England and Wales High Court (Commercial Court) Decisions

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
23rd November 2011

B e f o r e :

MR JUSTICE FIELD
IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN THE MATTER OF AN ARBITRATION

FIVE OCEANS SALVAGE LIMITED **Claimant**

- and -

WENZHOU TIMBER GROUP COMPANY **Defendant**

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MR T. HILL QC appeared on behalf of the Claimant.
THE DEFENDANT did not attend and was not represented.

HTML VERSION OF JUDGMENT

MR. JUSTICE FIELD:

1. There are before the court applications made under sections 32 and 68 of the Arbitration Act 1996. The applicant is the claimant, Five Oceans Salvage Limited. The defendant, Wenzhou Timber Group Company ("WTG") has been served with notice of this application but it does not appear and is unrepresented.

2. The background to these applications is as follows. WTG were the owners of most of a cargo of logs loaded on board the *Medea K* at anchorage off Mayumba, Gabon. 19th October 2009, the *Medea K* developed a serious list whilst she was still at anchor and the crew abandoned ship.

3. By an agreement dated 31st October 2009 ("the Salvage Agreement"), on the terms of the Lloyd's Standard Salvage Agreement ("LSSA") made between the claimant and Hecate Shipping Co for and on behalf of the owners of *Medea K*, her cargo, freight, bunkers and stores, it was agreed that the claimant should use its best endeavours to salve the *Media K* and her cargo and take them to a place of safety "to be agreed" and that in the event of success, the remuneration therefor would be decided by arbitration in London in the usual way.

4. The salvage took a considerable period of time because the vessel had to be towed from Mayumba, to Piraeus, where she was redelivered on 29th December 2009.

5. Pursuant to the Salvage agreement, on 3rd November 2009, the Council of Lloyd's, on the application of the claimant, appointed Mr. Simon Kverndal QC as sole arbitrator.

6. By an Interim Final Award dated 29th April 2010, the Arbitrator found that the total value of the salved property was US$4,174,036, of which US$2,882,952 was referable to the value of the cargo. The Arbitrator awarded the claimants, as contractors, a salvage award in the sum of US$2,748,200, plus interest and other expenses. The Arbitrator also awarded that the cargo respondents should pay to the claimants the sum of US$7,277.17 in respect of LSSA Clause 6 expenses.

7. On 24th January 2011, the Arbitrator made his Final Award, which was published on 31st January 2011. He awarded the claimant its costs, assessed in the sum of £90,000.

8. Following WTG's refusal to pay their proportion of the Awards, the claimant took steps to enforce the award made against WTG. These included enforcement proceedings before the Ningbo Maritime Court ("the NMC"). WTG opposed the application. They submitted that they had never authorised Websters to act on their behalf in the handling of the salvage operations and/or attending the relevant salvage arbitration proceedings. They submitted that the application to enforce should therefore be dismissed pursuant to Article V(1)(b) of the New

York Convention. They further contended that they had never been served a written notice appointing Websters, pursuant to Clause 7 of the LSSA Clauses, which provides:

> 7.1 Any party to the Agreement who wishes to be heard or to adduce evidence shall appoint an agent or representative ordinarily resident in the United Kingdom to receive correspondence and notices for and on behalf of that party and shall give written notice of such appointment to the Council.
>
> 7.2 Service on such agent or representative by post or facsimile shall be deemed to be good service on the party which has appointed that agent or representative.
>
> 7.3 Any party who fails to appoint an agent or representative as aforesaid shall be deemed to have renounced his right to be heard or adduce evidence.

9. WTG further contended that: (i) the lack of such a written notice should be deemed a violation of the agreed arbitral procedures and, accordingly, the application for enforcement should be rejected pursuant to Article V(1)(d) of the New York Convention (ii) it was not the Cargo Respondent liable to the Contractors (the claimant); (iii) there was no emergency to justify the Master signing the Salvage Agreement; and (iv) recognition and enforcement of the Arbitral Awards would be contrary to the public policy of the PRC, the country where recognition and enforcement was being sought.

10. The NMC investigated the matter. Representatives of WTG, PICC (WTG's insurers) and RICC (the lawyers acting for PICC) were interviewed. In the event, acting on advice they received from an independent Chinese lawyer, the claimant concluded that it could not continue with the Chinese enforcement proceedings.

11. In light of their inability to enforce the award against WTG, on 20 July 2011, the claimant commenced proceedings against Websters in the High Court for breach of warranty of authority. In their Defence Websters plead that they had actual or ostensible authority to act for WTG. They contend that, although they were not in direct contact with WTG, PICC (the insurers) had authority to act on behalf of WTG and, in so doing, PICC appointed Websters.

