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[COURT OF APPEAL]

# *HISCOX v. OUTHWAITE (No. 2)

1991 March 25

Lord Donaldson of Lymington M.R., McCowan and Leggatt L.JJ.

*Arbitration—Award—Application for leave to appeal—Preliminary objection to jurisdiction under appeal to House of Lords—Judge granting leave to appeal—Whether appropriate to reserve substantive hearing to same judge—Whether appropriate to adjourn substantive hearing*

The parties, members of two Lloyd's syndicates, referred their dispute to arbitration to take place in London. The arbitration was conducted by stages, the second stage concluding in an award signed and dated by the arbitrator in Paris. On the claimant's application, inter alia, for leave to appeal under section 1(3) of the Arbitration Act 1979 the judge rejected the respondent's assertion, raised as a preliminary issue, that as a consequence of the award's having been made in France, the court's supervisory jurisdiction was excluded under the Arbitration Act 1975. The Court of Appeal affirmed the judge's decision on different grounds and gave the respondent leave to appeal to the House of Lords. On the resumed hearing of the claimant's application under section 1(3) of the Act of 1979 the judge granted leave to appeal against the award and, considering the matter urgent and that the court's judgment on the substantive appeal would assist the arbitrator in a later stage of the arbitration, he reserved the hearing of that appeal to himself and refused the respondent's application for an adjournment pending the determination of his appeal by the House of Lords.

On the respondent's application for leave to appeal against the reservation and the refusal of an adjournment:—

*Held*, granting leave and allowing the appeal, that although it was a matter for the judge's discretion whether or not in granting leave to appeal against an arbitrator's award he would reserve the substantive appeal to himself, there was a general practice that save in exceptional circumstances the substantive appeal would be heard by a different judge; that, further, having regard to the bias against the court's interference with arbitral awards, particularly when they related to one-off contracts, there was a stronger case for a different judge to hear a substantive appeal relating to a one-off contract than one relating to a standard terms contract; that although a judgment of the High Court might assist the arbitrator in a later stage of the arbitration, its availability was contingent on the House of Lords determining that the court's jurisdiction under section 1(3) of the Act of 1979 had not been excluded; that since the judge had expressed a strong opinion in respect of an issue which would arise on the substantive appeal and had considered that his judgment would assist the arbitrator irrespective of the House of Lords' decision he had erred in the exercise of his discretion; and that, accordingly, the substantive appeal should be heard by a different judge, and since the interests of the parties required an early resolution of the issues in dispute the hearing should not be adjourned, but the judge should give a written judgment, to be signed by him and placed in a sealed envelope, only to be opened in the event of the House of Lords concluding that there was jurisdiction to hear the appeal (post, pp. 547D–F, F–G, 548A, F—549A, A, B–C).

Decision of Hirst J. reversed.

The following cases are referred to in the judgment of Lord Donaldson of Lymington M.R.:

*Hiscox v. Outhwaite* [1991] 2 W.L.R. 1321, C.A.

*Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. (The Nema)* [1982] A.C. 724; [1981] 3 W.L.R. 292; [1981] 2 All E.R. 1030, H.L.(E.)

*Tor Line A.B. v. Alltrans Group of Canada Ltd. (The TFL Prosperity)* [1982] 1 Lloyd's Rep. 617

The following additional case was cited in argument:

*Antaios Compania Naviera S.A. v. Salen Rederierna A.B. (The Antaios)* [1985] A.C. 191; [1984] 3 W.L.R. 592; [1984] 3 All E.R. 229, H.L.(E.)

APPLICATION for leave to appeal from Hirst J.

On 19 March 1991 Hirst J. granted the claimant, Robert Ralph Scrymgeour Hiscox, suing on his own behalf and on behalf of the members of Syndicate 33 at Lloyd's, leave to appeal from the award of Robert Alexander MacCrindle Q.C. dated 20 November 1990 in an arbitration between the claimant and the respondent, Richard Henry Moffit Outhwaite, and all other members of Syndicate 661 at Lloyd's who were party to the contract of reinsurance which was the subject matter of the dispute, and ordered that (a) the appeal be reserved to himself and (b) the appeal should be heard on 9 April 1991 and not adjourned pending the determination by the House of Lords of the respondent's appeal from the decision of the Court of Appeal [1991] 2 W.L.R. 1321 that the High Court had power to grant leave to appeal from the award.

