Huyton SA v Jakil SPA [1998] APP.L.R. 03/98

CA on appeal from the order of Mr Justice Clarke QBD before Roch LJ; Aldous LJ; Brooke LJ. 24th March 1998

LORD JUSTICE BROOKE:

1. This is an application by the Plaintiffs for leave to appeal from an order of Clarke J made on 16th September 1997 when he struck out for want of prosecution the Defendants' Notice of Motion to the Commercial Court dated 17th October 1996 challenging parts of an Interim Final Award of the Board of Appeal of the Federation of Feed Oil Seeds and Fats Association Ltd (FOSFA) dated 24th September 1996.

2. The parties' dispute arises out of a contract dated 1st June 1993 for the sale by the Plaintiffs to the Defendants of 3,500 tonnes of Chinese cotton seed for shipment between 1st and 15th June 1993 at a price of US$164 per tonne CIFFO Ravenna. The vessel was delayed on the voyage and did not arrive at Ravenna until 13th September 1993. The Defendants did not pay for the documents on the vessel's arrival, and the Plaintiffs declared default. In the arbitration the Plaintiff claimed just over US$464,000, plus expenses, based on the difference between the contract price and the price for which the goods were eventually disposed of in Italy on or about 4th January 1994.

3. Before the first tier arbitrators the Plaintiffs' claim failed. The umpire found that the Defendant was entitled to reject the documents because the bill of lading was ante-dated. The Plaintiffs appealed to the Board of Appeal, and following a two-day hearing in May 1996 the Board published its Interim Final Award on 26th September 1996. The Board held that the Defendants had not proved to the necessary high standard that the bill was ante-dated and it rejected other grounds relied on by the Defendants for rejecting the documents, and also their claim based on misrepresentation. In relation to the other issues canvassed before it, the Board found against the Defendants on what became known as "the quality issue" but for them on what were known as "*the market price issue*" and "*the insurance issue*", the latter two findings being fatal to the Plaintiffs' claim.

4. The Plaintiffs by their Notice of Motion sought leave to appeal under the Arbitration Act 1979 against the Board's adverse conclusions on the market price issue and the insurance issue, and by a Respondents' Notice the Defendants sought to uphold the Board's decision, as distinct from its reasoning, on the ground that it ought to have decided the quality issue in the Defendants' favour.

5. The Plaintiffs' motion came before Thomas J on 15th November 1996. He granted the Plaintiffs leave to appeal on the market price issue and the insurance issue, and granted the Defendants leave to appeal, if appeal was required, on the quality issue. However, for reasons he explained in his judgment he acceded to a request by the Plaintiffs for an order remitting to the Appeal Board the paragraphs of the award which dealt with the market price issue and the quality issue, and directed that their appeal should not be set down for hearing until 21 days after publication by the Board of the supplemental award which would arise out of the remission.

6. We have been supplied with a chronology which sets out the events between 15th November 1996 and 1st July 1997 when the Defendants issued a summons in the Commercial Court for an order to strike out the Plaintiffs' motion for want of prosecution. The timetable of events was as follows:

   1996
   - November 15 Judgment of Thomas J

   1997
   - January 31 Defendants' solicitors (HFW) ask Plaintiffs' solicitors (RB) for sealed copy of judge's order
   - February 24 Office copy of judge's order provided after original went astray.
   - RB wrote to FOSFA and HFW concerning arrangements for the resumed hearing.
   - February 27 FOSFA asked RB to co-ordinate availability dates, indicating that a hearing in April or May was anticipated.
   - March 12-24 Correspondence between RB and HFW about length of hearing, dates etc.
   - April 7 FOSFA request a more definitive reply from RB on the question of dates, stating that its aim was to ensure that appeals proceed with the minimum of unnecessary delay.
   - RB reply that the case handler was abroad and would deal with the matter on his return.
   - July 1 Defendant's summons to strike out for want of prosecution issued and served.

