Case No: A3/2006/0902

Neutral Citation Number: [2007] EWCA Civ 471
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
(MR JUSTICE DAVID STEEL)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 25th April 2007

Before:

LADY JUSTICE ARDEN
LORD JUSTICE LONGMORE
and
LORD JUSTICE TOULSON

- -

Between:

THE REPUBLIC OF KAZAKHSTAN

Appellant

- and -

ISTIL GROUP LTD

Respondent

- -

(DAR Transcript of
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MR H PAGE QC and MR M VINALL (instructed by Messrs Penningtons) appeared on behalf of the Appellant.

MR A MALEK QC and MR M PARKER (instructed by Messrs Reed Smith Richards Butler LLP) appeared on behalf of the Respondent.

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Judgment

Lord Justice Longmore:

1. In 1994 and 1995, a British Virgin Island company called Metals Russia Corp Limited ("Metals Russia") made three contracts for the purchase of rolled steel. All three contracts contained a London arbitration clause requiring the disputes to be resolved under the auspices of the London Court of International Arbitration ("the LCIA"). The counterparties to those contracts were as to the first contract an organisation called Estate Foreign Trade Company Kazakhstan Sauda ("Sauda"), and as to the second and third contracts, Oltex Trading Limited ("Oltex").

2. Metals Russia and their successors in title, Istil Group Inc, whom I shall call Istil, the present applicants, have from an early stage contended that Sauda and Oltex made the sale contracts as agents for the owners or operators of the steel mill from which the steel was to be provided, pursuant to those contracts, Karaganda Metallurgical Combine ("Karmet"). No steel has ever been delivered pursuant to those sale contracts.

3. In late 1995, Karmet was experiencing severe financial difficulties and, on 17 October 1995, the Republic of Kazakhstan ("ROK"), passed decree number 1338, by clause 6 of which all export sales and agreements for supply of raw materials were suspended with effect from 18 October 1995. Istil now contend that Karmet was not a legal entity distinct from ROK, and ROK itself was liable on the contracts as principal.

4. Alternatively, it is said that ROK agreed as part of the subsequent sale of Karmet's assets, by way of privatisation to a company called Group Ispat UK, that it would discharge the debts and liabilities of Karmet. One such debt was said to arise from various "verification of debt" documents signed on 17 and 18 October 1995, whereby Karmet acknowledged that various sums in excess of $10 billion were due to Metals Russia. But neither payment nor damages for non-delivery have been forthcoming.

5. Metals Russia therefore started proceedings in the Paris Commercial Court by a writ dated 7 November 1997. Since any claim under the contracts themselves would be subject to the arbitration clause, it seems that Metals Russia put its claim mainly, if not entirely, on the basis that ROK was responsible for Karmet's debts. But it was also said that Karmet was an emanation of ROK and that ROK was liable for Karmet's debts for that reason also. ROK responded by relying on the arbitration clause in the contracts and claiming that, in any event, ROK was entitled to sovereign immunity. The Paris Commercial Court in the judgment of 23 June 1999 pointed out that the arbitration clause would not apply to a claim that ROK was responsible for Karmet's debts by reason of the privatisation agreement and that the privatisation agreement was for the benefit of Ispat, not of third parties. It then upheld the plea that the French courts had no jurisdiction.

6. Thus rebuffed, Metals Russia did not in fact start proceedings in Kazakhstan but resorted to arbitration proceedings in London by a notice of arbitration of 5 July 2001. The LCIA duly appointed three arbitrators, Dr Volka Tribel of Düsseldorf being the Chairman. The tribunal dealt with the question of jurisdiction in what they called a partial award of 15 January 2003. By that time

Metals Russia had in early April 2002 merged into its parent company, Metals Russia Group Holdings Limited, which in turn had merged in mid April 2002 into Istil. According to British Virgin Island law that meant that both Metals Russia and its parent company had ceased to exist. No one, however, informed the arbitrators of that fact, so that their partial award which decided that they did indeed have jurisdiction was in favour of Metals Russia.

