Henry Boot Construction (UK) Ltd v Malmaison Hotel Ltd [2000] APP.L.R. 05/25

CA on appeal from TCC (Mr Justice Dyson) before Swinton Thomas LJ; Waller LJ; Mrs Justice Waller. 25th May 2000

Lord Justice Waller:

1. Henry Boot Construction (UK) Ltd (Henry Boot) are the main contractors under a building contract on JCT Standard Form of Building Contract, 1980 Edition (with Quantities). Malmaison Hotel (Manchester) Limited (Malmaison) are the employers. A dispute arose in relation to the proper construction of Clause 25 of the contract, and as to whether the Architect should have granted a further extension of time. The matter was referred to arbitration, and Mr Bruce Mauleverer QC made an interim award. With the consent of Malmaison (by virtue of Clause 41.6.1 of the contract), Henry Boot challenged the interim decision under Section 69(1) of the Arbitration Act 1996 in the Mercantile Court in Manchester. The matter was transferred to the Technology and Construction Court at the Royal Courts of Justice, and heard by Dyson J. He upheld the view of the arbitrator. Henry Boot sought from the judge leave to appeal to this court under Section 69(8) of the 1996 Act. That was refused by Dyson J. They then sought leave from Dyson J to appeal his refusal of leave. He was of the view that he had no jurisdiction to grant such leave but made clear that even if he had he would have refused leave.

2. Mr Black QC on behalf of Henry Boot has sought to persuade us either that the Court of Appeal has jurisdiction to grant leave to appeal under Section 69(8) of the 1996 Act, or at the least that it has the power to review the refusal of leave ie (as I would understand it) that this court has the power either to treat Dyson J's refusal as a decision of the High Court in relation to which this court could itself grant leave to appeal; or review it in the sense of holding that the judge did not exercise his discretion properly, and substituting the exercise of this court's discretion for that of the judge.

3. At the conclusion of Mr Black's submissions, we ruled that on the proper construction of Section 69(8), since Dyson J had refused leave to appeal, this court had no jurisdiction either itself to grant leave or to review that refusal to grant leave. These are our reasons for so ruling.

4. Section 69(8) provides as follows:-

   "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."

5. The court is defined in section 105 as the High Court or the County Court.

6. Simply as a matter of construction "the court" whenever it appears in the subsection seems to mean the "High Court" or the "County Court", and it is to be contrasted with the use of the words the "Court of Appeal" where that court was intended. At one stage of his argument Mr Black felt constrained to accept that that must be so, but he submitted that the words of the subsection did not preclude the Court of Appeal reviewing the grant of leave. He submitted that although it was understandable that Parliament should support the view that arbitrators were tribunals chosen by the parties and that interference in their decisions should be kept to a minimum, that philosophy should not apply to proceedings once they were in court. He submitted that clear words would be necessary to curtail a litigant's right of appeal.

7. Miss Finola O'Farrell in her skeleton argument submitted that the language of the subsection is clear, that a requirement for leave to be obtained from the High Court or County Court to appeal a decision on an arbitration application was consistent with Parliament's attitude that there should be as little interference as possible with arbitration awards, and she would not accept the approach that there was prima facie any "right" to appeal. To be entitled to appeal a would-be appellant must bring himself within a statutory provision providing for that right.

8. In my view it would be difficult to find words clearer than the words of this particular subsection for the proposition that leave of the High Court (or the County Court) was needed before any appeal could be brought in the Court of Appeal. Furthermore, if one has regard to its statutory predecessor, the position becomes clearer still. It is in my view unnecessary to have regard to the Departmental Advisory Committee's Reports on the Arbitration Bill which lay behind the drafting of the 1996 Act, but if confirmation were needed of the views formed they are readily ascertained from that report.

9. It would furthermore seem to me absurd to contemplate a review process in the Court of Appeal in relation to the giving of that leave, otherwise the objective sought to be attained is defeated.

10. Let me start with that last point first, not least because it enables the authorities to be reviewed in chronological sequence.

11. In ***Lane v. Esdaile*** [1891] AC 210 the House of Lords had to consider whether an appeal lay to the House of Lords after a refusal by the Court of Appeal to grant "*special leave*" under the following provision. *"No appeal to the Court of Appeal from any interlocutory order, . . . shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, . . . "*

12. Lord Halsbury's speech is instructive, and I make no apology for quoting a substantial portion of it.

    "My Lords, I am of opinion that this preliminary objection ought to prevail. An appeal is not to be presumed but must be given. I do not mean to say that it must be given by express words, but it must be given in some form or other in

which it can be said that it is affirmatively given and not presumed. In the particular case now before your Lordships the appeal is certainly not given in express words. The words used are "leave of the Court"; and although it may be that in some sense the leave of the Court, whether it is given or withheld, becomes an order (that I will not stay to discuss), that is not the ordinary mode in which it would be described. It is to be something that is done by the order of the Court. I confess myself I should hesitate if it was only to turn upon the question of language, because although a thing might be called an order, or might be called a judgment, or might be called a rule, or might be called a decree, it might well be that nevertheless by reason of the context it would come within the obvious meaning and purpose of the statute; so that although it was no one of those things in name it might be one of those things in substance, and therefore would come within the general provision that an appeal should lie.