7. This summons came before Clarke J on 15th September 1997 and he gave judgment the following day. He applied the test approved in this court in ***Secretary of State for the Environment v Euston Centre Investments Ltd*** [1995] Ch 200 when applicants are dilatory in pursuing High Court challenges to the awards of arbitrators and struck out the Plaintiffs' motion for want of prosecution. Although the Plaintiffs originally sought to challenge the basis on which Clarke J exercised his discretion, when he considered the significance of their appeal against the award, they have not pursued this proposed ground of appeal following observations by Hobhouse LJ when he directed that their application for leave to appeal should be heard inter partes, with the appeal to follow if leave is granted. He said that the point seemed to have been overlooked that the Award had been remitted by Thomas J, and that it would therefore seem that there must be a further hearing before the Appeal Board and a further Award: apart from this consideration, he would have been minded to say that Clarke J's discretion must stand. The Plaintiffs then recast their proposed challenge to the judgment of Clarke J along the lines I set out below. We decided, after a brief initial hearing, that the points Mr Legh-Jones QC sought to raise were fit for argument even on an appeal in an Arbitration Act matter, and that since no further delay would be involved in view of the way Hobhouse LJ had framed his direction, we granted leave to appeal and proceeded to hear the appeal.

8. It is convenient to set out a few background matters first. Arbitrators derive their power to strike out proceedings for want of prosecution on ***Birkett v James*** lines not from the common law but from Section 13A of the Arbitration Act 1950, which restates the familiar principles in statutory language. If a party to an arbitration seeks to challenge an award in the High Court, Paragraph 7.2 of the Guide to Commercial Court Practice provides that in arbitration matters it is the particular duty of the Court to see that court proceedings are not a cause of delay. In the ***Euston Centre*** case this court affirmed, with a slight change of language, the developing practice of commercial court judges to strike out court challenges if they were not being pursued with appropriate dispatch. Steyn LJ made it clear that the court's inherent power to strike out appeals to the High Court from awards of arbitrators was not limited to cases where the delay occasioned by one party was such as to cause serious prejudice to the other: it was exercisable whenever there had been a failure to conduct and prosecute an appeal with all deliberate speed.

9. The power of the High Court to remit matters for the reconsideration of an arbitrator is contained in Section 22 of the Arbitration Act 1950 which provides:

"(1) In all cases of reference to arbitration the High Court or a judge thereof may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.

(2) Where an award is remitted the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order."

10. Mr Legh-Jones' first complaint is that the judge did not consider whether it was appropriate to strike out the proceedings begun by the Plaintiffs' Notice of Motion when there had been delay not in the appeal proceedings before the court but in an arbitration which had been revived by Thomas J's order. No argument had been addressed to the judge on the significance of the fact that the Respondents were seeking to strike out the remitted arbitration proceedings as well as the appeal proceedings in court. The distinction between the pending arbitration proceedings and the anticipated subsequent appeal proceedings in the Commercial Court had been obscured by treating a failure to prosecute the former as constituting delay in prosecuting the latter. He pointed out, correctly, that neither this court in the ***Euston Centre*** case nor Hobhouse J in ***The Leon*** [1985] 2 Lloyd's Rep 470 and ***The Faith*** [1993] 2 Lloyd's Rep 408 were concerned with a delay on a remission to arbitrators. These were the authorities on which Clarke J had relied in determining the principles relevant to the exercise of his discretion on the summons before him, and Mr Legh-Jones submitted that he was wrong to do so.

11. He accepted that the judge had an inherent jurisdiction to strike out proceedings on an appeal from arbitrators as an abuse of the process of the court, notwithstanding the order for remission, if there had been unacceptable delay, but he argued that since the matter was back before the Appeal Board when the summons to strike out was issued, the judge should have applied the only criteria which are available to arbitrators themselves when deciding to strike out an arbitration for want of prosecution, namely the criteria set out in Section 13A of the 1950 Act.

12. In my judgment this submission is ill-founded. The ***Birkett v James*** criteria are clearly suitable for policing the progress of an arbitration but wholly inapt as a means of policing progress after an award has been remitted by a court to arbitrators who must by statute complete their duties within three months of the remission. The remission in this case was parasitic to the granting of leave to appeal against the original award, and exactly the same policy considerations apply to the need to process a remission timeously as apply to the need to process an appeal timeously. I consider that the judge adopted an appropriate test and that there is nothing in this point.

