sir Nicholas Brown-Wilkinson VC agreed that after he had accepted *"the arbitrator cannot, by reason of his status, deal unilaterally with one only of the parties. Even after accepting the appointment, there can be no objection to the arbitrator dealing openly with both parties and reaching an agreement with both parties as to his fees*".

He also said at 886: *"Although a commitment fee would not have been payable in default of agreement, I can see nothing improper in the arbitrators proposing the payment of a commitment fee so long as that proposal is made to both parties and all negotiations relating to it are conducted with both parties*."

This case, of course, is not about commitment fees it is about an interim payment of money that had been earned, and of expenses that had been incurred. There seems to me the world of difference between that and a commitment fee, which would be a payment in advance for work that may never be done.

The question then arises, in my view, whether the agreement in this case provided for an interim payment. There is an interesting discussion on this topic in Mustill and Boyd on Commercial Arbitration, second edition pages 241-242. There is little, if any, authority cited. But the tenor of the passage in Mustill and Boyd seems to me to be, that in the ordinary way an arbitrator is justified in asking for an interim payment in respect of his fees and expenses, provided that he does not leave the request so late that the parties would be placed in a difficult position with inferior bargaining power if the arbitrator insists on his request. Apart from that, it seems to me that the authors support the view that an arbitrator can make a reasonable request for an interim payment of his fees, and if it is declined he may impose the sanction that he will not to continue to act.

Now, the question that we have to decide is whether there is such a term in the contract in this case. I have read the terms of the arbitrator's letter so far as it is relevant. There is a provision, as I pointed out, for payment of fees that are due before the award is collected. But I would not regard that as negativing a possible implication that an interim payment of fees may be due at some earlier time. Take this very case -- as the Master of the Rolls used to say many years ago. Mr Clark expected the arbitration to be concluded in 3 months or so. Instead of that he was involved in a long series of preliminary meetings. Was he expected to work for no present reward for as long as the parties required him to do so? Did they have a free hand to demand of his time and indeed of his expense? Was it necessary for him to incur expense for so long as they pleased, provided only that at the end of the day when he eventually made an award he would then have a right to reimbursement? That does not seem to me to be good law or good sense. In my judgment, on the true construction of this contract and in the light of the surrounding circumstances which prevailed when it was made -- or as some people like to say the factual matrix -- it was an implied term that the arbitrator might request an interim payment towards his fees and expenses provided that that was done at a reasonable time, either once or oftener, and provided also that it was not made after the parties were so committed to his services at a hearing that they would be in an inferior bargaining position to refuse. Subject only to that I would say that the arbitrator is entitled to make a reasonable demand for interim payment, and to enforce it with the sanction of resignation if it is not complied with.

That is the basis upon which I would conclude the first issue in this case. It makes it unnecessary for me to decide the point upon which the judge decided that issue. He held that Mr Clark had not made a demand but merely a request or a proposal. He did not take the view that Mr Clark was saying, by implication, "*if this request is not met I shall resign*". I am far from saying that the judge was wrong. I express no view on that point since I consider that it need not be decided.

I now turn to the second point in the case. Granted Mr Clark was entitled to demand a payment on account of his fees and expenses, was what happened afterwards misconduct? The case of Hyundai shows that it is wrong for an arbitrator to agree to accept a fee from one party after the start of the arbitration and not from the other. He may, it seems, do so if he agrees to that course before the arbitration starts but not afterwards. Now, what is the consequence if the arbitrator infringes that principle? Mr Pelling submits, and he may well be right in this, that one must consider two different situations depending on whether the arbitrator had a right to make the demand or not. If the arbitrator has no right to make a demand and does make one he is wrong to do so. He his certainly wrong if he accepts from one party money consequent upon that demand and retains it whilst the other party does not contribute. The position is not so clear to my mind if the arbitrator has a right to make a demand, as I hold he has in this case, but nevertheless only one party responds to his request.

Let us take the worst case. Let us suppose that the arbitrator had no right to make a demand, but nevertheless did so and one party paid. Mr Clark in this case would have done better, in my opinion, not to bank the cheque at the time when he received it. He knew that Mr Barney was potentially arguing that there was no right to payment. He should either have put the cheque in his drawer, so to speak, so that it was in suspense, or returned it. He did not take that course for a period of 3 months.

I am quite satisfied that there was in no way any deliberate wrong-doing in this case. It seems to me highly probable that he was somewhat puzzled as to what he ought to do, with one side sending him the cheque for half the fee and the other side questioning whether he was entitled to it. He consulted a lawyer. The lawyer evidently gave him advice, and he then returned the cheque. The whole process was somewhat dilatory, as it always is when people consult lawyers or almost always. I do not think that anything that Mr Clark did or did not do amounted to misconduct. He was doing his best, with evidently a knowledge of arbitration procedure which may not have been comprehensive, and the necessity to get advice from outside.

