

JUDGMENT : His Honour Judge Chambers QC: TCC. 28th August 2002

1. The Applicant ("Equatorial") applies under sections 67 and 68 of the Arbitration Act 1996 ("the Act") to set aside an award, undated except as to the year 2001, that was made by the Board of Appeal of the Coffee Trade Federation Limited ("the CTF") upon the grounds that the award ("the Appeal Award") was not within the jurisdiction of the tribunal as it was not seised of any legitimate appeal.
2. The Respondent ("Dreyfus") does not seriously dispute the application but itself asks that time be extended under s 79 of the Act to validate service of its statement of case served in an earlier appeal made by it against an award dated 12 March 2001 and in favour of Equatorial. By that award Equatorial recovered US\$ 18,900 together with interest in respect of the non-delivery of a parcel of coffee that Equatorial had purchased from Dreyfus.
3. Dreyfus accepted liability for the non-delivery of the coffee but asserted that the damages claimed were inflated and artificial. The argument was accepted by the Appeal Committee.
4. Under the Arbitration Rules of the CTF ("the Rules") Dreyfus had until 11 April 2001 (30 days from the publication of the first award) in which to give notice of appeal. Under rule 42(c) Dreyfus had 21 days from giving the notice of appeal in which to send its statement of case together with its supporting evidence. Rules 42(f) and (g) provide as follows:

"(f) The board of appeal can permit an extension of the above time provisions and/or permit the submission of additional statements and/or supporting evidence upon the application of either party. In the absence of such permission, no additional statements, submissions or supporting evidence shall be served by either party.

(g) If the appellant fails to send to the Secretary a statement of his case within the time limit under rule 42(c) or within any extension, the appeal shall be deemed to be withdrawn and the award of the arbitrator(s) or umpire shall become final and binding immediately upon expiry of the relevant time limit. The appellant shall be responsible for all the fees, costs and expenses of the board of appeal and the Federation."
5. Dreyfus served its notice of appeal on 4 April 2001 which meant that it had until 25 April 2001 to serve its statement of case. In fact it was served on 4 May 2001. This was because Mr Haylock, who had immediate responsibility for the case, suffered from severe back trouble which (as I hold) prevented him from doing the work any sooner.
6. Despite extensive and bad tempered wrangling between the parties, the situation at this time may be summarised quite shortly.
7. During the absence of Mr Haylock, Mr Rookes had charge of the matter. Neither man is a qualified lawyer although both are well experienced in trade disputes. That is what their department deals with. Mr Rookes knew that he had to put in a notice of appeal within the relevant period because that is what it said on the reverse of the award. Although he could have done, Mr Rookes did not bother to look at the Rules. He was very busy. Unfortunately despite his wide general experience, he had little experience of coffee arbitration. Other rules of which he knew, contained nothing of the draconian nature that I have set out. While that may be so, it is surprising that he took no steps to find out the framework within which the appeal was to operate. A very short time would have sufficed.
8. By its letter dated 10 May 2001, Equatorial squarely took the point that the statement of case was out of time. Later and without prejudice it served a statement of defence dated 22 May 2001. By a letter dated 24 May 2001, the CTF accepted Equatorial's submissions. The process of reasoning was impeccably set out in the letter. In a short fax dated 29 May 2001 Mr Haylock referred to his indisposition and asked for *"the Board's discretion"* for the case to *"be allowed despite the time factor"*. Nothing was said as to why the Board might have such a discretion.
9. By a letter dated 5 June 2001 the CTF wrote to the parties a letter which contained the following passages:

".....

The Committee met on Monday 4th June and decided that notwithstanding the provisions of Rule 42(g) an extension of time would be granted as per Rule 35 of the Coffee Trade Federation Arbitration Rules and therefore the submissions dated 4th May would be admissible.

The appeal is therefore deemed to have been reinstated by decision of the Arbitration and Contracts Committee of 4th June 2001.

The Committee also re-appointed a Board of Appeal as follows:

....."
10. Rule 35 reads as follows:

"Extension of Time for Appeal

35. Notwithstanding the above time provision, the Federation, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time limit so fixed has expired may, on such terms, if any, as the justice of the case may require extend the time for such period as it thinks fit."
11. It is clear from the wording of the provision that it is concerned with matters that have previously appeared in the Rules and not those which are to follow. It is essentially directed at rule 32, which requires notice of appeal to be received within 30 days of the award.