13. Mr Legh-Jones's second point, in addition to being quite novel, was much more sophisticated. He said that the effect of Thomas J's order was to render the first award a nullity (***Johnson v Latham*** (1851 LJQB 236 240). The effect of Clarke J's order, in the absence of any new award published by the Appeal Board, was to terminate the arbitrators' powers so that they cannot produce a further award (even as to costs) and thereby finalise the reference. In these circumstances he submitted that we should allow the appeal so that the arbitrators can get on with their task. To leave matters in their present uncompleted state would be productive of chaos.

14. This raises, as I have said, a novel point, and the law is at present in a state of some uncertainty.

15. In ***Johnson v Latham*** , the parties had included in their contract what was known as a "***Richard's clause***" (for which see ***King v Thomas McKenna Ltd*** [1991] 2 QB 480 per Lord Donaldson MR at p 486) which gave the High Court a power to send matters back to an arbitrator for reconsideration. This power had been invoked following an arbitration over the depth of the water a defendant was entitled to maintain in his weir, and the court remitted the award to the arbitrator to reconsider the prospective directions he should give. Without any further hearing, the arbitrator made a new award, repeating the old award verbatim and giving appropriate new prospective directions.

16. The issues Erle J had to determine were whether the course the arbitrator had chosen to adopt could be faulted, and whether an allocatur in relation to the taxed costs of the original award was still enforceable once the second award had been made. Both counsel and the judge seemed to be agreed that during the period between the time of the remission and the time of the second award, the first award was in a state of suspense (for counsel, see pp 238 LHC and 239 LHC, and for the judge see p 238 LHC). Erle J held in the event that the arbitrator had not misconducted himself and that once the second award had been made, the first award (and the allocatur made in consequence of it) had become a nullity. He said at p 240 that the argument should prevail which had been expressed to him in these terms: *"... it was argued that a reference back of one of several matters referred, by*

virtue of an order of reference authorising the Court so to do, renders the first award inoperative, and that although the arbitrator might not alter his first award upon any matter not referred back still he must make a fresh award repeating the first award as to those matters, and deciding anew that which was so referred back; that the discretion of the arbitrator over the costs of the reference and award is to be exercised at the close of the reference, and at the time of making the award; and that as the first award so became null by the reference back the allocatur thereon was also null."

17. The status of a first award which was superseded, following a remission by the court, by a second award was discussed quite recently by Mr Michael Wheeler QC, sitting as a deputy high court judge, in ***Shield Properties & Investments Ltd v Anglo-Overseas Transport Co Ltd (No 2)*** (1988) 279 EG 1088. In that case an arbitrator's first award on a rent review was £30,000 higher than his subsequent award made 18 months later. Mr Wheeler QC said at p 1092: *"The short point which I have to consider is the status of the original award following the remittance by Bingham J and what I will call the arbitrator's 'second award', although I suspect that [counsel] would prefer it to be called the 'revised' award. The reality of the matter is that the remittance in fact put the original award completely in the melting pot because it would (or might) affect the one question at issue on the arbitration, namely, the amount of the revised rack rent. In that sense, therefore, it was the whole of the original award which was remitted, albeit in the light of some only of the evidence on which it has been based. The result of the remittance, therefore, in my judgment was, at the very least, to suspend the original award and, so to speak, put it 'on ice'; whether it is necessary to go so far as the learned authors of Mustill & Boyd and say that remission 'automatically annulled' the original award I need not decide. But it appears to me that once the second award was given, it completely replaced the original award, and from that time onwards the original award ceased to have any effect."*

18. The reference to *Mustill & Boyd* is a reference to the first edition of those authors' book on *Commercial Arbitration* in which they expressed the view at p 507 that *"remission automatically annuls that part of the award which relates to the matters remitted"*. Mr Wheeler had quoted a fuller passage at p 508: *"The courts have worked out the effect of a remission rather more fully. It appears that where the Order embraces all the matters referred, the arbitrator resumes all his authority over the dispute, and the original award completely falls away. When the remission applies to only some of the matters referred, the arbitrator no longer has power to vary his award in respect of those matters which the Court has left untouched. He must, as a matter of form, make a fresh award covering the whole of the matters submitted to him: but as regards those not remitted he must simply repeat his original decision. Until this new award is published, there is no binding adjudication on any of the matters referred : so that, apparently, the successful party could not proceed to enforcement even on the parts of the award which were unreproachable."*

19. The expression of opinion at p 507 is repeated at p 564, and the passage cited from p 508 is repeated at p 566 of the second edition of *Mustill & Boyd* (1989).