12. Paragraph 15 of Websters' Defence pleads:

> Without prejudice to the Defendant's contentions in sub-paragraph 14 (d) above, the Defendant avers that if, which is denied, the Awards are unenforceable for the reasons alleged by the Claimant, the true nature of the loss suffered by the Claimant, if any, is the costs which would be incurred by the Claimant in order to obtain from the Arbitrator an enforceable Award against WTG. Further or alternatively, the Claimant has failed to mitigate its losses by seeking to obtain such an enforceable Award. Without prejudice to the generality of the foregoing, the Defendant will aver that if, as the Claimant alleges, the Award was obtained without WTG being given an opportunity to be properly represented:
>
> > a. The Award is not binding on WTG and/or the Claimant is entitled pursuant to s. 68 of the Arbitration Act 1996 to have the Award set aside alternatively remitted in so far as it applies to WTG; and

b. the Claimant is entitled to and should invite the Arbitrator to make a further Award in respect of WTG.

13. In a letter dated 10th October 2011 from Websters' solicitors, ReedSmith, and in a Response to a Request for Further Information under paragraph 15 of the Defence, there are set out the contentions Websters say should be advanced in applications designed to obtain an enforceable award against WTG. In brief, those contentions are: (i) that an application under s. 32 of the Arbitration Act 1996 should be made to establish that by reason of the breach of natural justice caused by the lack of any notice to WTG of the arbitral reference, the Arbitrator continues to have jurisdiction to issue a further award; and (ii) that applications should made under s. 68 (2) (a), (b) and (i) on the ground that there has been an innocent serious irregularity arising out of the failure to give WTG notice of the arbitration.

14. The applications made by the claimant are based on these contentions asserted by Websters. They are made to protect the claimant's interest in the proceedings against Websters for breach of warranty of authority and are made with a great deal of hesitation about the strength of the arguments advanced. The approach that has been adopted is to set out before the court those arguments that can be made in favour of the applications and those arguments which it is felt are relevant but which tell against the applications.

15.

At this stage it is necessary to look in a little more detail as to the steps in the reference that led to the making of the Interim Final Award. The Council of Lloyd's has provided to the claimant its file in respect of the arbitration, with the result that the correspondence between the various parties, their representatives and the Council of Lloyd's, is before the court.

16. On 2nd November 2009, the claimant's solicitors, Clyde & Co, wrote to WTG informing them of the Salvage Agreement, detailing the bills of lading in which it was believed WTG were interested and indicating that, in due course, the claimants would require salvage security. On 3rd November 2009, Clyde & Co requested the Council of Lloyd's to appoint an arbitrator. On the same day, Lloyd's appointed Mr. Kverndal QC and informed Clyde & Co of this appointment by letter dated 5th November 2009. Subsequently, Clyde & Co understood that the ship respondents had appointed Ince & Co in Greece to represent them and so informed the Council of Lloyd's on 5th November 2009, but they stated that they did not know who acted for the cargo interests. Also on 5th November 2009, the Council of Lloyd's informed Ince & Co that Mr. Kverndal QC had been appointed as the arbitrator.

17.

At some stage Mr. Anthony Carter of W E Cox Claims Group (Europe) Limited ("Cox") informed the Council of Lloyd's that Cox acted for a small part of the cargo and on 6th November the Council notified Mr. Carter of Mr. Kverndal's appointment. On 9th November 2009, the Council informed Mr. Kverndal's clerk that Ince & Co represented the ship respondents and that Cox represented "certain cargo interests". On 16th November 2009, Clyde & Co wrote to WTG to similar effect to that of their letter of 2nd November and on 19th November informed the Council that Websters were acting for part of the cargo interests. They also

> informed the Council that Waltons & Morse were now acting for the other small cargo interest.

18. On 19th November, the Council wrote to Mr. Bolden at Websters, asking him to confirm their instructions in the matter. Initially, Websters stated that they were yet to receive "formal instructions", though they were in contact with insurers. Thereafter, on 24th November 2009, Websters stated to the Council in a communication copied to Clyde & Co, Ince & Co and Waltons & Morse, that on 23rd November they had written to the Council as follows:

> "Please note that we are instructed to represent the insurers of Wenzhou Timber Group, who, we are advised, are concerned with some 14,097.007 cbm logs carried on board the above vessel, said to be valued C&F, around €3.5 million. We will revert with the specific details of the Bs/L shortly."

19. On 24th November, Ms. Geraldine Savin of Websters sent an email to the Council stating that she was handling this case:

> "We can confirm that we have received firm instructions from PICC. We attached [sic] a schedule of the bills of lading that we represent."