But when I look not only at the language used, but at the substance and meaning of the provision, it seems to me that to give an appeal in this case would defeat the whole object and purview of the order or rule itself, because it is obvious that what was there intended by the Legislature was that there should be in some form or other a power to stop an appeal - that there should not be an appeal unless some particular body pointed out by the statute (I will see in a moment what that body is), should permit that an appeal should be given. Now just let us consider what that means, that an appeal shall not be given unless some particular body consents to its being given. Surely if that is intended as a check to unnecessary or frivolous appeals it becomes absolutely illusory if you can appeal from that decision or leave, or whatever it is to be called itself. How could any Court of Review determine whether leave ought to be given or not without hearing and determining upon the hearing whether it was a fit case for an appeal? And if the intermediate Court could enter and must enter into that question, then the Court which is the ultimate Court of Appeal must do so also. The result of that would be that in construing this order, which as I have said is obviously intended to prevent frivolous and unnecessary appeals, you might in truth have two appeals in every case in which, following the ordinary course of things, there would be only one; because if there is a power to appeal when the order has been refused, it would seem to follow as a necessary consequence that you must have a right to appeal when leave has been granted, the result of which is that the person against whom the leave has been granted might appeal from that, and inasmuch as this is no stay of proceeding the Court of Appeal might be entertaining an appeal upon the very same question when this House was entertaining the question whether the Court of Appeal ought ever to have granted the appeal. My Lords, it seems to me that that would reduce the provision to such an absurdity that even if the language were more clear than is contended on the other side one really ought to give it a reasonable construction."

13. In ***Gelberg v Miller*** [1961] 1 WLR 459, the House of Lords considered Section 1(2) of the Administration of Justice Act 1960. That section provided as follows :- *"No appeal shall lie under this section except with the leave of the court below or of the House of Lords; and such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the House of Lords, as the case may be, that the point is one which ought to be considered by that House."*

14. The petitioner in that case did not obtain a certificate from the Divisional Court that a point of law of general public importance was involved. The submission on behalf of the petitioner to the House of Lords was that if the court below did not grant a certificate the House of Lords itself had the power to grant it, or if there was no power to grant they had the power to remit with a direction to the Divisional Court to grant it.

15. Viscount Simonds said:- *"This petition is refused. It is quite hopeless, for it is obvious that the whole purpose of Section 1(2) of the Act is to ensure that leave to appeal shall not be granted unless it is certified by the court below that a point of law of general public importance is involved."*

16. ***Lane v Esdaile*** and the obvious logic of the above House of Lords authorities were the foundation of the Court of Appeal decision in the arbitration context in ***Aden Refinery Ltd. v Ugland Ltd.*** [1987] 1 QB 650 (see in particular the judgment of Sir John Donaldson MR pages 657 and 658). In that case a principle relied on by Mr Black in his submissions the "*Scherer principle*" was held to be confined to its own subject-matter and to be inapplicable to appeals under the Arbitration Act 1979. The "*Scherer principle*" was so called after a decision of the Court of Appeal in ***Scherer v Counting Instruments Ltd*** [1986] 1 WLR 615 in which the Court of Appeal held that despite the wording of Section 18(1)(f) of the Supreme Court Act 1981 which provided that *"no appeal shall lie without leave of the court or judge making the order . . . . as to costs only which by law are left in the discretion of the court", the Court of Appeal could entertain an appeal if the judge had "no relevant grounds available or ....in fact acted on extraneous grounds."*

17. In the ***Aden*** case the court was considering Section 1(6A) of the Arbitration Act 1979 as amended by section 148(2) of the Supreme Court Act 1982 which provided:- "*Unless the High Court gives leave, no appeal shall lie to the Court of Appeal from a decision of the High Court - (a) to grant or refuse leave under subsection (3)(b) . . .*"

18. All three members of the court were of the view that the *Scherer* principle did not apply to the plain words of that section. Mustill LJ explained how that principle had grown out of the statutory provisions relating to costs (see page 665). In the result an attempt to appeal the refusal of leave to appeal by Leggatt J failed on that ground as well as others.

19. In *National Westminster Bank Ltd v Arthur Young & Co.* [1985] 1 WLR 1123 the Court of Appeal considered a further provision of the Arbitration Act 1979, Section 1(7). That section was the predecessor of the section of the 1996 Act with which we are concerned. The section provided as follows:- *"No appeal shall lie to the Court of Appeal from a decision of the High Court on an appeal under this section unless - (a) the High Court or the Court of Appeal gives leave; and (b) it is certified by the High Court that the question of law to which its decision relates either*

is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal."

