BLCT (13096) Ltd. v J Sainsbury Plc [2003] APP.L.R. 06/30

CA on appeal from Chancery (Mr Justice Pumfrey) before Arden LJ; Longmore LJ. 30th June 2003

Lady Justice Arden :

1. This is an application for permission to appeal against the refusal of Pumfrey J by letter received on 30 January 2003 to hold an application for an oral hearing of an application made by the appellant BLCT (13096) Ltd ("BLCT") for permission to appeal on a point of law against an award dated 13 May 2002 in an arbitration between BLCT and J Sainsbury plc. The application for permission to appeal to this court comes on for hearing in court before two Lord Justices pursuant to the directions of Waller LJ dated 31 March 2003. In his reasons Waller LJ stated that he had doubts as to whether the Court of Appeal had jurisdiction to grant permission and as to whether it would grant permission even if it had jurisdiction to do so. However, he added that the point on jurisdiction was one which should be clarified. Accordingly, the matter has come on for hearing before this court with respect only to the question of an application for permission to appeal. There is also an application for an extension of time. With the permission of the court, the respondent also appears by counsel.

2. The relief sought in the re-amended notice of appeal is that the order made by the judge set out above should be set aside and that there should be an oral hearing of the appellant's application for permission to appeal against the arbitrator's award. The grounds of appeal are as follows:-

   i) in not granting permission to appeal the judge erred in law for the reasons set out in the application dated 7 June 2002 and the statement of Mr I P Travers dated 7 June 2002. This ground has not been pursued.

   ii) the judge also erred in not allowing a reconsideration of the decision to refuse permission to appeal at an oral hearing. Reliance is placed on CPR Part 52.3(4) which provides that *"where the appeal court without a hearing refuses permission to appeal, the person seeking permission may request the decision to be reconsidered at a hearing"*. In the notice of appeal BLCT submits that this rule is not excluded by section 69 of the Arbitration Act 1996. However, this ground has also not been pursued.

   iii) section 69(6) of the Arbitration Act 1996 is incompatible with Article 6(1) of the European Convention on Human Rights because of its effect in entirely preventing in the circumstances such as have arisen in this case any consideration by the Court of Appeal of an application to appeal it.

Background

3. The arbitration which led to the award concerned the operation of a rent review provision in a lease dated 21 December 1989 for a term of 35 years made between the Equitable Debenture and Assets Corporation Ltd, as landlord, and J Sainsbury plc, as tenant, of a food superstore at Coldhams Lane, Cambridge. The current landlord is BLCT. The critical definition for the purposes of the arbitration was that of "market rent" as referred to in paragraph 1.2 of the third schedule to the lease. The arbitrator's function was to determine that market rent in accordance with the terms of the lease and the law. Under paragraph 1.2 of the third schedule, "market rent" means "*the higher of the yearly rental aggregate yearly rents at which the demised premises might reasonably be expected to be let as a whole or in permitted parts by a willing lessor to a willing lessee with vacant possession without any premium in the open market at the relevant Review Date …"* on certain specified assumptions. The nearest comparable related to a proposed new ASDA store at the Beehive Centre in Cambridge. The ASDA comparable was largely contemporaneous, was a superstore of the same size as Coldham Lane and was only about a mile away. In July 1999 Safeway offered £20.48 per square foot and ASDA offered £18.00 per square foot plus a premium of £3,000,000 and the latter offer was accepted. The £3,000,000 capital payment was not paid for anything specific. BLCT says that it was paid as a premium in the ordinary strict sense of being a part of the consideration for the grant of the lease. Its case is that it was not unusual. Companies taking leases of large superstores are often willing to offer and pay substantial premiums in order to do so in addition to the rent as ASDA did in the case of the ASDA comparable. Operators of such stores apparently find this convenient. Both parties in effect agreed that this was the nearest comparable but they did not agree how to analyse it and how it should be adjusted for the purposes of finding market rent at Coldhams Lane. In particular they could not agree as to whether the £3,000,000 premium paid by ASDA should be decapitalised (or rentalised) and treated as part of the rent. BLCT's expert witness said that the ASDA comparable would reveal an open market rental of £23.00 per square foot if no premium had been paid and appropriate adjustments were made. On that basis he reached a rent of £1.8 million per year. By contrast, the expert witness for Sainsbury said that the appropriate course was to ignore wholly the premium element in the ASDA comparable and to reduce the £18.00 per square foot to £16.00 per square foot to take account of other factors, for instance, that the ASDA comparable is of a new building. BLCT says that the rentalisation of capital sums is a common feature of adjustment of comparables in the course of rent reviews and cites in support to the decision of the High Court in ***Curry's Group v Martin*** [1993] 3 EGLR 165 and ***Broadgate Square plc v Lehman Brothers Ltd*** [1995] 1 EGLR 97, which concerned a reverse premium.