7. It was only on 14 April 2003 that Istil informed the arbitrators of the position. A final hearing then took place in February 2004 which led to a final award in favour of Istil of 11 June 2004. The final award decided that the partial award was a nullity, since Metals Russia had ceased to exist. The arbitrators then substituted Istil as claimant and confirmed their original conclusion as to jurisdiction. They further held that ROK had in 1995 accepted an obligation to be responsible to Karmet's trade creditors, that ROK had in any event succeeded to Karmet's obligations and that ROK should pay Istil a sum of about $6 million.

8. ROK then issued proceedings before the Commercial Court under section 67 of the Arbitration Act 1996, on the grounds that the award of the arbitrators was outside their jurisdiction. On 3 April 2006, David Steel J held:

> 1) Any contention by Istil that the tribunal had exceeded its powers in setting aside its partial award should have been pursued under section 68 of the Act but that it had not been.
>
> 2) The parties were therefore now bound by the decision that the partial award was a nullity.
>
> 3) Obiter, that the partial award was not in fact a nullity since Istil had succeeded to Metals Russia's right to arbitrate under British Virgin Island law and that, although English law required notice of Istil's succession to be given, once it was given the arbitration could continue and any orders or awards already made would be effective.
>
> 4) ROK never made any ad hoc agreement to the effect that the tribunal could finally decide the question of jurisdiction.
>
> 5) Karmet and ROK were separate legal entities so that ROK could not be liable just because Karmet was.
>
> 6) None of the contracts was made by Sauda or Oltex as agents of ROK but only, if at all, as agents for Karmet.
>
> 7) ROK never became a party to any arbitration clause.
>
> 8) The claim before the arbitrators was essentially the same as that made before the Paris Commercial Court, which had decided that the claim did not fall within the arbitration clause, and Istil were now estopped from arguing the contrary.

9. For all those reasons, David Steel J decided that the arbitration tribunal lacked substantive jurisdiction to consider Istil's claims and that the award should be set aside. He refused permission to appeal. Istil now seek permission to appeal and

the question now before us is whether this court has any jurisdiction to grant permission to appeal once the judge has refused.

10. The 1996 Act itself has vested in the court of first instance the duty to decide whether permission to appeal should be granted in cases where under section 67 the judge decides questions of jurisdiction. It has done likewise under section 68, where procedural irregularity has been alleged, and under section 69, where permission to appeal an award has been granted or refused or where a decision on such an appeal has been made.

11. In order to maintain the compatibility of sections 68 and 69 with the Human Rights Act and the European Convention's Article 6 requirement of a fair hearing, the courts are allowed a very limited inroad on the finality of the judge's decision and have held that if there was any procedural unfairness in the judge's decision, in relation to the question of an appeal or, if this is different, a failure to engage with the arguments on that limited question this court can set aside the judge's decision and consider what further order should be made, see CGU v AstraZeneca [2006] EWCA Civ 1340, [2007] 1 Lloyds Reports page 142. The judgment of this court was delivered by Rix LJ, with whom, as it happens, myself, and the Master of the Rolls agreed. In paragraph 79 Rix LJ said this:

> "What one is looking for is not merely an error of law, but such a substantial defect in the fairness of the process as to invalidate the decision."

He continued in paragraph 80:

> "For these purposes, it is clear that perversity in itself, a decision that no reasonable decision-maker could make, is not enough. It might be enough in judicial review: but in this context, perversity is an error of law like any other."

12. On behalf of the applicant's in this application, Mr Hugo Page QC submits that permission to appeal should have been given and that this court should so decide or refer the matter back to the judge. He supported this originally by four main arguments.

13. Firstly, he said that section 67(4) is incompatible with Article 6 of the European Convention of Human Rights and should be construed so as to provide that the leave of the court of first instance "or the Court of Appeal" is required for any appeal from a decision under section 67.