20. The judge in that case had refused leave and refused to certify a question of law. Sir John Donaldson MR having dealt with the leave aspect as not being fatal because of the reference in the alternative to the Court of Appeal, continued as follows, and again I make no apology for quoting extensively:-

"It is submitted by Mr Morritt for the respondents that the court has jurisdiction to review the judge's refusal to grant a certificate because, as he submits, the decision to which section 1(7) applies is the underlying decision, namely a decision on questions of law raised in the arbitration. That subsection has no application to the grant or refusal of a certificate, which is a decision of the High Court to which section 16 of the Supreme Court Act 1981 would apply. He further draws our attention to the fact that in ***Pioneer Shipping Ltd. V. B.T.P. Tioxide Ltd. (The Nema)*** *[1980] 1 Lloyd's Rep. 519n. Lord Denning M.R., giving the judgment of the court, held at p. 522, that this court had jurisdiction to review a discretionary decision by a High Court judge whether to grant or refuse leave to appeal to the High Court, a judgment which was reversed by Parliament by including a new section 1 (6A): see the Supreme Court Act 1981, section 148(2). Mr Morritt submits that, in the absence of an equivalent subsection in section 1 of the Act of 1979, we should be persuaded by the decision of this court in* ***The Nema*** *to take a similar line.*

It is not apparent to what extent the matter was argued below; and, in any event, the problem with which we are faced is different, because, as was pointed out by Sir John Megaw in argument, in section 1(7) there is a direct and clear antithesis between leave which can be granted alternatively by the High Court and the Court of Appeal and the certificate which can only be granted by the High Court. In the face of that antithesis and the decision of the House of Lords in ***Gelberg v. Miller*** *[1961] 1 W.L.R. 459 in the context of similar provisions for criminal appeals, where Viscount Simonds said, at p. 461, that the whole purpose of section 1(2) of the Administration of Justice Act 1960* ***"is to ensure that leave to appeal shall not be granted unless it is certified by the court below that a point of law of general public importance is involved,"*** *I have no doubt at all that on the true construction of section 1(7) of the Act of 1979, this court has no jurisdiction to consider an appeal from a refusal by a judge of the High Court to grant a certificate under the Act."*

21. Thus under section 1(7) of the Arbitration Act 1979 leave could be obtained from either the High Court or the Court of Appeal, but no appeal could be brought without a certificate. ***The National Westminster Bank*** case held that a refusal to grant a certificate was not a decision within section 16 of the Supreme Court Act 1981. This section provides as follows:-

"16. (1) Subject as otherwise provided by this or any other Act (and in particular to the provision in section 13(2) of the Administration of Justice Act 1969 excluding appeals to the Court of Appeal in cases where leave to appeal from the High Court directly to the House of Lords is granted under Part II of that Act), the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court."

22. That section is the foundation of litigant's rights to appeal, and demonstrates that there is no presumption that they have such a right, and demonstrates that when construing a statutory provision relating to appeals it is illegitimate to start from the point of view that litigants have such rights. Lord Halsbury in ***Lane v Esdaile*** in the passage I have quoted makes this very point.

23. I should also add for completeness that Mr Black QC, by a note received following conclusion of the argument, helpfully drew our attention to two further House of Lords authorities where the ***Lane v Esdaile*** reasoning had been applied. In ***Georgas SA v Tramno Gas Limited*** [1991] 1 WLR 776, the House of Lords held they had no jurisdiction to entertain an appeal from a grant of leave to appeal to the Court of Appeal by the Court of Appeal under section 1(7) of the Arbitration Act 1979. **Re *Poh*** [1983] 1 WLR 2 related to refusal by the Court of Appeal of leave to apply for judicial review where again the House of Lords held they had no jurisdiction to entertain an appeal against that refusal.

24. I now return to the wording of the relevant section of the Arbitration Act 1996 which for convenience I will requote:- *"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."*

25. The wording of the section would indicate to me that the draftsman saw no good reason to maintain a system as per the 1979 Act, whereby leave could be granted by either the Court of Appeal or the High Court, but a point of law needed to be certified by the High Court. The subsection contemplates one court doing one exercise, but, it should be emphasised, an exercise including considering whether the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal, which was the exercise heretofore carried out by the High Court, and not the Court of Appeal. The definition of "c*ourt*" is the High Court or the County Court, and on a natural reading of the section it would seem that sensibly the draftsman has thought that since it was the High Court that previously certified, and since in the context of most litigation that arises from arbitrations it is the commercial judges, the judges of the Technology and Construction Courts and Mercantile judges who will consider whether a point needs to go to the Court of Appeal, that is a sensible place to have that question resolved.

26. I also reject Mr Black's submissions that once matters are in court the philosophy applicable to arbitrations somehow has no further application. Parties who have agreed to have their disputes arbitrated should have finality as speedily as possible and with as little expense as possible. (see generally section 1(a) of the 1996 Act.

Limitation on the rights of appeal is consistent with that philosophy and one tribunal dealing with the question is also consistent with that philosophy (see the observations of Sir John Donaldson MR in ***Aden*** p. 655). As Lord Nicholls emphasised in ***Inco Europe v First Choice Distribution*** [2000] 1 WLR 586 at 590C many sections of the 1996 Act provide for applications to the court and some of them restrict appeals from decisions of the court. The Act thus adopts the same philosophy and the construction I have placed on section 69 is consistent with its context.

