JUDGMENT : HIS HONOUR JUDGE PETER COULSON QC: TCC. 11th May 2007

Introduction

1. Pursuant to a contract evidenced in two letters of 3rd November and 5th November 2003, the applicant (whom I shall call "the Stern Trustees") engaged the respondent (whom I shall call "Levy") to act as the building surveyor in respect of extensive works at the Stern family home at 3 West Heath Avenue, London NW11. The parties fell out, and Levy commenced arbitration proceedings for unpaid fees. The Stern Trustees counterclaimed for damages alleging professional negligence and fraud. A lengthy arbitration hearing took place in April and May of 2006 in which Mr. Stern himself represented the Trustees, and Ms. Franklin (who appears before me today) represented Levy.

2. Unhappily, the Arbitrator, Mr. James Leckie, did not produce his award until 19th February 2007. Even more unhappily, the Stern Trustees were so dissatisfied with his award that on 16th March 2007 they issued an application seeking:

   (a) permission to appeal a point of law pursuant to section 69 of the Arbitration Act 1996 (the "1996 Act"); and

   (b) to set aside the award, on the grounds that the Arbitrator had been guilty of serious irregularities pursuant to section 68 of the 1996 Act.

3. Although applications under section 69 are normally dealt with on paper, where there is a concurrent application under 68 this court adopts the practice outlined by Colman J in ***Bullfract (Cyprus) Ltd. v. Boneset Shipping Company Ltd.*** [2002] EWHC 2292 (Comm), and fixes a hearing at which both applications can be taken together. However, it is to be stressed that, in line with the authorities, the only relevant material on the section 69 application is the award itself. I take that as the appropriate starting point for my consideration of the current disputes between the parties.

The Contract and the Award

4. The relevant part of Levy's contract of engagement comes on page 7 of the letter of 3rd November 2003. Service Stage D is described as: *"Contract administration services including monitoring of work on site, administration of contract from commencement to final account."*

   Remuneration for this work was stated to be by way of a percentage of what was called the "Category 2 fee". Page 6 of the same letter described Category 2 as follows: *"Project specification and contract administration services. These services relate to building work to be carried out and are inclusive of preliminary planning, specification, tendering, monitoring of work on site, certification and all other contract administration services through to final account and practical completion. The percentage fee to be charged is 11 %. It is to be based on the total value of works that this firm certifies."*

5. The amount of the percentage referable to Stage D was said to be *"35% payable in equal monthly tranches for duration of contracted period"*. The expression *"contracted period"* was not defined in the contract. Stern argued that it meant the actual period for which the contractor was on site, whether that was shorter or, as it turned out, longer than the period stated in the construction contract.

6. The Arbitrator decided at paragraph 22 of his award that *"the contracted period"* could only be a reference to the 22 weeks stated in the construction contract. He said: *"It seems to me that the only construction I can put upon the terms for the payment of Stage D invoices is that advanced by Ms. Franklin on behalf of Mr. Levy. 'Contracted period' was plainly intended to mean the period of 22 weeks from the start of the work which was programmed as 30th April 2004 and the fees were to be paid by equal monthly tranches over that period. If one of the consequences of that might, in the event, mean that all the fees were paid long before the work was completed, then so be it. The contractual obligation to complete the work remained and failure to complete it would be a breach of contract, for which damages can be claimed. In the circumstances, therefore, I find for the Claimant on this point and acquit the Claimant of any charge of fraudulent invoicing."*

Section 69 Application

7. On behalf of the Stern Trustees, Ms. Stephens argues that the Arbitrator was obviously wrong to conclude that the contracted period could mean anything other than the actual duration of the construction work at the property, particularly in circumstances where Levy's fees were to be *"based on the total value of the works this firm certifies"*. How can it be, she asks rhetorically, that Levy could claim full entitlement to his Stage D fees after 22 weeks, regardless of the value of the work that had been completed by that date? There is, on any view, some force in this point. The question for me is whether it meets the onerous test required by section 69.