4. The arbitrator, Mr Graham Frank Chase, Dip.Est.Man, FRICS, FCI Arb ("the arbitrator"), in effect preferred the view of Sainsbury. He accepted that the ASDA comparable was of critical importance but then treated it as if no premium had been paid. He held that the premium was a "key money payment with no evidence that it could at any time be converted into a rental payment or could be treated as a payment in lieu of rent." He held that there was no single approach to the treatment of premiums as they could be amortised at different rates. His opinion was that premiums should not be decapitalised as a matter of course. Market place rentals could be lower than that which operators could afford. It could not automatically be assumed that a premium paid for representation reflected the difference between rent actually paid and a higher market rent. He said:- *"Although it is accepted that for the purposes of the review a hypothetical world has to be adopted where no premium is paid, this does not*

necessarily mean premiums in themselves have to be amortised and added to the Market Rent if the Market Rent identified is already at the level which the market will adopt and where there is no evidence to suggest that a higher rent in the market would be achievable."

5. He held that in order to amortise the premiums paid for food superstores it would be necessary to identify the higher open Market Rental level which can be achieved and that the premium paid reflected the difference between that recognised rental level and the rent actually paid. The arbitrator held that his function was to ascertain the Market Rent and that for this purpose the market itself had to be identified and the rents which were paid in the market applied to the subject premises. If there was no evidence in the market that higher rental levels would be paid and that the landlord receives the full rent plus a premium there is no evidence as to why an even higher rent should be automatically identified as the market rent through the amortisation of the premium if there is no such evidence of Market Rents being at higher levels. Where the rental reflected the Market Rent and the premium paid is key money there is no reason to amortise or decapitalise the rent to secure a higher rent which in itself cannot be supported by evidence in the market place. Accordingly, it was not appropriate to decapitalise the premium paid by ASDA. "If the market will not support a higher rental level than the rent paid, then the Market Rent must be adjudged to be the rent paid without the amortisation of a premium".

6. BLCT's case is that the arbitrator misunderstood the legal concept of willing lessee. A willing lessee is a person who is actively seeking premises which fulfil the needs which the present premises could fulfil. However, he is an entirely hypothetical person: ***Evans (Leeds) Ltd v English Electric Co Ltd*** [1978] 1 EGLR 93. In other words, he is a hypothetical entity. Accordingly, the fact that other real tenants would not have paid a higher rent in place of the premium is irrelevant. Accordingly, the arbitrator made a fundamental error of law to reject the rentalisation of the £3,000,000 paid by ASDA, in a word, the comparable is not truly comparable at all. BLCT also submits that the result is very unfair on the landlord. The second error of law which BLCT alleges is that the arbitrator wrongly regarded the premium as "*key money*" and thereby as entirely unconnected with the lease and the consideration paid for the grant. BLCT submits that this is unrealistic. The £3,000,000 was part of the package which ASDA paid to obtain the lease. BLCT submits that a case relied on by Sainsbury before the arbitrator, ***Wallshire Ltd v Aarons*** [1989] 1 BGLR 147, in support of the proposition that where a premium is paid in relation to a comparable transaction no notice must be paid to the premium in the valuation process relating to the property, is distinguishable.