Conclusion

27. Thus in my view "court" means the High Court (or the County Court) but not the Court of Appeal. It follows that the note in Civil Procedure Volume 2 (2000 ed.) paragraph 2B-256 is inaccurate in suggesting leave can be obtained from the Court of Appeal. The refusal of leave by the High Court or the County Court is not a decision within section 16 of the Supreme Court Act 1981 which can itself be the subject of an application for leave to appeal to the Court of Appeal. The above is confirmed by section 18(1)(g) of the Supreme Court Act 1981 as amended by section 107 and paragraph 37(2) of Schedule 3 to The Arbitration Act 1996, and supported by the reasoning in ***Inco Europe v First Choice Distribution*** (supra) particularly in Lord Nicholls of Birkenhead's speech with which all others agreed at 590D. The *Scherer* principle has no application, and the refusal of leave cannot thus be reviewed in the Court of Appeal.

28. In the result it is not open to a would be appellant to challenge in the Court of Appeal a decision of the High Court (or the County Court) under section 69 without leave of the High Court (or the County Court), and the refusal of the High Court (or the County Court) to grant leave to appeal is not capable of challenge in the Court of Appeal.

29. As indicated at the commencement of this judgment, the above conclusion seems to me plain without recourse to the Departmental Advisory Committee's Report on the Arbitration Bill, but it is comforting to note that in their report dated January 1997 paragraph 27 said:- *"The Bill used the words "**unless the court certifies**." These were changed by amendment to "**which shall not be given unless the court considers.**" This amendment was made to make clear that where an appeal is desired from a decision of the Court, leave must be obtained from that Court itself, and will always be required. Leave may not be obtained from the Court of Appeal. As originally drafted, the incorrect impression was given that leave of the Court may not be necessary where that Court certified the issue as being one of general importance or one which for some other special reason should be considered by the Court of Appeal."*

30. It is for these reasons that we held that this court has no jurisdiction to entertain the appeal of Henry Boot from the decision of Dyson J.

Mrs Justice Arden:

31. I agree.

Lord Justice Swinton Thomas:

32. I also agree.

Addendum : 28th July 2000

Lord Justice Waller:

1. On the day that we handed down our judgments our attention was drawn to Section 55 of the Access to Justice Act 1999 which came into force on 27th September 1999 ie before Dyson J's decision in this case. That Section reads as follows:-

   "Second appeals

   55.*(1) Where an appeal is made to a county court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that –*

   (a) the appeal would raise an important point of principle or practice, or

   (b) there is some other compelling reason for the Court of Appeal to hear it.

   (2) This section does not apply in relation to an appeal in a criminal cause or matter."

   [Rule 52.13 now supports that Section but since that Rule did not come into force until 2nd May 2000, it did not apply to the application for permission to appeal in this case].

2. We recalled our judgments in order to give consideration to the question whether Section 55 could have any influence on the views expressed.

3. What was suggested was that on the wording of Section 55 an appeal from an arbitrator to the High Court or the County Court is an "appeal .... in relation to any matter" and thus that Dyson J's decision being in relation to that matter would be covered by the Section. It was thus further suggested that if the Section applied it would follow that no appeal could be made to the Court of Appeal unless **the Court of Appeal considered** that the point would raise an important point of principle or practice or that there was some other compelling reason for the Court of Appeal to hear it. A possibility which needed consideration was whether Section 55 had by implication repealed Section 69(8).

4. The following are, as it seems to me, the alternatives for consideration, which can be identified by reference to the positions that the parties have now taken up.

1. Implied repeal.

5. Mr Black for the applicant submits that the above is a correct interpretation of the Section and that the consequence is that by implication Section 55 has repealed Section 69(8) of the 1996 Act. He submits that Dyson J had no jurisdiction to deal with the question whether permission to appeal should be given and that the Court of Appeal was the only court that had that jurisdiction.

2. Permission now needed from both the court who heard the appeal from the arbitrator and the Court of Appeal.

6. This is the alternative which Miss O'Farrell supports in her written submissions. She submits that albeit the above is the correct interpretation of Section 55 ie that the appeal from an arbitrator to the high court or a county court is a first tier appeal for the purposes of Section 55, that does not produce an implied repeal of Section 69(8). She submits that both Sections apply and that an applicant for permission to appeal must obtain leave to appeal from the court which makes the decision on appeal from an arbitrator under Section 69(8), **and** permission from the Court of Appeal under Section 55. If that were the appropriate construction that would be sufficient for her purposes since this was a case in which Dyson J refused permission to appeal. On her construction a refusal cannot be reviewed by the Court of Appeal for the reasons given in the judgment originally handed down.

3. Section 55 was not intended to deal with appeals from an arbitrator to the High Court or the county court .

7. Mr Black, in his response to Miss O'Farrell, points to the cumbersome process that her solution produces and points to the fact that it seems to produce an inconsistency with the objectives of Section 69(8) of the Arbitration Act, which, as explained in the original judgment, included limiting hearings as much as possible and leaving the question of permission to appeal in the hand of the courts most experienced in the field rather than the Court of Appeal. Thus, an alternative possibility which it seems to me needs consideration is whether, although Section 55, because of the broad terms in which it is drafted could as a matter of language be said to cover an appeal from the High Court or county court where that court has been dealing with an appeal from an arbitrator, it was not in fact intended to do so, and Section 69(8) was intended to continue to be the only Section covering such appeals.