8. The relevant parts of section 69(3) provide as follows:

   "(3) Leave to appeal shall be given only if the court is satisfied –

   (a) that the determination of the question will substantially affect the rights of one or more of the parties;

   (b) that the question is one which the Tribunal was asked to determine;

   (c) that on the basis of the findings of facts in the award –

   (i) the decision of the Tribunal on the question is obviously wrong; or

   (ii) the question is one of general public importance and the decision of the Tribunal is at least open to serious doubt; and

   (d) that despite the agreement of the parties to resolve the matter by arbitration it is just and proper in all the circumstances for the court to determine the question.

9. There are thus four ingredients required for a successful application under section 69:

   (a) the identification of a true question of law, as opposed to a complaint about the Arbitrator's findings of fact masquerading as a point of law;

   (b) that the Arbitrator was obviously wrong on the relevant point of law or, if it is a point of general or public importance, that the Arbitrator's decision was at least open to serious doubt;

   (c) that the point of law substantially affects the rights of the parties in the arbitration (see ***The Northern Pioneer*** *[2003] 1 Lloyd's Report 212);*

   (d) that it is just and proper for the court to determine the point of law (see ***Kershaw Mechanical Services Ltd. v. Kendrick Construction Ltd.*** [2006] EWHC 727 (TCC)).

(a) Is this a point of law?

10. I am in no doubt that the true construction of the words in the letter describing the fee payable for the Stage D work was a matter of law. Indeed I note that on Day 1 of the arbitration (at page 166, line 15 of the transcript) the Arbitrator himself said: *"If there is a dispute about what those words mean then it is for me, as a matter of law, to construe them …."*

Miss Franklin contends that the alleged issue of law has not been formulated or clearly identified but, for the reasons that I have given, I reject that submission.

(b) Was the Arbitrator obviously wrong?

11. It is common ground that the true construction of this one-off form of words cannot be a matter of general or public importance. Thus it is necessary for the Stern Trustees to show that the Arbitrator was obviously wrong in reaching his conclusion on the true construction of the fee arrangements for Stage D.

12. I have already said that there is some force in Ms. Stephens' criticism of the Arbitrator's construction. If it is correct, there is a potential contradiction between the fee stage payments being complete after 22 weeks (and therefore regardless of the pace of work actually carried out), and the statement that the fees would be based on the total value of works certified by Levy. But can it be said that he was obviously wrong when the alternative argument, that "contracted" really meant "actual", not only strains the words used in the document but, as the Arbitrator himself correctly pointed out, renders unworkable the agreement that the fee would be paid in equal monthly tranches.

13. Questions of construction are often a matter of impression. Whilst I can see how and why the Arbitrator could have come to a different view, I am unable to say that he was obviously wrong in reaching the conclusion he did. It seems to me that either interpretation was available to him and, as he was bound to do, he chose one over the other. I do not consider that he was obviously wrong in the choice he made. Furthermore, given that this is a question of construction that had to be answered against the background of the relevant factual material in accordance with the well-known principles in ***Investors Compensation Scheme v. West Bromwich Building Society*** [1998] 1 WLR 896, it should only be in the clearest cases that a Judge considering a section 69 application, who has not heard such evidence, should substitute his own construction for that of the Arbitrator, who has.

14. In the course of her careful submissions, Ms. Stephens raised a number of other points which, on analysis, I do not consider to be relevant to the question of whether or not the Arbitrator was obviously wrong on this issue of construction. So the potential difficulties created by Levy's pleadings, and the way in which the Arbitrator addressed that point in argument, may go to the section 68 application (with which I deal below) but are irrelevant under section 69. I consider that the criticism that the Arbitrator failed to apply the 'contra proferentum' rule to be unfair, since I regard this as a relatively straightforward issue of construction and I do not consider that his approach to that issue would have been assisted by reference to the rather old-fashioned rules of interpretation embodied in that principle. Similarly, I do not believe that it could be said that the Arbitrator should have paid more regard to the expert evidence, which apparently was to the effect that a fee arrangement based on the contracted (as opposed to actual) period on site was relatively unusual. In my judgment that evidence was probably inadmissible, and certainly of no real value, because what mattered was what these parties had agreed, not what other parties might have agreed on other projects. Moreover, the term as construed by the Arbitrator might have been unusual, but I do not regard it as unfair, particularly in an industry in which lump sum payments are often made weeks or months before the work that is the subject of the payment is actually carried out. I therefore do not accept that there was ever an argument available under the **Unfair Terms in Consumer Contracts Regulations 1999**.