7. In essence, therefore, the error of law alleged by BLCT on the part of the arbitrator was to hold that it was necessary, when determining the rent that a willing lessee would pay to find that there was evidence that such levels of rent were actually paid, where there was evidence that in comparable transactions sums had been paid as consideration for the grant of the lease which were not called rent.

Procedural History

8. The award was published on 13 May 2002. On 7 June 2002, BLCT made an application to the Commercial Court for leave to appeal against the award. The application set out detailed reasons. The questions of law were stated. It is necessary for the purposes of this application to set out only the first of those questions of law which was:-

> *"(i) whether it is to misunderstand the concept of the hypothetical willing lessor for an arbitrator in a rent review to reject rentalisation of a premium paid by the tenant under a lease of a comparable transaction when, under the lease of the premises of which the rent is being reviewed, it must be assumed for the purposes of the rent review that the hypothetical lessee would be paying no premium and therefore that (a) the hypothetical lessee would have to offer a greater rent than competing prospective tenants who were prepared to pay a premium as well as a rent, in order to remain competitive therewith and (b) the hypothetical willing lessor would only transact with the hypothetical willing lessee who was not offering to pay a premium were the hypothetical willing lessee to offer a higher rent than competing prospective tenants who were offering to pay such a premium."*

9. The grounds stated that the question would substantially affect the amount of rent determined on the rent review. In terms of rent, the difference was between a rent of £18.00 per square foot and £23.00 per square foot over an area of 71,000 square feet for a period of 5 years. The applicant contended that the decision of the arbitrator on the questions of law was obviously wrong. Alternatively, the question was one of general public importance because it applied not only to the lease which was the subject of the rent review but to many leases of other commercial properties throughout the country where a premium has been paid.

10. The Commercial Court transferred the matter to the Chancery Division. On 19 June 2002, Deputy Master Hoffman made an order that BLCT's application for permission to appeal be allowed and that either party do have permission to apply to vary or discharge the order on seven days' notice. Sainsbury made an application to discharge the order. The Masters of the Chancery Division have no power to grant leave under section 69 of the 1996 Act unless a judge otherwise directs (see the definition of the High Court in schedule 1 to the Interpretation Act 1978 and section 4(1) of the Supreme Court Act 1981). The papers should have gone direct to the judge, and would normally have done so. On 17 July 2002 Deputy Master Hoffman made a further order that there be a case management conference on 7 August 2002, at which hearing the court would consider whether the order dated 11 June 2002 should be discharged and what other directions should be made. On 7 August 2002, Master Price made an order that the order dated 19 June 2002 be set aside and:- *"that the application to appeal be referred to a judge of the High Court for consideration pursuant to section 69(5) of the Arbitration Act 1996 on a date to be fixed by the listing office."*

11. We are told by Mr Jonathan Gaunt QC, for the respondent, that at the hearing before Master Price on 7 August 2002 Mr Travers, solicitor for the appellant, asked the Master whether the application would be dealt with by the judge as a papers only application, and that Mr Travers made the further point that the application was of such importance that it would benefit from an oral hearing. We are told that the Master replied that if leave was refused on paper, the application could be renewed orally. (We are told that Miss Kathy Holland, for the respondent, told the Master that the papers were complete and thus it may be that the respondent opposed an oral hearing.) So on this basis, it appears that the Master thought that there could be an oral hearing after the initial disposition on paper. It also appears clear that Mr Travers asked for an oral hearing. Furthermore, the order of the court was ambiguous since it referred both to section 69(5) of the 1996 Act and to the fixing of a date by the listing office. The latter phrase would be consistent with an oral hearing. The former phrase would suggest that there would be no oral hearing unless the judge thought it was appropriate. Further, a person who read the order without knowing of the discussion before the Master on 7 August 2002 might well take the view that there was to be an oral hearing.

12. On 30 August 2002, the Chancery listing officer wrote to BLCT's solicitors stating that the court file had been put before Pumfrey J who had directed that leave to appeal be refused. That letter set out the reasons for a refusal of leave to appeal. I need only quote that letter in part:-

"Reasons of refusal of leave to appeal.