14. Secondly, he submitted that the refusal of permission to appeal by the judge was indeed procedurally unfair in that, although he changed the original draft of his judgment to delete any reference to any encouragement by or cooperation from Istil, which produced the second award to the effect that the first award was a nullity, he adhered to the results to which he had already come in his draft judgment and became so wedded to that conclusion that for that reason he refused permission to appeal. Indeed, in oral submissions Mr Page said that in the course of discussion the judge said, "It is not going to affect the result".

15. When this court examined the transcript with the help of Mr Page, it became apparent not merely that the judge had not said any such thing but that the judge made it clear that he was going to consider the consequences of the wrong facts to which his attention had been drawn and whether it would in fact make any difference to the judgment and that he was going to consider those consequences carefully. In those circumstances, this court put it to Mr Page that perhaps he would wish to withdraw this part of his argument and on reflection he accepted that he should do so. That acceptance by Mr Page was entirely right.

16. Thirdly, Mr Page submitted that the judge had failed to engage with the applicant's argument that the Republic was precluded from objecting to the decision that the arbitration tribunal had jurisdiction because it had failed to challenge the partial award and that the judge also failed to appreciate that the point if decided in Istil's favour by him or on appeal would dispose of the application.

17. Fourthly, there was a submission that in his written reasons as opposed to his oral reasons the judge had applied a test which was stricter than the test which should be applied: namely, whether there was any reasonable prospect of success.

18. I turn to the first submission. In my judgment that submission is an impossible one, partly because this court has already decided this question of construction in Athletic Union of Constantinople v National Basketball Association [2002] EWCA Civ 830, [2002] 1 WLR 283, by holding that once the judge at first instance has made a decision on the arbitration tribunal's jurisdiction and has refused permission to appeal, this court has no jurisdiction to grant permission to appeal, and partly because the proposed construction is not necessary to protect Istil's human rights. It is true that no Human Rights Convention point was raised in the Athletic Union case, but it has now been raised and comprehensively dealt with in the North Range Shipping Limited v Sea Tram Shipping Corporation [2002] 1 WLR 2397 and the CGU case, to which I have already referred in relation to section 69 of the Act, and indeed in ASM Shipping Limited v TTMI [2006] EWCA Civ 1341, [2007] 1 Lloyds Reports 136, in relation to section 68 of the Act.

19. Now that it is clear that there is the residual jurisdiction in this court, in these cases, to ensure that a fair hearing of the application for permission to appeal has been afforded it must to say the least be doubtful whether any special construction has to be given to section 67 (4). It is, however, said by Mr Page that the safeguards afforded by the North Range and CGU cases are not sufficient for cases where there is alleged to be an excess of jurisdiction since, unlike the situation which arises under section 68 and 69 of the Act where the parties have agreed to arbitration and the court is a second tier, the court is the first tier for jurisdiction or disputes in cases where, on one view of the matter at least, there has never been any arbitration agreement.

20. In those circumstances, Mr Page invites the court to return to Human Rights basic principles. He submits that the Article 6 right of an impartial hearing before an independent tribunal is engaged and that for the restriction on appeal contained in section 67(4) to be justifiable, it must not only be in pursuit of a legitimate aim but the means used musts be proportional to that aim.

21. For my part, while acknowledging that we have not found it necessary to call on Mr Malek on this application, who in his skeleton argument argued to the contrary, I would accept that Article 6 is engaged where a state grants a right of appeal but seeks to restrict that right. This court has so held in relation to section 69 and has construed the restrictions in the way that I have mentioned in the North Range and CGU cases.

22. That latter case itself referred to one of the cases Mr Page cited to us DePonte Nascimento v United Kingdom decision 55331/00, a decision on admissibility of an application to the court in relation to this Court's restrictions on second appeals. That case is of some relevance because effectively the restrictions on appeals in the relevant sections of the Arbitration Act do, in my judgment, relate to second appeals. That is obviously so in relation to the section 69 but, despite submissions to the contrary, is scarcely less so in relation to section 67.