15. For all these reasons, therefore, I conclude that the Arbitrator was not obviously wrong in reaching the conclusion that he did. Whilst he could have come to a different conclusion, neither of the competing cases sat easily with the rest of the contract. So whichever answer he plumped for, the Arbitrator was going to find himself open to at least some criticism. In all those circumstances, therefore, the section 69 application must fail.

(c) Does the point substantially affect the parties' rights?

16. Although my analysis at paragraphs 11 to 15 above makes it strictly unnecessary for me to comment on this aspect of the application made by the Stern Trustees under section 69, I ought do so because I have reached the firm conclusion that, even if I had decided that the Arbitrator was obviously wrong in his construction, it would not have substantially affected the rights of the parties. There are essentially two separate reasons for that conclusion.

17. First, Levy's claim for fees was just £22,733. Moreover, as the Arbitrator explains in some detail at paragraph 11 of his award, the relevant invoice on which the claim was made was not in fact calculated on the contractual basis for which Levy contended, but on the basis alleged by the Stern Trustees. The Arbitrator said: *"Matters came to a head in early to mid-October. Mr. Levy, as a result of the admonitions of Mr. Stern, prepared his latest invoice on the basis contended for by Mr. Stern rather than on what he regarded as his strict entitlement under his original terms of engagement."*

    Whilst I understand that the Stern Trustees dispute that finding, Ms. Stephens properly accepted that she was unable to take that point further, because it was the subject of a clear finding of fact by the Arbitrator which she cannot go behind. On that basis, therefore, it is impossible for me to say that the Arbitrator's alleged error made any difference at all to the parties' rights.

18. Secondly, Ms. Stephens argued that, but for this error of law as to the proper fee calculation, the Arbitrator would not also have mistakenly concluded that the Stern Trustees were not entitled to terminate the agreement with Levy on the basis of Levy's incorrect invoices. As discussed in argument, I am unable to accept that submission. Ms. Stephens is obliged to make it because of the way in which the Stern Trustees put their case in the arbitration, but it seems to me that the position on termination is clear. Although there was a difference of view between the parties as to how the fees should be calculated, it is quite impossible to see how that dispute, on its own, could have justified either party in terminating the contract. That point has even more force when one remembers that – as the Arbitrator found – the final invoice was calculated on the basis contended for by the Stern Trustees and not the controversial basis originally suggested by Levy. Thus, even if the Stern Trustees had been right on the issue of construction, it could not have justified the termination in any event.

(d) Summary on section 69 application

19. For all these reasons, therefore, I reject the application under section 69 of the 1996 Act. I am unable to say that the Arbitrator was obviously wrong. Even if he was, it has not been shown that his alleged error would or could have affected the rights of the parties, let alone have had a substantial effect on those rights.

The Section 68 Application

20. The relevant parts of section 68 of the 1996 Act read as follows:

    "(1) A party to arbitral proceedings may upon notice to the other parties and the tribunal apply to the court challenging an award in the proceedings on the grounds of serious irregularity affecting the tribunal, the proceedings or the award. ….

    (2) 'Serious irregularity' means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

    (a) failure by the tribunal to comply with section 33 (general duty of tribunal) …."

21. The relevant part of section 33 of the same Act reads as follows:

    "(1) The tribunal shall –

    (a) act fairly and impartially as between the parties giving each party a reasonable opportunity of putting its case and dealing with that of his opponent …."

22. There are therefore two principal ingredients required for a successful application of this type under section 68. They are:

    (a) a failure on the part of the Arbitrator to act fairly and give each party an opportunity to present its case;

    (b) substantial injustice as a result of that failure; see ***Lesotho Highlands Development Authority v. Impreglio SpA and Others*** [2005] UKHL 43.

23. In addition, the combination of these ingredients must be enough to persuade the court that the case under review is an extreme case "where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected": see paragraph 280 of the DAC Report of February 1996, cited with approval in ***Egmatra AG v. Marco Trading Corporation*** [1999] 1 Lloyd's Report 862.