20. In the meantime, on 20th November 2009, Mr. Kverndal's clerk had sent a message to Clyde & Co with a copy of Form 1, which required certain information to be inserted therein, including the name of the parties' representatives. That form was returned duly completed on 27th January 2010 stating that Websters represented the cargo along with Waltons & Morse. In answer to question 8 on Form 1 under the rubric "unrepresented interests", it was stated, "none". On 8th February 2010, the arbitrator's clerk gave notice to all the representatives, including Websters, that the hearing of the arbitration would take place on 22nd March at 10.30 am, which duly happened.

21. On 30th September 2011, Clyde & Co wrote to the Arbitrator asking for a decision, *inter alia*, as to whether he retained jurisdiction. On 4th October 2011, the Arbitrator replied by fax stating that his present inclination was to hold a short hearing to consider the application, which would be strictly without prejudice to any plea that he was *functus officio*, a plea which, in his preliminary view, would not be open to WTG to advance. It was subsequently decided not to seek a decision from the Arbitrator but instead to make the applications which are now made to the court. The Arbitrator's consent was sought for the application under s.32 pursuant to s.32(2) and, on 18th October 2011, he gave the permission sought.

22. I turn to the application made under s.32. That section provides (to the extent relevant):

> (1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal. A party may lose the right to object (see section 73).
>
> (2) An application under this section shall not be considered unless –
>
> (a) it is made with the agreement in writing of all the other parties to the proceedings, or

"(b) it is made with the permission of the tribunal and the court is satisfied –

(i) that the determination of the question is likely to produce substantial savings in costs,

(ii) that the application was made without

delay, and

(iii) that there is good reason why the matter should be decided by the court."

23. As I have already recorded, the contention which the claimant is urged by Websters to advance is that, by reason of a breach of the rules of natural justice resulting from the fact that WTG had no notice of nor were they represented in the arbitration, the Arbitrator continues to have jurisdiction to make a further award. I asked Mr. Hill QC, who appears for the claimants, if he could assist me in understanding the contention which Websters seek to have advanced. Mr. Hill had some difficulty in doing so. Doing the best I can, it would seem that it is being contended that where there has been a breach of natural justice on the part of the tribunal the tribunal retains jurisdiction to repair that breach. Mr. Hill frankly informed me that it was his view that there were no grounds for a determination that the arbitrator continued to have jurisdiction in the reference.

24. He drew my attention to the following passages at pp. 404-405 in **Mustill and Boyd's The Law and Practice of Arbitration in England 2nd Edition** and the relevant paragraph in the Companion Volume to that edition published in light of the enactment of the 1996 Act.

Second Edition

(1) "**Functus officio"**

When an arbitrator makes a valid award, his authority as an arbitrator comes to an end and, with it, his powers and duties in the reference: he is then said to be functus officio. This at least, is the general rule, although it needs qualification in two respects: First, if the award is merely an interim award, the arbitrator still has authority to deal with the matters left over, although he is functus officio as regards matters dealt with in the award. Second, if the award is remitted to the arbitrator by the Court for reconsideration, he has authority to deal with the matters on which the award had been remitted and to make a fresh award.

Apart from these two cases, however, nothing which the arbitrator does after he has made his award can have any effect on the rights of the parties to the reference. For instance, if, after making his award he issues a document setting out the reasons for his decision, it forms no part of his award and cannot be used to support an application to challenge the award even if it contains an error of law.

In practice the most important consequence of the arbitrator becoming functus officio after making his award is that he has no power to alter the award without the consent of the parties. If he does so, his altered award is a nullity.

Companion Volume

404-414

> To a large extent, the position under the 1996 Act remains as before. There are, however, two respects in which the powers of the tribunal have been enlarged. In the first place the arbitrators are now allowed to remove any ambiguity in the award (s.57(3)(a)). We believe that this power is intended to deal with situations where the effect of the award is unclear and not to require to be rewritten in a more convincing way when one or other of the parties is not satisfied with the reasoning and believes that it may be wrong. Secondly, there is the case where the award fails to deal with all the matters submitted to arbitration. Such a failure is a ground for challenge under s.68(2)(e), but since it would be much more economical if it were put right by the tribunal through a supplementary award without the need for recourse to the court, section 57(3)(b) much enlarges the tribunal's power to make a supplementary award, which previously under s.18(4) of the 1950 Act, existed only in relation to a failure to deal with costs.

25. In my judgment, it is clear from these passages, which are of great authority, that the Arbitrator here is *functus officio*. There exists no basis for a declaration that he continues to have jurisdiction in the reference. If there has been a breach of natural justice or some other irregularity in the course of the arbitration, then the only recourse is an application under s. 68.

26. I turn then to deal with the application under that provision and state at the outset that I extend time under s. 79 for this application to be made. I do so because the claimant did not know that it was unable to enforce the Awards until July 2011 and had no appreciation that it might have an opportunity to set aside the Awards under s. 68 until Websters so averred in their Defence.