…

(2) It is not entirely clear what the suggested questions of law are. The questions are said to arise in relation to the correct treatment of a payment of £3 million paid by ASDA in respect of comparable premises.

(3) The arbitrator did not exclude the possibility that such a payment might be rentalised for the purposes of ascertaining the notional rent for the purposes of comparison. Whether to do so, and in what circumstances, is a question of the method of valuation. The basic question is whether the rent payable by ASDA should be taken to be reduced [sic] by the payment of £3 million.

(4) The first complaint is that the arbitrator found that other real tenants would not have paid a higher rent in place of the premium, but that this was irrelevant (see paragraph 30 of the supporting affidavit). This is not so. It is a matter which has been taken into account, since the notional willing lessor and lessee cannot be taken necessarily to agree a rent higher than any real rent in the market place …

…

(6) I do not consider that the award is obviously wrong and I do not consider that it raises an issue of general public importance. … "

13. BLCT's complaint is that the judge's reasons make no reference to the questions of law as formulated by it in its notice of application. On 9 September 2002, BLCT issued an application for an order that *"upon reconsideration that an oral hearing pursuant to CPR 52.3(4) of the refusal of permission to appeal made by Mr Justice Pumfrey on 27 August 2002, that the appellant be granted permission to appeal"* the award and "*in the alternative pursuant to section 69(6) of the Arbitration Act 1996, that leave to appeal to the Court of Appeal be granted to appeal the order of refusing permission to appeal, with all necessary extensions of time in order to be able to do so.*" The Chancery listing officer fixed a date for the hearing of that application, namely 5 February 2003.

14. On 26 October 2002, the respondent's solicitors wrote to Mr Justice Pumfrey stating with respect to the application dated 10 September 2002 that they had been advised by leading counsel that CPR 52.3(4) had no relevance and enclosing a detailed skeleton argument. It referred also to the respondent's position in its skeleton argument. They requested the judge to review the papers and if he agreed with the advice they had received, finally to dispose of the matter. By letter dated 29 January 2003, the clerk to Pumfrey J replied to the respondent's solicitors, with a copy to the appellant's solicitors, stating that:-

"a decision under section 69(6) taken without a hearing is dealt with in that way because the court does not consider that a hearing is required – see section 69(5). The judge did not consider that a hearing was required.

CPR 52.3(4) is expressly subject to any rule, enactment or practice direction which sets out special provisions with regard to any particular category of appeal. It is subject to section 69 of the 1996 Act, which creates the right of appeal on a point of law subject to the conditions of that section. The ordinary rules relating to a renewal of an application for permission to appeal refused on paper do not, in the judge's view, apply to a decision under section 69(6).

The judge has accordingly caused that the date fixed for the proposed oral application for leave to appeal be vacated."

15. On 5 February 2003, the appellant's solicitors wrote to the clerk to Pumfrey J requesting an opportunity to present oral argument on their application for permission to appeal to the Court of Appeal. In a letter dated 6 February 2003, the respondent's solicitors requested that issue to be dealt with on paper. On 10 March 2003, the clerk to Pumfrey J wrote to the appellant's solicitors as follows:- *"The judge refuses leave to appeal against his refusal to grant leave to appeal under section 69(2). The reasons are the same as those given in refusing leave to appeal to the High Court. The judge considers that the provisions of section 69(8) (which applies to appeal which have been heard) suggests that important factors in deciding whether to grant leave to appeal [against] a refusal of leave are whether the case is one of general importance or there is some special reason. The judge considers that there is no such factor here."*

16. By this date the appellant had already filed its notice of appeal with this court.

***The* Arbitration Act 1996**

17. Section 69 of the Arbitration Act 1996 provides:-

"69. Appeal on point of law

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except:

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(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 fact 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.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7) On an appeal under this section the court may by order:

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.

But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."

18. Section 105(1) of the 1996 Act (so far as material) provides that *"the court"* means the High Court or a county court.