8. We have received great assistance from both Counsel. They have put in further extensive written submissions, and we are grateful to them. We are also grateful to Philip Jamieson a Judicial Assistant with the Court of Appeal for certain research which he has done and which we made available to both Counsel.

9. Mr Black in his written submissions first deals with the rather strange circumstance that Section 55 came into force on 27th September 1999, but the Rule supporting it only came into force on 2nd May 2000. He submits that Section 55 was not dependant on a Rule or any further Order before it came into force. Miss O'Farrell does not contend otherwise and we accept that he is right in this submission. It is also right to say that I do not think that the coming into force of the Rule will add anything to the arguments in relation to applications for permission to appeal made after 2nd May 2000. The question is one of statutory construction, and if Section 55 applies then as from 2nd May 2000 the Rule applies; if Section 55 never did apply then the Rule does not apply either.

10. It is relevant to see both Section 69(8) and Section 55 in their contexts. In the original judgment I set out the philosophy which supported the view I took about the construction of Section 69(8). That philosophy included limiting the court's interference in the awards of tribunals chosen by the parties to try their disputes; speed in obtaining a final resolution; and keeping down the costs so far as possible. Those objectives would be supported by the philosophy that lay behind The Access to Justice Act.

11. Section 55 was concerned with limiting the rights of appeal where there had already been one appeal. I can quote paragraphs 6 to 9 from Mr Black's submissions which set the background accurately, and assist in identifying the philosophy lying behind the section.

> *"6. The Parliamentary debates make it clear that section 55 was intended to give effect to the recommendations of Sir Jeffrey Bowman in his report on the Civil Division of the Court of Appeal. On 11th May 1999, Mr Hoon, Minister of State in the LCD, addressed Standing Committee "E" on what was then Clause 41 of the Bill (incorrectly described in Hansard) (Session 1998099, Publications on the Internet, Standing Committee Debates, Access to Justice Bill [HL], Standing Committee E, [Part II], column 303;*
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> *The clause introduces the principle that, in normal circumstances, there should be only one appeal to the courts in relation to any matter. The Bowman review found that many cases reaching the civil division of the Court of Appeal had already been considered on appeal by a lower court and concluded that that was inconsistent with the principles of certainty and proportionality which are at the heart of the wider civil justice reforms. It will of course remain possible to appeal to the Court of Appeal, but under more restricted circumstances.*
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> *7.* The Bowman report had been published on 6th November 1997. In the section "*Current Situations and Reasons for the* Review" (Internet version, LCD web-site) the committee (of which Lord Woolf was a member) said,
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> *The principles underlying a civil appeals system*
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> *8. The application of the Woolf principles led us to the conclusion that more than one level of appeal cannot normally be justified. In addition, we concluded that certain appeals which now reach the CA should normally be heard at a lower level provided that they are heard by a court or judge with a superior jurisdiction to that which made the first instance decision. Such appeals could reach the CA, however, where there is an important point of principle or practice or one which for some other special reason should be considered by the CA.*

And at "*Summary of recommendations*" number 9:

More than one level of appeal cannot normally be justified except in restricted circumstances where there is an important point of principle or practice or one which for some other special reason should be considered by the CA.

8. Following the sitting of the Standing Committee, the wording of the relevant clause of the Bill reached its final form and was published on 17th May 1999.

9. In ***Tanfern*** [2000] 2 All ER 801 Lord Justice Brooke commented as follows (paragraphs 44-45, pages 811g-812e):

44. The reason for this significant change of appellate policy can be found in the 1997 Review of the Business of the Court of Appeal (Civil Division). This Review reported that over the previous decade there had been a substantial increase in the number of cases coming to the Court of Appeal. Its authors believed that if there had to be an appeal in a civil case this should normally be the end of the matter. This principle reflected the need for certainty, reasonable expense and proportionality, and they said that there must be special circumstances if there was to be more than one level of appeal. Elsewhere in their report they had said that judges of the quality of Lords Justices of Appeal were a scarce and valuable resource, and that it was important that they were used effectively and only on work which was appropriate to them (Review of the Court of Appeal (Civil Division), pp 10, 26 and 22).

45. It is clear that in the Access to Justice Act 1999 Parliament not only accepted the report's analysis of the problems confronting the Court of Appeal but that it also adopted even tougher measures than those recommended by the Review to ensure that second appeals would in future become a rarity and that the judges of this court would be freed to devote more of their time and energy in hearing first appeals in more substantive matters which either their court or a lower court had assessed as having a realistic prospect of success." "

In paragraph 10 Mr Black submits as follows:-

"10. It is submitted that the policy behind section 55 appears to have been that it would apply to all second appeals."

12. In so far as that is suggesting that the policy intended Section 55 to apply to second appeals where the first appeal was from a tribunal other than a court, I am not sure he is right, and his paragraphs 6 to 9 do not in fact support it.