20. The only cases cited in *Mustill & Boyd* to support the passage in italics in Mr Wheeler QC's judgment (but not in the original text) are *Johnson v Latham* and *Re Stringer v Riley Bros* [1901] 1 KB 105.

21. It was common ground between counsel, quite correctly, that the second of these two cases had no bearing on the passage in the text for which it is cited as authority. So far as *Johnson v Latham* is concerned, it is authority for the proposition that it was accepted on all sides in argument in that case that following a remission of any of the matters in an award, the first award is suspended (and in that sense is no longer a binding adjudication on any of the matters referred during the period of suspension). Once the second award (which must include the unremitted parts of the first award) is published, the first award must fall away and become null, in Erle J's phrase, because there cannot be two concurrent awards on the same reference. It is not, therefore, the order for remission which automatically annuls the first award, but the publication of the new award following the remission. Erle J's expression "the first award became null by the reference back" should be interpreted in this way.

22. The concept of a partial remission is not one which is recognised by the statute, despite the language of footnote 6 on p 566 of the second edition of *Mustill & Boyd* ("Partial remission is authorised by the words 'or any of them' in s 22(1). There are numerous reported examples"). As the language of Section 22, buttressed by its marginal note, makes clear, it is the whole award that is remitted, although the court may be remitting all the matters contained in the original reference, or only one or some of them, for reconsideration by the arbitrator. On a single reference there can only be a single award, and this is why ever since the days before Section 8 of the Common Law Procedure Act 1854 was enacted, a arbitrator must include in any new award following a remission the parts of his original award he was directed not to reconsider. (For the position under the Arbitration Act 1996 see below). For the sake of completeness, I should add that the same marginal note ("power to remit award") also appeared against Section 10 of the Arbitration Act 1889 the statute which replaced the three arbitration systems that were previously in existence by a single unified regime.

23. The problem which is created by the rule that if a court remits any of the matters contained in a reference back to an arbitrator his new award, following the remission, will replace the old was recognised by the House of Lords in ***The London Explorer (Timber Shipping Co SA v London & Overseas Freighters Ltd*** [1972] AC 1). The difficulty which arose in that case was that arbitrators had wrongly decided that they had power to determine the rate at which their award should carry interest. On this basis they directed that the award should carry interest at 8% at a time when the Judgments Act rate of interest was only 4%. By the time the House of Lords decided the case on May 12th, 1971, the rate of interest on judgment debts had been raised by statutory instrument to 7½%, which prompted Lord Donovan to say at p 22F-G: *"If a new award has to be made by the arbitrators simply to give*

effect to the decision of this House on the question of interest, it might well turn out that the appellants would lose the fruits of their victory on this point: and all the more so since the rate of interest on judgment debts was raised by the Judgment Debts (Rate of Interest) Order 1971 to 7½ per cent as from April 20th, 1971."

24. The solution which appealed to the majority of the House of Lords, upholding the approach of Salmon LJ in the Court of Appeal (***sub nom London & Overseas Freighters Ltd v Timber Shipping Co SA*** [1971] 1 QB 268 at p 275), was to hold that since that part of the arbitrators' award that awarded interest at 8% was *ultra vires* the arbitrators, it was severable and could simply be set aside as being incapable of having any legal effect, without recourse to the difficulties that would be created by a remission of the award with a direction to the arbitrator to reconsider the question of interest (see Lord Morris of Borth-y-Gest at pp 22A-22C; Lord Cross of Chelsea at p 23A-24A). Lord Morris of Borth-y-Gest had said at p 21G that it would be unfortunate if some mere technicality involved the necessity of further proceedings with a possible consequence of a result which would differ from that which on the view of the law adopted by the majority of the House of Lords would have been correct and should have been followed. By this he no doubt had in mind the consequences of a remission, in which, quite apart from the judgment debt point, the arbitrators would have the power in the exercise of their discretion to award interest at the higher rate right up to the date of their new award.