19. Article 6(1) of the European Convention on Human Rights (the Convention) provides:-

"Article 6 – Right to a Fair Trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Appellant's submissions

20. The appellant accepts that it has no right to appeal to this court against a refusal of leave or to appeal against the decision of an arbitrator or to ask this court for such leave. However, Mr Michael Barnes QC, for the appellant, submits that the appellant is entitled to an oral hearing under Article 6 in the absence of special circumstances. He relies on ***Scarf v United Kingdom*** [1999] EHRLR 332. In that case the arbitration was a County Court arbitration which was in effect a full trial and there was a hearing which the applicant attended. The only issue was whether that hearing ought to have been held in public rather than in private. The decision does not, therefore, deal with the question whether the hearing for which Article 6 provides needs to be an oral hearing.

21. Mr Barnes further relies on ***Allan Jacobson v Sweden (No.2)*** (8/1997/792/993, unreported) and *Fischer v Austria* (1995) 20 EHRR 349. In the former case the European Court of Human Rights ("the Strasbourg court") recalled its

case law that in proceedings for a court of first and only instance the right to a "public hearing" under article 6(1) of the Convention entails an entitlement to an oral hearing unless there are exceptional circumstances that justify dispensing with such a hearing. In ***Fischer v Austria***, the applicant had an irrevocable refuse/tipping license which was revoked by the governor of the land of Lower Austria. Mr Fischer appealed to the Federal Ministry of Agriculture complaining that he should have had the right to be heard. His appeal was rejected and one of the grounds on which it was rejected was that he had had ample opportunity to make his views known and an oral hearing was not required. Mr Fischer then applied to the Constitutional Court where his complaint was rejected on the grounds that it did not have sufficient prospect of success. Mr Fischer then applied to the Administrative Court, where his request for an oral hearing was also rejected. The Strasbourg court noted that Mr Fischer had expressly requested an oral hearing. It had been refused on the ground that it was not likely to contribute to clarifying the case. There were no exceptional circumstances that justified dispensing with a hearing. The Administrative Court was the first and only judicial body before which Mr Fischer's case was brought. It was able to examine the merits of his complaints. Its review addressed not only issues of law but important factual questions. The proceedings were important for the existence of Mr Fischer's business and in all the circumstances the court concluded that his right to a "public hearing" included an entitlement to an oral hearing.

22. As respects jurisdiction, Mr Barnes submits that in ***North Range Shipping Ltd v Seatrans Shipping Corporation*** [2002] 1 WLR 2397, the Court of Appeal had held that there was a *"residual jurisdiction in this court to set aside the judge's decision under section 69 in a case of unfairness"* (page 2403 per Tuckey LJ giving the judgment of the court). This proposition is accepted by Mr Gaunt QC.

23. The appellant submits that it should have the right to have the decision reconsidered at an oral hearing. They submit that section 69(5) does not prevent this.

24. Mr Barnes further submits that section 69(6) is incompatible with Article 6 because it confers no right of appeal in the present case and because there was no right to an oral hearing below.

Respondent's submissions

25. The respondent submits that the judge's authority to determine the application was exhausted once he had decided the issue on paper. Accordingly, he could not reconsider the matter. CPR 52.3(4) is subject to statutory provisions to the contrary and thus the judge was correct to conclude that CPR 52.3(4) is subject to section 69(5).

26. There is no prospect of success in any event because the judge was correct to conclude that an oral hearing was not necessary. He had full particulars of the grounds of the application.

27. The respondent relies on ***North Range Shipping Ltd v Seatrans Shipping Corporation*** [2002] 1 WLR 2397 for the following propositions:-

    i) Parties to a consensual arbitration waive their Article 6 rights in the interests of privacy and finality.
    ii) Article 6 does not guarantee a right to appeal.
    iii) The limitations imposed by the statute on the right to appeal to the courts do not themselves offend Article 6.
    iv) Article 6, however, applies to the statutory appeal process.
    v) The manner of application of Article 6 to court proceedings depends on the special features of the proceedings involved. Account must be taken of the entirety of the proceedings in the domestic legal order and the role of the appellate court therein.

28. Based on these propositions, the respondent submits that the appellant accepted arbitration with limits on the rights to appeal.