24. On behalf of Levy, Ms. Franklin took the preliminary objection that, pursuant to section 73 of the 1996 Act, the Stern Trustees had lost their right to object to the Arbitrator's conduct and, in particular, with the way in which he dealt with the dispute as to the interpretation of the contract provisions relating to the calculation of the fees for Stage D. Her submission was that, after the commencement of the arbitration, when the point had come out into the open, the Stern Trustees (through Mr. Stern) should have reserved their position or continued to complain about the Arbitrator's conduct in allegedly deciding the point without further argument and/or ignoring Levy's pleaded case (which, so it was said, agreed with the construction advanced by the Stern Trustees). I consider that submission to be unrealistic. It seems to me that Mr. Stern debated the point with the Arbitrator on day one and he made his position clear. When the Arbitrator provided him with a draft award, he repeated his arguments as to how and why the Arbitrator was wrong on the construction issue. Therefore I find that at no time did the Stern Trustees sit on their hands in the way that section 73(1)(b) of the 1996 Act endeavours to prevent. For these reasons I reject the suggestion that the Trustees have lost their right to object to the Arbitrator's conduct. The next point, of course, is whether that conduct amounted to serious irregularity?

25. Ms. Stephens submits that the Arbitrator failed to comply with section 33 of the 1996 Act because:

    (a) he failed to hold Levy to his pleaded case on the meaning of "contracted period" which, she says, accepted that it meant the actual duration of the contract, not the 22 weeks;

(b) he failed to require Levy to amend its pleaded case and/or failed to allow the Stern Trustees the opportunity to make further submissions on this point once it turned out that the construction of the relevant provisions was in fact in dispute.

26. Of course, the principal difficulty that Ms. Stephens now has with this aspect of her application is that I have concluded that the Arbitrator was not obviously wrong in his construction, and that, even if he was, it did not make any significant difference anyway. But, even putting those difficulties to one side, I have concluded that the situation here was far removed from the sort of extreme case for which section 68 was intended.

27. As to the pleading point, I accept that Ms. Franklin's pleading in relation to the meaning of *"contracted period"* was, with great respect to her, rather unhelpful. That is because in answer to the question, *"What does the contracted period mean?",* the pleaded answer was that: *"It referred to the duration of the construction contract from commencement to final account as therein defined. The period is therefore the actual duration of the construction contract."*

28. On its face, by its use of the word "actual", this suggests the same or a very similar interpretation to the one contended for by the Stern Trustees. But on Day 1 of the arbitration hearing (which was 4th April 2006) the transcript makes clear that, when Mr. Stern sought to rely upon Levy's pleading to make this point, the Arbitrator expressly pointed out that he was not bound by that interpretation, if he concluded that it was wrong. In this way he triggered a major debate about what the contract actually meant. From that point on it was clear that:

(a) the point of construction was in issue in the arbitration;

(b) the Arbitrator had reached a preliminary view to the effect that the words referred to the 22 weeks, not the actual period, but expressly and/or impliedly invited further submissions from Mr. Stern on the point;

(c) Mr. Stern was not prevented from revisiting the point again or from making any submissions that he wished to;

(d) as we have seen, following the production of the draft award, when the Arbitrator asked the parties to identify any errors of fact or law, Mr. Stern, on behalf of the Stern Trustees, did just that and made his points as to the meaning of the words "contracted period".

29. In those circumstances I find it impossible to say that there has been any injustice. The point was ventilated at the outset of the arbitration and thereafter remained a live issue throughout. The Stern Trustees had every opportunity to make their case as to the correct construction and I consider that they took those opportunities. Although I accept Ms. Stephens' point that the Arbitrator was somewhat peremptory in his dealings with Mr. Stern, and interrupted him on more than one occasion on Days 1 and 2 (both of which I consider to be unfortunate), I do not believe that that could possibly amount to misconduct. It had no effect on the ultimate outcome of the arbitration.

30. For those reasons, therefore, I reject the application under section 68. I am very grateful to both counsel for their helpful written and succinct oral submissions.

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