23. The scheme of the 1996 Act is that when the jurisdiction of arbitrators is under challenge it should be the arbitrators who in the first instance decide their jurisdiction; see section 30, which also provides that the rulings of the arbitrators are not final and may be challenged by, for example, an application under section 67. Section 31 specifically provides that any objection to jurisdiction must be taken at the earliest possible moment so that the matter is properly before the arbitrators and indeed section 73 of the Act makes a similar provision in relation to the applications which can be made under section 72. Thus the parties will, in most if not all cases, have had the benefit of two decisions by the time an award has been made and a challenge to that award has been made in front of the first instance judge.

24. In these circumstances it is, in my view, a legitimate aim for Parliament to seek to restrict further appeals. That is particularly so when section 1(1) of the 1996 Act provides that the relevant provisions of the Act are to be construed so as to achieve the object of obtaining fair resolution of disputes without unnecessary delay or expense and, also, that the court should not intervene except as provided by the Act. Those aims are themselves legitimate and one way of achieving those aims is by restriction of appeals.

25. Of course, the restriction has to be proportionate and the question is whether it is proportionate to restrict what are effectively second appeals to those cases where the judge deciding the application considers that there is no reasonable prospect of success. This restriction is itself, one might observe, a broader concept than the more restricted test for appeals under section 69 of the Act.

26. In my judgment, it is proportionate because it is in the interests of the legitimate aim that only second appeals which do have a reasonable prospect of success should be permitted to proceed. The only way in which the restriction in this case differs from second appeals in general is that it is the judge rather than this court that is given the final say. It is, of course, true that the decision is vested in the judge who has himself decided whether the point argued is right or wrong. That does not seem to me to be a relevant consideration. Judges are independent tribunals and one of their common, though no doubt unenviable, tasks is to decide whether to give permission to appeal against their own decisions. In other parts of

the civil system, their decision may not be the final one but it is nevertheless a decision which they are accustomed to make. In the context of arbitration cases, where disputes have to be resolved without unnecessary delay or expense, it is, in my view, proportionate that it should be the judge who knows about the case and who decides the dispute who should be entrusted with the decision whether there is a reasonable prospect of success.

27. I would, therefore, hold that section 67 (4) is human rights compliant, provided that it is read in the same way that CGU v AstraZeneca has decided that section 69 should be read viz that it is open to the court to review the fairness of the process of the determination of the question whether leave to appeal should be given.

28. As I have already said, Mr Page has withdrawn the second submission that he made. I therefore turn to deal shortly with his third submission, that the judge has here failed to engage with his argument. The position here is that it is said that he failed to deal with the argument that the partial award was a fully enforceable award which ROK had not sought to set aside and that, pursuant to section 58 of the Act, Istil therefore had an unassailable right to rely on it.

29. In my judgment this is incorrect for two reasons. First, the partial award would be likely to be useless to Istil because it was in favour not of Istil but in favour of Metals Russia. Secondly, a partial award which a later award has declared is a nullity can scarcely be said to be an enforceable award, whether by reason of section 58 of the Act or at all. More importantly however, contrary to Mr Page's submissions, the judge did in fact engage with that argument by saying that Istil would have had first to apply to set aside the decision in the final award that the partial award was a nullity but had never sought to do so. The learned judge gave an oral judgment on the application for permission to appeal. In the course of that he said this at paragraph 4:

> "The position it seems to me is perfectly plain. The arbitrators if and to the extent they exceeded their powers in setting aside the partial award were responsible for an irregularity which if either party had objected to they could and should challenge. The Metals Russia group, if I may call them that, did not do so and the time for that has expired, so I confidently feel that the submission that the Metals Russia group's objection to ROK's attempt to set aside the final award because there was in existence an earlier award is not made out and thus there is no reasonable prospect of success on any appeal."

30. Mr Page complains that that is wrong. Whether right or wrong, however, is beside the point. The judge has engaged with the point; he has given a decision on it. It echoes the relevant paragraph in his judgment on the merits and it is impossible to say that he has not engaged with the argument that Mr Page presented.