29. The respondent further submits that if a would be appellant cannot convince a judge on paper, it would be a rare case where he could do so at an oral hearing.

30. In any event, the Strasbourg court has held that permission to appeal can be refused on paper even in a criminal case: ***Monell & Morris v UK*** (1987) 10 EHRR 205.

Conclusions

31. Both counsel accepted that notwithstanding section 69(6) of the 1996 Act, this court had a residual jurisdiction to grant relief in a case of unfairness (see ***North Range Shipping v Seatrans Shipping Corporation***, above). The question at issue in that case was whether the judge's reasons for refusing permission to appeal under section 69(5) were adequate for the purposes of Article 6 of the European Convention. The court held that they were and the case is an active example of the court considering the process by which the judge reached this decision complied with Article 6(1). The Court of Appeal had, therefore, directly to consider the application of Article 6 to the Convention.

32. At paragraph 28 this Court said: *"the judge is right to say that in reality the High Court is the court of last resort in arbitral proceedings. Resort to that court by way of appeal is severely limited by statutory provisions which do not offend Article 6. We reject Mr Plender's submission that there is no proper analogy because, unlike the cases considered by the Commission, there have been no court hearings in the lower courts to which Article 6 will have applied. The arbitral process has its commercial advantages of privacy and finality which does not involve such hearings but that is what the parties have chosen."*

33. This holding on analysis is authority for two further propositions, one explicit and one implicit. That statutory provisions limiting the right of appeal from an arbitral award do not offend Article 6 as a general proposition.

The parties have chosen that course, and (by implication) it is open to parties to agree to waive the protection of a public hearing and a public pronouncement of the decision to which they would otherwise be entitled under Article 6. Moreover, where Article 6 is satisfied by proceedings at first instance, there is no Convention requirement on the state to provide an appeal process.

34. The residual jurisdiction of the court to intervene in the event of unfairness is, as I see it, a residual jurisdiction to intervene to ensure that the process of reaching a decision under section 69(5) complies with Article 6 and that he hearing of that application is a *"fair … hearing"* for the purposes of that article. A hearing which violated the appellant's right under Article 6(1) to a fair trial would constitute unfairness for the purpose of the ***Seatrans*** case.

35. I do not consider that there is any real prospect of success on the argument that an application determined on paper under section 69(5) can be reconsidered at an oral hearing. That proposition would require a provisional determination on paper before a final determination at a hearing. That is not the way in which section 69(5) is drafted. It is drafted on the basis that the court shall "determine" the application on paper unless it makes the positive decision that a hearing is required. If an oral hearing is required by Convention jurisprudence, then it is surely "required" for the purpose of section 65(5) on its true interpretation. But it is too late to ask for an oral hearing once the application has been determined on paper.

36. I do not accept the submission that it is a requirement of Article 6 that there should be an oral hearing unless there are exceptional circumstances in the case. The fact is that the parties have already had a full hearing before the arbitrator and Mr Barnes does not suggest that that process did not comply with Article 6. The hearing was before an independent tribunal. Each side had the opportunity to put its case and knew the evidence of the other party. The arbitrator gave reasons for his decision. The proceedings were in private. This is apparently contrary to Article 6, but the parties waived their right to assert that this was a violation by virtue of their agreement to arbitration.

37. In my judgment, the true principle is that, in order to determine whether an oral hearing is necessary for Article 6 purposes, the nature of the application must be examined to see whether an oral hearing is required. In the present case, the question on which leave was sought had to be a question of law. There is no question, for example, as to a party's credibility. There is no question of any decision on the facts at all, as in the case of *Fischer v Austria* (above). In those circumstances, in my judgment, Article 6 does not require an oral hearing of an application for leave to appeal against an arbitral award save in exceptional circumstances.

38. That means it is necessary to look at the particular circumstances in this case. The point was a complex point of law, but there is no difficulty in explaining it. There is a statutory obligation to identify the point of law and there was a full and sufficient description of it in the application and there was a substantial witness statement in support. The judge also had skeleton arguments. It is not suggested that the judge lacked any material information for the purposes of his decision.