12. Whatever the feelings of the Committee on the merits of the matter, it had no power to decide as it did.
13. By a letter dated 6 June 2001, Equatorial wrote to complain and make submissions. The complaint was chiefly directed at the absence of opportunity to address Dreyfus' application rather than an attack on the power to make the decision at all. On 11 June, Dreyfus wrote to stress the veracity of its case as to the indisposition of Mr Haylock and on 19 June CTF wrote to express its surprise at Equatorial's complaint in light of the fact that the Dreyfus letter of 29 May 2001 had been copied to it. Having recited its position the CTF said: "... This Appeal 956T is therefore deemed to have been re-instated by decision of the Arbitration & Contracts Committee on 18th June 2001".
14. By its letter of 19 June 2001, Equatorial provided lengthy submissions on the merits of the appeal. By its letter dated 22 June 2001, the Board of Appeal declared that the exchange of written statements was complete and that the appeal would take place on 6 August 2001.
15. On 19 July 2001, Equatorial sent to the CTF a detailed and compelling case as to why it challenged the right of the CTF to extend time for the submission by Dreyfus of its case. The letter contained the following passage:

"Conclusion

Our primary argument is that the Sellers were out of time for service of their Appeal Submissions and that the Committee do not have any discretion under the Rules to extend time for service of these submissions. Accordingly the Appeal should be withdrawn and the first tier Award should be considered final and binding.

....."
16. Although the letter does not appear to have been copied to Dreyfus, that company had a copy of it on or before 24 July 2001. Although it sent two short fax's on respectively 24 and 25 July, Dreyfus failed to make any response to the detailed case made by Equatorial as to the procedural irregularity of the appeal.
17. On 28 July 2001 Equatorial wrote to the CTF a letter that contained the following passages:

".....

Thirdly, as stated in our letter of 22 May, we made our submissions in the Appeal without prejudice to our primary position that the Appeal is out of time. It remains our primary argument that the Appeal should be dismissed. We consider that the Committee has exceeded its powers under the CTF Rules and wish to give the Committee a further opportunity to review the matter before the costs of the hearing on 6 August are incurred. This is an issue which is separate from the Appeal itself. Accordingly, in our view, the directions of the Board on 22 June did not apply to the extension of time question.

.....

In view of the time remaining before 6 August, we should be grateful if the Committee would inform the parties as soon as possible whether they intend to review the matter as to the extension of time. If so, please could LD immediately thereafter state whether they intend to respond substantively to our submissions on the extension of time point.

Alternatively, we would suggest that, if the Committee and the Board feel it is appropriate, the hearing set for 6 August be postponed pending the Committee's final decision on the question of the extension of time.

To avoid any misunderstanding we reserve all our rights to make an application to the High Court if we feel that is appropriate."
18. Equatorial's letter was copied to Dreyfus.
19. On 1 August 2001 the CTF replied to Equatorial in the following terms:

".....

I refer to your letter dated 19 July 2001 which appears to have been directed to both the Arbitration & Contracts Committee and the new Board of Appeal in Appeal No 956T. I am requested by the committee to advise you of the following,

 1. *The original Board of Appeal dismissed the Appeal for reason of the late submission of the Appellant's Statement of Case as a result of the operation of Rule 42(g)*
 2. *The Appellant subsequently applied to the Federation for an extension of the time limit for serving its Statement of Case citing undue hardship. The matter was considered by the Arbitration and Contracts Committee on 4 June 2001.*
 3. *The Committee identified that there was no provision in the Rules for an extension of time for the delivery of the Statement of Case by the Appellants as such and therefore treated the application as an application for an extension of time to file a fresh appeal out of time, the relevant time limit under Rule 32(b) having expired. The Federation has power to grant such an extension of time pursuant to Rule 35 in the case of undue hardship. As you will know the powers of the Federation in this regard are delegated to the Committee pursuant to Rule 3(c).*
 4. *The Committee decided to grant the extension of time to the Appellants. It was for this reason that a new Board of Appeal was appointed since this was in effect a new appeal, although for reasons of judicial economy the papers already filed in the original Appeal were allowed to stand in the new Appeal.*
 5. *Following the receipt of further submissions from the Respondent and the Appellant the Committee reconsidered the matter afresh and reached a final decision to the same effect.*

In summary therefore, the Committee acted within its power under Rule 35 in extending time for a new Appeal to be filed, ordering the consequent appointment of a new Board of Appeal and thus allowing the extension of time for

delivery of the Appellant's Statement of Case. Accordingly the Committee is not minded to change its decision and the new Appeal is now within the jurisdiction of the new Board of Appeal, not of the Federation nor of the Committee.
....."