13. Schedule 15 of the Access to Justice Act deals with repeals and revocations. The following points are of interest.

1. There is no reference to Section 69(8) of the Arbitration Act and thus no express repeal of that Section;
2. That schedule includes as repealed Sections 18(1A) and 18(1B) of the Supreme Court Act 1981. It will be remembered that by virtue of Section 18 (1)(g) of that Act it is provided that "(1) No appeal shall lie to the Court of Appeal..... (g) except as provided by Part 1 of the Arbitration Act 1996, from any decision of the High Court under that part", and there is no repeal or alteration of that subsection.
3. That schedule repealed the words "with the leave of the judge or of the Court of Appeal" in section 375(2) of the Insolvency Act 1986. That section read as follows:-

"(2) An appeal from a decision made in the exercise of jurisdiction for the purposes of those Parts by a county court or by a registrar in bankruptcy of the High Court lies to a single judge of the High Court; and an appeal from a decision of that judge on such an appeal lies, with the leave of the judge or of the Court of Appeal, to the Court of Appeal."

14. The effect of the repeal of the particular words is that Section 55 would then appear to apply. Thus, where there has been an appeal to a single judge of the High Court from a decision of the county court or a registrar in bankruptcy, appeal to the Court of Appeal will lie **only** with permission of the Court of Appeal.

4. It seems that there are provisions similar to section 375(2) of the Insolvency Act with words similar to those now repealed in the following ten other statutes.

1. Banking Act 1987 (c 22), s 31(3),
2. Building Act 1984 (c 55), s 42(5) (not yet commenced),
3. Building Societies Act 1986 (c 53), s 49(3),
4. Estate Agents Act 1979 (c 38), s 7(5),
5. Friendly Societies Act 1992 (c 40), s 61(3),
6. Patents Act 1977 (c 37), s 97(3) (the Patents Court being part of the Chancery Division of the High Court: Supreme Court Act 1981, s6),
7. Planning (Listed Buildings and Conservation Areas) Act 1990 (c 9), s 65(5),
8. Town and Country Planning Act 1990 (c 8), s 289(6),
9. Transport Act 1985 (c 67), ss 9(8), 43(4) (although s 43 has been prospectively repealed by the Greater London Authority Act 1999, s 423, Sch 34),
10. Tribunals and Inquiries Act 1992 (c 53), s 11(5).

15. Schedule 15 could have contained repeals of the words *"the court or the Court of Appeal"* in all those sections if it had been intended that Section 55 would now cover second tier appeals in so far as they were appeals from the relevant tribunals under the above Acts to the court and from the court to the Court of Appeal. It is noteworthy that all those sections deal with circumstances where the first tier decision was of a tribunal or person, **not** a court. One answer may be that those sections have by implication been repealed, but the alternative is that the decision not to make the alteration was deliberate, and it was intended that Section 55 should simply apply to second tier appeals where the first hearing was before a court.

Has Section 55 by implication repealed Section 69(8)?

16. Mr Black has helpfully set out the relevant authorities which guide us in consideration of this question, and again I can quote certain paragraphs of his written submissions.

> **"IMPLIED REPEAL**
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> 15. In ***West Ham Church Wardens & Overseas v Fourth City Mutual Building Society*** [1892] 1 QB 654, (DC) A L Smith J said at page 658:
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> *The test of whether there has been a repeal by implication by subsequent legislation is this: Are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together?*
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> 16. There is a presumption against implied repeal. In *Jennings v United States* [1982] 3 All ER 104, (HL) Lord Roskill said at page 116:
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> *My Lords, counsel for the defendant also referred your Lordships to a number of cases in the last century and indeed before on the subject of the implied repeal of an earlier by a later statute, as, for example,* ***Henderson v Sherborne*** *(1837) 2 M & W 236, 150 ER 743 and* ***Michell v Brown*** *(1858) 28 LJMC 53. An even more striking example can be found in the earlier case of R v Davis (1783) 1 Leach 271, 168 ER 238, where a statute creating a capital offence was, perhaps not surprisingly, held to have been impliedly repealed by a later statute carrying a penalty of only £20. My Lords, I do not doubt that the principles applicable to the implied repeal of an earlier by a later statute are well established. But today those old cases must be approached and applied with caution. Until comparatively late in the last century statutes were not drafted with the same skill as today.*
>
> 17. Implied repeal is also subject to the principle that where the literal meaning of a general enactment covers the situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one and that the earlier specific provision is not to be treated as impliedly repealed. In ***Seward v The Vera Cruz*** (1884) 10 App Cas 59, (HL) the Earl of Seborne LC said at page 68:
>
> *Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.*
>
> In ***Blackpool Corporation v Starr Estate Co Ltd*** [1922] 1 AC 27, (HL) Viscount Haldane said at page 34:
>
> *My Lords, in that state of matters we are bound, in construing the general language of the Act of 1919, to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specially declared. A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to. An intention to deal with them may, of course, be manifested, but the presumption is that language which is in its character only general refers to subject-matter appropriate to class as distinguished from individual treatment. Individual rights arising out of individual treatment are presumed not to have been intended to be interfered with unless the contrary is clearly manifest.*
>
> (See generally *Cross on Statutory Interpretation* (3rd Ed., 1995) pages 5 and 77; and *Bennion on Statutory Interpretation* (3 Ed. 1997) pages 225-7."