39. The only circumstances which might qualify as exceptional in this case are those arising out of the hearing on the 7 August 2002. Mr Travers, the solicitors for the appellant, specifically asked for an oral hearing. It was indicated to him by the Master that if a decision was made on paper which was adverse to him there would be a right to renew the application before a judge. There was also the form of the order dated 7 August 2002 (the material part is set out above) which gave rise to a reasonable expectation that there would be an oral hearing.

40. Do any of these indications matter? I should point out that Mr Travers is himself a solicitor and therefore was in a position to form a view as to whether or not there could be any oral renewal of the application. It is not suggested that he was under the impression that the matter would necessarily be the subject of an oral hearing and that he omitted to take some step on the basis of what the Master had told him. I do not consider that the judge's decision not to hold an oral hearing can be faulted on what he knew. If he had known that there had been a request for an oral hearing the question arises as to whether he would reasonably have reached the other view. So far as I can see, he would have maintained his view that an oral hearing was not appropriate.

41. Accordingly, even if the judge did not have in his mind the particular circumstances mentioned above, I do not consider that there would be a real prospect of success on appeal because they would have made no difference to his decision in the end result.

42. Mr Barnes was not able to identify any other characteristic of the application which would constitute an exceptional circumstance justifying an oral hearing in this case. He made the point generally that there is value in oral argument. Undoubtedly that is so. Good advocacy is an essential requirement for doing justice in an individual case. (The qualities which made advocacy helpful to the court in achieving justice include both clarity and economy in presentation). However, there are countervailing policy considerations in the 1996 Act. Section 1 of the 1996 Act provides:-

"General Principles

1. The provisions of this Part are founded on the following principles, and shall be construed accordingly:

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) in matters governed by this Part the court should not intervene except as provided by this Part."

43. As to the need for an oral hearing of an application under section 69(5), it would be impossible to lay down guidelines for judges determining such applications (they may be judges of the Commercial Court, the Chancery Division or the Technology and Construction Court) other than that they should seek to determine such applications *"without unnecessary delay or expense"* (1996 Act, section 1(a)). As this case shows, once the question of an oral hearing is raised, there will inevitably be the loss of time in fixing dates. That undermines the finality and efficiency of the arbitral process.

44. I now turn to Mr Barnes' submission that section 69(6) of the 1996 Act is incompatible with Article 6 because it confers no right of appeal in the present case and further because there was no right to an oral hearing below.

45. As respects the first of these arguments, section 69(6) only requires the leave of the High Court for any appeal from a decision of the court *"to grant or refuse leave to appeal"*. The question is whether that decision includes a decision that a hearing is not required. Mr Gaunt submits that such a decision is an integral part of the decision to grant or refuse leave to appeal and that submission has practical commonsense to support it. However, that same argument (if good) would apply to the refusal of a judge to recuse himself on the grounds of bias. It would certainly be very odd if the refusal of the judge to give leave against that decision meant that the appellant had no avenue of appeal to the Court of Appeal. In my judgment, the answer lies not in any incompatibility with the Convention but in the residual jurisdiction articulated in the ***North Range*** case. In the case of any violation of a party's right to a fair trial. I would accept Mr Gaunt's submission. I do not consider that there is any prospect of appeal on the contrary argument.

46. I now turn to Mr Barnes' argument that section 69(6) is incompatible with Article 6 because there was no right to an oral hearing below. I do not accept this argument because, although Article 6 confers the right to "a fair and public hearing", this does not necessarily mean a hearing at which the litigant is entitled to attend. It all depends on the nature of the application: see ***Monell and Morris v UK*** (above).

47. Mr Barnes accepts that the judge was correct in his holding that CPR 52.3(4) does not apply to a decision under section 69(5) of the 1996 Act.

48. Accordingly, in my judgment, there is no real prospect of success on appeal and permission to appeal should be refused.

Lord Justice Longmore:

49. I agree.

Michael Barnes QC and Jonathan Seitler QC (instructed by Nabarro Nathanson) for the Appellant
Jonathan Gaunt QC (instructed by Denton Wilde Sapte) for the Respondent