20. In its fax in response sent in August 2001, Equatorial said:
".....
We have some difficulty in following the Committee's reasoning particularly when considered next to the correspondence exchanged at the time.
We will be considering the file in due course."
21. There seems to have been no further correspondence until the Appeal Committee made its award which appears to have been taken up by Dreyfus on or shortly before 7 January when a copy of the Appeal Award was sent to Equatorial who promptly made its application under s 68. This was followed by an application under s 67.
22. In the event that I allow either of Equatorial's applications, Dreyfus asks for relief under s 79.
23. The matter first came before me on 24 May 2002 and was adjourned to give Dreyfus the opportunity to provide more detailed evidence of the circumstances in which it came to miss the time limit for service of its case. I have already set out the effect of that further evidence.
24. Although the application under s 67 was out of time, no real objection was taken to this as the application under s 68 had been properly made and the grounds of complaint were the same. Before me, Mr Charkham, who appeared on behalf of Dreyfus, accepted that the CTF had erred in seeking simply to transpose to the second appeal everything that happened in the original appeal. The concession related particularly to the use of the existing submissions without the opportunity to put in fresh ones. He appeared to accept that this was a material irregularity which would justify my setting aside the Appeal Award. He reserved his position as to whether there was a power under rule 35 to authorise further proceedings once the default provisions of rule 42(g) had taken effect.
25. While I would not disagree with Mr Charkham's apparent viewpoint, I do not think that the Rules can be read as permitting the commencement of a new appeal where the Rules themselves declare that the award is to become final and binding in the circumstances that have occurred. I note that rule 34 goes to considerable trouble in specifying how, for 28 days, an appeal is to be treated as resuscitable in circumstances where the award is 'final and binding'.
26. I hold that the tribunal had no jurisdiction to make the Appeal Award and that there was serious irregularity in the proceedings. The award cannot be saved. It must be set aside.
27. What either or both of Dreyfus and the original appeal tribunal should have done was to apply for an extension of the time for service of the statement of case under s 79 of the Act. Relevant provisions read as follows:
"79 Power of court to extend time limits relating to arbitral proceedings
(1) Unless the parties otherwise agree, the court may by order extend any time limit agreed by them in relation to any matter relating to the arbitral proceedings or specified in any provision of this Part having effect in default of such agreement.
This section does not apply to a time limit to which section 12 applies (power of the court to extend time for beginning arbitral proceedings, &c.)
.....
(3) The court shall not exercise its power to extend a time limit unless it is satisfied –
(a) that any available recourse to the tribunal, or to any arbitral or other institution or person vested by the parties with power in that regard, has been exhausted, and
(b) that substantial injustice would otherwise be done.
(4) The court's power under this section may be exercised whether or not the time has already expired.
(5) An order under this section may be made on such terms as the court thinks fit.
....."
28. No authority could be found on the application of s 79. The relevant provision of the DAC Report reads as follows:
"Clause 79 Power of Court to extend time limits relating to arbitral Proceedings
308 Here we propose that the Court should have a general right to extend time, except time limits for starting an arbitration
309 This power is limited in the ways set out in this Clause. In particular, no extension will be granted unless a substantial injustice would otherwise be done and any arbitral process for obtaining an extension of time must first be exhausted. As we have said in other contexts, it would be a rare case indeed where we would expect the Court to grant an extension where such has not been obtained through that process. With these limitations we take the view that this provision can properly be described as supporting the arbitral process."
29. Both counsel are agreed that if relief is to be granted, the extension must be to or shortly after the time of this judgment.

30. As the second appeal proceedings are a nullity, there is no reason in principle why the first and, initially valid proceedings, should not be revived. But should they?
31. Mr Ashcroft, counsel for Equatorial, appears to argue that there has been no recourse to the tribunal for relief. I do not understand this submission as (a) there was no relief that the tribunal could grant and (b) Dreyfus did ask for such relief and the tribunal at first purported to grant it.
32. Mr Ashcroft further invites me to model myself upon the stringent requirements of s 12, albeit with some degree of latitude.
33. By contrast Mr Charkham says that one should treat the provision as if the relevant rules had been drafted to include it.
34. While I see the attraction of Mr Charkham's submission, I think that it loses sight of the fact that s 79 is part of a statutory regime and that it derives its ethos from that regime.
35. Although there may be various views upon the precise area of the discretion that I must exercise, I propose to start with the following rule of thumb approach, namely that a party that seeks interlocutory relief from a court ought to apply for the relief as soon as reasonably possible after that party ought to appreciate that it is required.
36. In the present case there has been intense debate as to whether the failure of Mr Rookes to acquaint himself with the Rules should preclude the making of an order. Although the period of delay was short and the CTF was resolutely in favour of giving time, I incline to the view that there is no substantial injustice in holding Dreyfus to the consequences of Mr Rookes' own deliberate failure to look at a set of rules that would instantly have revealed the danger of delay. However I prefer to base myself on what I think to be a more serious factor in the case.
37. Dreyfus is a large and sophisticated trading concern. It is well used to litigation and the involvement, when needed, of lawyers. I am struck by the total failure of Dreyfus to address the arguments made by Equatorial as to the procedural deficiencies. Dreyfus was content to let the CTF make the running.
38. While I can see that a trader who is unused to litigation may fairly rely upon what seem to be the competent utterances of an experienced tribunal, that was not this case. Equatorial's letters of respectively 19 and 25 July 2001, together with its August fax, made the position entirely clear. At that stage, if not much earlier, Dreyfus' proper course was to consult its lawyers and to make its application under s 79. The section holds no scope for a 'wait and see' approach.
39. I see no injustice in holding Dreyfus to the consequences of its own considered conduct and no one has suggested that there is anything in the merits that should alter that view.
40. The Appeal Award will be set aside and the application under s 79 will be refused. All consequential matters will be dealt with at a time convenient to the parties and any relevant time limits extended until then.

Michael Ashcroft (instructed by Stephenson Harwood) for the Applicant
Graham Charkham (instructed by Richards Butler) for the Respondent