17. In my view it would not be right to construe Section 55 as having impliedly repealed Section 69(8). The reasons for that view are:
    1. the indications are that Parliament did not intend that all second tier appeals would require the permission of the Court of Appeal in any event where the first tier was not a court but a tribunal;
    2. where there was an intention to repeal a provision inconsistent with Section 55 Parliament did so expressly;
    3. the draftsman actually looked at Section 18 of the Court and Legal Services Act repealed certain subsections but left untouched the provision relating to appeals under the Arbitration Act;
    4. Section 55 is a general provision not intended to effect Section 69(8) which gave individual treatment to appeals from arbitrators.

Is the position that in relation to arbitrations there are now two hurdles, Section 69(8) and Section 55?

18. This is the more difficult question because unlike the position in relation to the Sections in the ten statutes to which I have referred, it is possible to insist on compliance with both Section 55 as well as Section 69(8). In the other provisions the fact that it is the court **or** the Court of Appeal demonstrates that compliance with the relevant provision and Section 55 cannot have been intended.

19. The question whether there are two hurdles or whether Section 55 simply has no application does not actually arise on this appeal and it is for that reason that we have not asked the parties to come back and argue the matter orally. It did not seem right that they should they be put to that expense when neither need contend for it.

20. However it is right that I should express a view for the assistance of others and for consideration as to whether what I suggest is the result was the intended result by those concerned with these matters.

21. In my judgment the right conclusion is that Section 55 simply has no effect so far as Section 69(8) is concerned in the same way as it has not by implication repealed the ten provisions to which I have drawn attention. In other words if the court who has heard the appeal from the arbitrator grants leave to appeal to the Court of Appeal, that means what it says and there is no additional requirement to obtain the permission of the Court of Appeal.

22. I reach that conclusion for these reasons.
    1. It seems to me to follow from the fact that so many provisions were left unamended, and it is difficult to conclude that that was an oversight, since one provision in the Section in the Insolvency Act was amended;
    2. One would have expected if two hurdles were now to be appropriate, that would have been expressly referred to;
    3. It would actually be contrary to the philosophy of the Arbitration Act to put the parties to the extra cost and expense of applying to the Court of Appeal for very much the same considerations to be considered by that court. It would be extremely unlikely that the Court of Appeal would consider refusing leave to appeal if the court has granted it on the basis of the requirements of section 69(8), thus one can conclude it was intended by Parliament that parties were not to be put through an unnecessary exercise;
    4. It would actually be contrary to the philosophy of the Access to Justice Act generally to require two applications for permission to appeal. Section 55 contemplates only one application and I know of no other situation in which if "leave to appeal" is given by one court, permission must still be gained from some other court as well. Certification of a point of law of public importance is one thing, but actually granting permission to appeal, and then needing a further grant of permission makes little sense;
    5. (As already stated), Section 55 is a general provision not intended to effect Section 69(8) which gives individual treatment to appeals from arbitrators.

23. Thus, despite the interesting arguments presented, our previous judgment should stand.

Mrs Justice Arden:

1. For the reasons given below, I agree with Waller LJ that the Access to Justice Act 1999 ("AJA 1999"), section 55 has not repealed the Arbitration Act 1996 ("AA 1996"), section 69(8). That point is strictly the only point which needs to be decided on this appeal but as the Court in reaching that decision has had to consider the interrelationship between the two sections it has decided to issue this supplementary judgment.

2. On the question whether the AJA, section 55 applies in addition to the AA 1996, section 69(8) or whether section 69(8) applies to the exclusion of section 55, I have come to a different conclusion. I prefer the latter alternative, namely the view that permission to appeal is now needed from both the High Court and the Court of Appeal. The reasons for my conclusion may be shortly expressed as the relevant legislation has been set out in full in the judgement of Waller LJ.

3. Permission can be given under section 69(8) by a county court judge or a High Court judge but for simplicity I refer only to a High Court judge granting permission under this section.

4. The Bowman Report states that "More than one level of appeal cannot normally be justified except in restricted circumstances where there is an important point of principle or practice or one which for some other special reason should be considered by the Court of Appeal" (Report, ch 2 para.16). This recommendation appears under the heading "Principles underlying the operation of the civil appeals system". In chapter 4, para.59, the Report recommends that the tribunals structure should be examined in detail with a view to bringing the arrangements for appeals in line with the principles which the Report identifies as underlying the appeals system. For my own part, I would therefore accept that the principle that one level of appeal should be the norm was a principle which was to be examined and where appropriate applied to appeals from decisions of tribunals and to arbitration appeals. I further note that the question of rationalising appeal routes from tribunals is in fact currently under review (Review of Tribunals, The Rt Hon Sir Andrew Leggatt, consultation paper, 9 June 2000, question F10). The introduction to this consultation paper refers to the Bowman Report.