25. The same kind of considerations affected the mind of Donaldson J in ***Congimex SARL (Lisbon) v Continental Grain Export Corporation (New York)*** [1979] 2 Lloyd's Rep 346 at p 355 LHC. He proposed to make a complex order giving the parties the opportunity to decide within 21 days whether to consent to it, because he considered that the sensible course of having three appeals from arbitrators consolidated in a single award by a Board of Appeal had created complications: *"... because if I remit the whole award I shall do an unjustice to the seller who is not involved and also to the two other sellers in respect of the remaining 13 shipments. If, on the other hand, I refuse to remit the award, I shall do an injustice to the buyers. And I do not think that I have power to remit part of the award. I propose to overcome these difficulties and any problems of my jurisdiction or that of the board as follows ..."*

26. When the matter came back to him six weeks later, consent not having been obtained from both sides, Donaldson J explained again at p 356 LHC why he had tried to adopt an unusual solution: *"...[W]hen the matter came on for hearing before the Board of Appeal there was a problem - to use a neutral term - about special defences applying to five of the shipments. As I have been reminded, one of the sellers is not affected at all by these special defences. The other two are only partially affected. Being satisfied that the Board of Appeal had made a mistake in shutting out those defences and I wanted to ensure that the buyers had an opportunity of canvassing those defences but that the seller, who is unaffected, should be able to enforce his part of the award forthwith. Similarly I wanted to ensure that the two sellers who are partially affected should be able to enforce the unaffected parts of the award. Clearly that does not fit into the normal way of dealing with awards."*

27. It is only in an unusual situation like the present case that anything is likely to turn on the difference between remitting the award and remitting matters within the award for reconsideration. Hence in ***Miller's Timber Trust Co Ltd v Plywood Factory Julius Portempa Ltd*** (1939) 63 Ll L Rep 184 Bronson J at p 188 RHC referred at one stage to "the power to remit these awards" and at another to remitting "*the matter for [the arbitrator's] consideration*". He said on the facts of that case that it was not the mistaken award but the matter which was submitted to the arbitrator which had got to be reconsidered. The mechanism provided by Parliament in Section 22 of the 1950 Act is that the whole award is remitted, but the arbitrators only have power on the remission to reconsider the matter or matters mentioned in the court's direction pursuant to Section 22(1). That this is so is clearly set out in the judgment of this court in ***The Vimeira (No 1)*** [1985] 2 Lloyd's Rep 410.

28. For the future, Parliament has provided in Section 68(3)(a) of the Arbitration Act 1996 a power to "*remit the award to the tribunal, in whole or in part, for reconsideration*", and in Section 71(3) that: *"Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted ..."*

29. This puts beyond doubt for the future that the court has power to remit part of an award, and under these new statutory arrangements the arbitral's tribunal's powers on such a remission are limited to making a fresh award in respect of the matters remitted. We are concerned, on this appeal, however, with the state of the law before the 1996 Act came into force.

30. It was common ground between counsel that the situation would be chaotic if Clarke J's order and Thomas J's order were to continue to stand side by side, so that the appeal is struck out but the arbitrators would have a duty to reconsider the matters referred to in Thomas J's direction, with no appeal to follow. The remainder of the award (rewritten as it would be in the new award) would remain in being and continue to bind the parties, and because the Board's decision on the insurance issue would still stand, since it was not remitted for reconsideration, the new award, like the old one, would continue to be a final and binding dismissal of the Plaintiff's claim. Neither party appeared to show any relish for that outcome, and it appears to me that the appropriate course for this court to take, if it were otherwise resolved to uphold Clarke J's order, would be to vary the terms of it by adding the consequential direction that so much of Thomas J's order as remitted matters to the Board for reconsideration should be set aside. Such an order would have the effect of restoring the first award from the status of suspension or being "on ice" which it had enjoyed ever since the order for remission, and the court should so declare.

31. For these reasons I do not consider, if such a variation is made, that there is anything in Mr Legh-Jones's second submission which should deter us from upholding Clarke J's order if it is otherwise soundly rooted.