31. Lastly, Mr Page complains that in the written reasons, which every judge now has to compile, even when he has given his oral reasons in a form which comes before this court, the judge did not make any reference to reasonable prospect of success

but said that the absence of any entitlement to seek permission from the Court of Appeal emphasises the reason for finality. If we are going to get to a stage where the written reasons the judge has to provide, some time after his oral judgment, are going to be compared with his oral judgment and nitpicking points are going to be made about whether the same is said in the written reasons as in the oral judgment, we have come to a sorry pass. The judge clearly had the correct test in mind or, more accurately, the test which Mr Page says is the correct test in mind, and that is no reason to suppose that his written reasons were in any sense overruling what he said in his oral reasons.

32. Finally, I would repeat paragraph 100 of Rix LJ's judgment in the CGU case and seek to underline it as emphatically as I can:

> "It is important to underline what was also said in *North Range* about the dangers of this residual jurisdiction being misused. There may be a temptation, even an unconscious one, to present an unfavourable decision as one which is not only wrong but arrived at unfairly. But in the nature of things it is likely to be an exceptionally rare case where the submission of unfairness is justifiably advanced. The courts will not permit the residual jurisdiction, which exists to ensure that injustice is avoided, to become itself an unfair instrument for subverting statute and undermining the process of arbitration."

33. It is all too easy to dress up an argument on paper seeking to persuade this court that the process of the hearing in respect of the permission to appeal has been unfair or that the judge has not engaged properly with the submission made but it is an application that is only very rarely going to succeed and this application does not come within several miles of it.

34. I would refuse this application on the basis that it is an application which this court has no jurisdiction to grant.

Lord Justice Toulson:

35. I agree. I add one short point only in relation to the first issue. The point, which may seem rather obvious, is that arbitration is an optional regime. This is relevant when considering the proportionality of the legislative restrictions on rights of appeal. The principal attractions of arbitration are seen as speed, privacy and the limited control available to the court through challenges and appeals. A party which wishes to challenge the jurisdiction of arbitrators must take the point before the arbitrators, and will lose the right to challenge it before the court unless it has taken the point before the tribunal or can show that the party did not know the grounds of objection and could not with reasonable diligence have discovered them (section 73). Therefore, ordinarily in the case of a section 67 challenge there will be hearings at two levels. I can see nothing inimical to Article 6 in Parliament leaving it to the judge to decide whether the case is fit to go onto a third tier. As I have said, the limit in the number of permissible court challenges is an integral part of the package for which parties, in the free exercise of their

autonomy, opt when they contract out of the ordinary process of litigation and refer their disputes to arbitration.

Lady Justice Arden:

36. I agree with both judgments and would add three short points. First, Lord Justice Longmore said that the partial award would be useless to Istil. This was only one of the reasons which my Lord gave. I would like to leave this question open. We have not heard full argument on that point, which was one of the points dealt with by Steel J in his judgment. The effect of a merger on the liabilities of a company absorbed by a merger may well depend on the law of its domicile.

37. Secondly, I would like to express my particular agreement with Lord Justice Longmore's rejection of the argument that it was not open to the judge to decide the question of permission to appeal, given that the permission was sought to appeal from his own judgment. I agree with the reasons my Lord gave and would add that this is not a case in which it is suggested that the judge had any personal or financial interest. In this type of situation, the litigant has the protection that the judge has taken a solemn and important judicial oath. If by chance that there were any evidence, which there is certainly not here, to show that the judge had departed from his judicial oath that would, in my judgment, be procedural unfairness within the exception formulated in the AstraZeneca case.

38. Thirdly, although the effect of this court's judgment is to refuse permission to appeal, in view of the argument that we have had, albeit only orally from the appellant, but also in writing from the respondent, I would make an order that these judgments may be reported and referred to hereafter as authority.

Order: Appeal dismissed.