5. Neither the AJA 1999 section 55 nor CPR 52.13 nor PD 52 para. 4.9 precludes the possibility of an application for permission to the High Court as well as to the Court of Appeal although in many cases this course will not be appropriate.

6. There was no need for the AJA 1999 to amend the Supreme Court Act 1981, section 18 as it is still the case that there is no appeal at all in arbitration matters unless the AA 1996 provides for such an appeal. Section 18 does not deal with the question of which court may give permission to appeal.

7. In my judgment the express repeal by the AJA 1999 of the words *"with the leave of the judge or of the court of appeal"* in the Insolvency Act 1986, section 375 is not necessarily significant. Those words are inconsistent with section 55 since they contemplate in a second tier appeal that a litigant has the right to appeal to the Court of Appeal if the High Court grants him or her permission. The amendment to section 375 reflects a decision as a matter of policy by Parliament to apply the general principle identified by the Bowman Report to second tier bankruptcy appeals. Bankruptcy matters are principally governed by Insolvency Rules, and so in the circumstances the view may have been taken that the most convenient course was to repeal the relevant words in section 375 by the AJA 1999. I accept that the like words have not been repealed in the other statutes mentioned in Waller LJ's judgment, but the appeals to which they relate are subject to CPR Rule 52.13. In addition the relevant words may be capable of repeal by order consequential on the making of CPR Rule 52.13: see the Civil Procedure Act 1997, section 4.

8. It is common ground that the AJA 1999 has not expressly repealed the AA, section 69(8). In my judgment neither has it not done so by implication. First the courts presume that Parliament does not intend an implied repeal: Bennion, Statutory Interpretation, 3 ed (1997), page 225. That presumption is strengthened in this case by the express amendment to the Insolvency Act 1986, section 375. Second, the AA 1996, section 69(8) is not actually inconsistent with the AJA, section 55. Because section 55 is not inconsistent with section 69(8), it can be read as imposing an additional or cumulative requirement. Both statutory provisions have as their effect the limitation of appeals in arbitration matters. But the limitations are for different purposes. Under the AA 1996 Parliament requires permission to be given for second tier appeals on points of law as part of a policy of restricting appeals in arbitration matters: see the philosophy of the AA 1996 as described in the judgment of Waller LJ and in the Court's judgement dated 25 May 2000. The High Court judge is the person selected by Parliament in that Act to consider whether the conditions for the grant of permission are satisfied. The judge may conclude that the question is not one of general importance and this will prevent an appeal from taking place even though the Court of Appeal would have concluded that an important point of principle or practice was involved. The judge has had the advantage of hearing the case and probably of hearing other similar cases and will be in a strong position to decide consistently with the policy of the AA 1996 whether permission to appeal should be given, and moreover I would expect the Court of Appeal to give weight to the views of the judge if the judge decided that it was appropriate to give prmission. The double requirement is not therefore contrary to common sense. If it was, that might then lead to the cocnclusion that Parliament could not have intended that result and that accordingly section 69(8) had been impliedly repealed. The requirement for permission to be granted by the Court of Appeal is inserted into the 1999 Act so that the Court of Appeal can safeguard its own resources. Like Waller LJ I am unaware of the imposition of two hurdles in any other case, but I see no reason why there should not be two requirements for permission where as here there are different policy requirements to be addressed.

9. The converse result is that the AJA 1999, section 55 does not apply to appeals pursuant to the AA 1996, section 69(8). But section 55 is general on its face. It refers to "*appeals*" and does not specify that they should be appeals from another court. The AA 1996, section 69(8) also uses the word "appeal" (and accordingly I need not consider whether an appeal by way of case stated is included: c.f. the AJA section 54(5)). I do not see any method by which the AJA 1999, section 55 can be read as qualified in this case. Furthermore, the criteria in the two sections differ slightly and the policy behind the two requirements is different: see above. Moreover to achieve its purpose section 55 needs to be applied to as many cases as possible.

10. Accordingly I conclude that even if a High Court judge grants permission to appeal under the AA 1996, section 69(8) the appellant must also obtain permission from the Court of Appeal under section 55 of the 1999 Act.

11. I appreciate that this means that a prospective appellant has two hurdles to cross before he or she can appeal but in practice there is unlikely to be a great difference between the two stages. Moreover it follows from our earlier judgment that this problem will arise only if the High Court judge gives permission. Furthermore it is possible that (if appropriate) the position may be capable of being changed by secondary legislation.

12. Finally, I too would like to express my appreciation of Counsels' further written submissions and the work done by Philip Jamieson, Judicial Assistant.

Lord Justice Swinton Thomas:

1. I agree with the addendum judgment given by Waller LJ. For the reasons given by him I am of the opinion that section 55 of the Access to Justice Act 1999 has no effect so far as section 69(8) of the Arbitration Act 1996 is concerned. In my judgment, it is very unlikely indeed that Parliament or the draftsman could have intended that leave to appeal should be obtained twice over, and the legislation does not, in my opinion, so require.

2. I agree with both Waller LJ and Arden J that section 55 has not repealed section 69(8).