27. Section 68 provides in relevant part:

> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
>
> (2)Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
>
> (a)failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> (b) ....
>
> (c)failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
>
> (d) ....
>
> (e) ...
>
> (f) ...

> (g) ....
>
> (h) ...
>
> (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
>
> (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—
>
> (a) remit the award to the tribunal, in whole or in part, for reconsideration,
>
> (b) set the award aside in whole or in part, or
>
> (c) declare the award to be of no effect, in whole or in part.
>
> The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

28. Subparagraph (a) refers to the general duty imposed on the tribunal by s.33. That section provides:

> (1) The tribunal shall –
>
> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

29. In the course of his submissions in respect of the case put under para (a), Mr. Hill referred me to para 8-110 in **Brice on Maritime Law of Salvage**, 4th Edition:

> In order for the award to be valid and binding it is necessary for the requirements of natural justice to have been fulfilled and for proper and adequate notice of the date and place of arbitration to have been given to unrepresented parties if an award is sought against them. The arbitrator will require at the commencement of the arbitration to see the form of notice given and have particulars of any response .....

30. The court was also informed that where a party has not appointed a representative and has not informed the Council that it is a party and wishes to be heard, the customary practice is for the arbitrator to require that a written notice be sent to that party informing it of the arbitration and giving sufficient details for it to participate should it desire to do so.

31. Mr. Hill submitted that it was arguable that there was a failure on the part of the Arbitrator to require written notice to be given to WTG since WTG was not in fact represented by duly appointed representatives for the purposes of the reference. As a consequence, WTG did not have an opportunity to make representations and to participate in the reference and, accordingly, there had been a breach of duty, albeit an innocent one, under s.33(a) of the Act. Mr. Hill argued that under s.68(2)(a) there was no requirement that the tribunal be at fault. If it has innocently conducted the proceedings in a way in which a party has not been given a reasonable opportunity of putting its case, then there has been a breach of the s.33 duty, under both paras (a) and (b) of s.33 (1).

32. In my judgment, Mr. Kverndal did not act in breach of the s.33 duty. I am quite satisfied that there was nothing before him that would have put him on notice to make further investigations as to whether WTG were represented in the reference by duly authorised representatives. Indeed, Mr Kverndal had every reason to believe that WTG were represented by Websters in the reference. He was so informed by what was stated in Form 1 and the manner in which Websters conducted themselves in the reference would have given the clear impression to him that WTG were duly and properly represented by authorised representatives. In these circumstances, I cannot conceive how it can be said that the Arbitrator was in breach of the s.33 duty. The fault, should it turn out that WTG were not represented by duly authorised representatives and were therefore not given an opportunity to be heard, is not that of the arbitrator.

33. Moving on to s.68(2)(c), Mr. Hill contended that if a party has not in fact appointed a representative under Clause 7 of the LSSA Clauses and, unwittingly, the arbitrator is unaware of that fact and proceeds on the basis that authorised representatives have been appointed, the proper procedure for the arbitration prescribed in the LSSA Clauses has not been complied with. In my judgment, the reasons for which I have rejected the case sought to be made under s.68(2)(a) apply equally to the case sought to be made under para (c). That paragraph opens with the words "failure by the tribunal". In my judgment, it cannot be said that Mr. Kverndal, who had no reason to think that WTG were not represented by Websters and every reason to think that they were, failed to conduct the proceedings in accordance with the agreed procedure.

34. Mr. Hill's case under s.68(2)(i) was that the tribunal had admitted there had been an irregularity in the conduct of the proceedings or the awards. He founded this contention on the fax sent by Mr Kverndal dated 4 October 2011 in which he stated: "Whilst I am of course conscious of costs considerations, my present inclination would be to hold a short oral hearing to consider this application [the application that he determine that he had jurisdiction to issue a further award]. This would be strictly without prejudice to any plea that I am *functus officio* (a plea which, in my preliminary view, it would not be open to Wenzhou Timber Group to advance).

35. Mr. Hill submitted that it was to be presumed that Mr Kverndal was of the view that it was not open to WTG to submit that he was functus officio because they had not had notice of the arbitration or the hearing. In effect, submitted Mr. Hill, the Arbitrator was accepting that there had been an irregularity in the conduct of the proceedings and that this irregularity needed to be redressed either by (a) the Arbitrator proceeding to make one or more further awards against WTG, or (b) any application to the Court under s.68. I cannot accept this submission. No fair reading of Mr. Kverndal's response supports the conclusion that he was accepting that there had been irregularity in the conduct of the proceedings.

36. Accordingly, for the reasons I have given, the applications made both under s.32 and s.68 fail and are dismissed.