32. Mr Legh-Jones' third point was that the judge misdirected himself as to the policy of the Arbitration Act 1979 in failing to draw a distinction between delay before and after leave to appeal is granted. This argument was based on the premise that the policy of the Act is not solely to promote speed in the enforcement of awards but to allow the losing party to argue that the arbitrator's decision on a point of law was wrong in those cases in which the leave of the court has been obtained. Where an award has already been called into question by the grant of leave, he said that a court should be more reluctant to strike out the appeal proceedings.

33. In developing this argument he submitted that an important factor which should have borne on the exercise of the judge's discretion was the interest of both the commercial community and of the courts in seeing appeals decided on important points of law, and that this contributed to the development of commercial law. The 1979 Act had represented a compromise between the importance of finality and the importance of the development of the law on the basis of precedents (see the discussion in ***The Nema*** [1982] AC 724), but when the High Court had marked an appeal as fit for argument before it by bestowing the grant of leave, he said that it should then be slower to strike out an appeal because it was not being processed with all deliberate speed.

34. In particular, he said, it would be unjust to leave the parties bound by the original award given Thomas J's evident views about its merits which had prompted the orders he had made, and there was no authority which suggested that the court should adopt the same criteria when considering a strike-out application following the granting of leave and the remission of matters in the award for reconsideration as it did before a plaintiff in the High Court had passed those hurdles. He pointed out that in ***The Leon*** [1985] 2 Lloyd's Rep 470 the owners had obtained leave to appeal in June 1984 and Hobhouse J had merely penalised them in costs for taking 13 months to bring the matter before him: it was not a strike-out case (see the report at p 472).

35. It is noticeable, however, that although Hobhouse J certified that that case raised a point of law of general public importance, he considered that even if it satisfied the ***Nema*** test (which it did not) the court should be extremely reluctant to accede to any application by the Respondents for leave to appeal, since they had been parties to the inordinate delay in bringing the motion before him. It does not look, therefore, that he would have been impressed by the argument Mr Legh-Jones is urging us to entertain.

36. In ***Secretary of State for the Environment v Euston Centre Investments Ltd*** [1995] Ch 200 Steyn LJ referred at p 207 with apparent approval (subject to one exception) to a passage in the second edition of *Mustill & Boyd, Commercial Arbitration* at p 611: *"It is the duty of the appellant to prosecute his application for leave to appeal, and if leave is granted, the appeal itself with proper dispatch. Failure to do so may lead to the application or the appeal being struck out."*

37. Steyn LJ at p 208C-D substituted the expression "*with all deliberate speed*" for the expression "*with proper dispatch*".

38. The principle that all deliberate speed is required both before and after the granting of leave is now enshrined in paragraph 7.2 of the Third Edition of the Guide to Commercial Practice which refers expressly to Steyn LJ's judgment in the *Euston Centre* case: *"In arbitration matters it is the particular duty of the court to see that court proceedings are not a cause of delay. A hearing date must be applied for promptly after the issue of the relevant process or after obtaining leave to appeal under the Arbitration Act 1979. ... A failure to act with all deliberate speed founds the Court's discretion to strike out ..."*

39. Whether the delay following the grant of leave is caused by a failure to apply promptly for a hearing date or a failure to pursue remitted arbitration proceedings (being a condition precedent to setting down the appeal) with all deliberate speed, the effect is the same. Clarke J said, correctly in my judgment, that the underlying policy set out by Hobhouse J in ***The Faith*** [1993] 2 Lloyd's Rep 408 at p 411 applied equally to an application for leave to appeal as it did to an appeal. I can find no fault with the way the judge directed himself on the law, and he did not commit any of the kind of errors in the way he exercised his discretion that would permit this court to interfere.

40. Subject to varying Clarke J's order in the way I have suggested, I would dismiss this appeal.

LORD JUSTICE ALDOUS:

41. I agree.

LORD JUSTICE ROCH:

42. I also agree.

Order: Appeal dismissed with costs

MR N LEGH-JONES QC (Instructed by Richards Butler of London) appeared on behalf of the Applicant
MR S HALES (Instructed by Holman Fenwick & Willan of London) appeared on behalf of the Respondent