I would hold that in the circumstances of this case there was not misconduct which would justify the removal of Mr Clark as an arbitrator.

Whether the situation would have been different on the alternative hypothesis that he was entitled to demand payment on account as I have held he was, one party paid and the other refused, is to my mind a rather more difficult question. Would he be entitled to keep the money from one party although he had not been paid by the other, or must he either return the money or resign from his position as arbitrator? That does not need to be decided in this case and I would leave it to another day. As matters stand I would dismiss this appeal.

LORD JUSTICE PILL:
I agree. I find no misconduct in the application -- to use a neutral word -- for interim fees actually made by the arbitrator in his correspondence with the parties. I do not construe it as a demand which would constitute misconduct. The application was made to both parties. Such conduct was, in relation to a request for a commitment fee, expressly approved by Sir Nicholas Browne-Wilkinson VC, in ***K/S Norjarl A/S v Hyundai Heavy Industries Limited*** [1992] QB 863 at 885H.

When an issue arose as to what the arbitrator would do if he was not paid, he did sufficiently indicate his willingness to proceed. Having received a majority of his fee from the council, the arbitrator paid it into his bank account; it remained there and was returned only after a period of about 3 months. The arbitrator should have returned the money sooner. However, that was not, in my view, something which amounted to misconduct. I agree with, Lord Justice Staughton, that there do not exist grounds from which a reasonable person would think that there was a real likelihood that the arbitrator would not determine the issue on the basis of the evidence to be called before him. I would dismiss the appeal on that ground.

Lord Justice Staughton has expressed the view that a term was to be implied into the contract by which the arbitrator was entitled to interim payments. That was not the basis on which the arbitrator made his application for interim fees or the basis upon which the council paid their part. I share Lord Justice Staughton's views as to the attractiveness and reasonableness of such an implied term, especially when an arbitration is prolonged, or where the arbitrator has had to pay to third parties the expenses which may arise in an arbitration. I also agree that an interim payment of fees for work done is quite different from a commitment fee, so that the decision of this court in Norjarl does not conclude the issue upon the implication of a term. Further, the fact that the arbitrator has been appointed to a quasi-judicial position does not necessarily conclude the issue as to what terms are to be implied into his terms of engagement. However, I should wish to reserve the question for further consideration in another case. The present case was not argued before the deputy judge or decided by him upon this ground. It has hardly been in the forefront of submissions made in this court. There has been no reference to authority, for example, as to whether or when such a term arises upon instruction of professional men in other contexts. Further, consideration of the actual term to be implied and of the consequences of implication, which may throw light upon whether implication is appropriate, is in my view desirable before the principle is decided. Lord Justice Staughton has mentioned some of the difficulties which may arise.

I also bear in mind the principle expressed by Bingham LJ in ***Loritson A/S v Weismueller*** [1990] 1 LLR 1, at page six. That was a case concerning a contract for carriage by sea: *"The drafting of this contract, as of most commercial contracts, is*

not faultless, but it is detailed and elaborate and suggests in some respects at least that the parties have applied their minds to the requirements of this. The term contended for, however reasonable, is not in my view necessary to make the contract operable nor is it a term which one could confidently say the parties would have adopted had the point been raised during their negotiations".

If an arbitrator is likely to seek interim payment of fees and expenses there are obviously advantages in providing for this by an express term.

LORD JUSTICE MUMMERY:
I agree with the judgment of Lord Justice Staughton. I also agree with the reasoning of the deputy judge on the construction of the correspondence starting on 10th May 1993. The deputy judge held that the letter of the 10th May, written by Mr Clark, was an unobjectionable request for payment. He said: *"First, on the true construction of the correspondence which passed between the parties commencing with Mr Clark's letter of 10th May this was a proposal made to both parties and not merely to one of them or whichever one of them agreed to the proposal. The letter, in identical terms, was sent to both parties in the hope and expectation they would both agree to its contents. In the event Mr Turner was not prepared to agree and it follows there was never any agreement at all, still less was there any private agreement as between Mr Clark and the council.*"

This was a remarkable but unsuccessful attempt by Mr Clark to secure agreement of both parties to an interim payment for work done by him. That is not conduct which would justify the removal of this arbitrator. I would dismiss this appeal.

ORDER: Appeal dismissed with costs. Legal aid taxation. Leave to appeal refused.

MR MARK PELLING (Instructed by Messrs David Barney SE1 1DA) appeared on behalf of the Appellant
MISS J MOSS (Instructed by The Legal Department Stevenage Borough Council SG1 1HN) appeared on behalf of the Respondent