By notice of application dated 22 March 1991 the respondent to the arbitration applied to the Court of Appeal for leave to appeal. The proposed grounds of appeal were, inter alia, that (1) the judge had erred in principle and/or misdirected himself in considering that the claimant's professed desire to use a decision of the High Court on the appeal from the award in the continuing arbitration between the parties, when that decision could subsequently be found by the House of Lords to have been made without jurisdiction and/or to be a nullity was a factor telling against an adjournment pending the House of Lords' decision; (2) the judge ought to have found that the pending appeal was a factor in favour of an adjournment, in that the continuing arbitration might be affected by a decision which the court had no power to give and accordingly that the claimant's appeal might be rendered nugatory; (3) the judge had failed to take into account a relevant factor namely the embarrassment which would be created for the House of Lords and for the administration of justice in general in the House of Lords' determining the pending appeal before it on a question involving the obligations of the United Kingdom courts under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards when the High Court had already heard the substantive appeal from the award; (4) the judge had erred in principle and/or misdirected himself in holding that the determination of the High Court on appeal from the award was of great urgency because of the need to prevent the arbitration being stalled on another issue to be determined by the arbitrator, whereas determination of that issue was not a matter of urgency; (5) even if there should have been no adjournment, the judge should not have reserved the substantive appeal to himself; (6) the judge had failed to follow the normal practice of allowing the appeal to be heard by a different judge in the absence of any consideration of urgency or other reason to justify departing from the court's normal practice.

The facts are stated in the judgment of Lord Donaldson of Lymington M.R.

*Bernard Rix Q.C.* and *Christopher Butcher* for the respondent.
*Anthony Colman Q.C.* and *John Lockey* for the claimant.

LORD DONALDSON OF LYMINGTON M.R. The *Hiscox v. Outhwaite* saga which was before this court on 11 March [1991] 2 W.L.R. 1321 has come back. On that occasion we gave judgment to the effect that there was the right to apply to the High Court for leave to appeal, notwithstanding that the award was a Convention award, the basis of our judgment being that there was an estoppel by convention which prevented Mr. Outhwaite from relying upon that fact. We gave leave to appeal to the House of Lords and indicated that the application for leave to appeal to the High Court should go ahead, notwithstanding that there was such a pending appeal.

We did not consider the question of what should happen if leave to the High Court were granted. That has now happened and the parties are back with two disputes. The first dispute is whether the appeal should go ahead at all pending a decision by the House of Lords. The second is whether Hirst J., who granted leave after a hearing which lasted some two days, should himself hear the appeal.

If I could deal with the second question first, there has grown up a practice in the Commercial Court of one judge hearing applications for leave to appeal and another judge hearing the appeal itself. For my part, I can understand the practice, although I was not aware of it, because there is a strong bias against interfering with awards by giving leave to appeal and the judge granting leave will necessarily have formed and expressed his, albeit provisional, views on the merits. The bias is in favour of finality rather than legality, to use the phraseology which I think was used by Lord Diplock. The bias is less strong in cases of standard contracts where there is a need in the trade for an authoritative decision on their construction. The justification for this bias would be much stronger in a "one-off" case where the judge has to be fairly sure that the arbitrator is wrong before he gives leave to appeal.

Might I add parenthetically that "fairly sure" is not now to be used as a new test. It merely represents my recollection of the effect of the authorities. For my purposes it is sufficient to say that the argument for a different judge hearing the substantive appeal is stronger in the case of one-off contracts than it is in the case of standard contracts.

On the other hand, there must be exceptional cases where it would be quite right that the same judge should hear the appeal. One case is that of urgency. There may be no other judge immediately available and it may save a great deal of time to go straight on. The other is where, contrary to *Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. (The Nema)* [1982] A.C. 724 and no doubt despite the best efforts of the judge, the matter has been very fully deployed and the answer in the view of the judge is totally and unanswerably clear. In such a case there would be a considerable waste of costs in having a further substantive hearing. That was the case which confronted Bingham J. in *Tor Line A.B. v. Alltrans Group of Canada Ltd. (The TFL Prosperity)* [1982] 1 Lloyd's Rep. 617. and he dealt with the matter in his judgment, at pp. 626–627. He decided to go ahead and himself hear the appeal. Ironically, having granted leave, he decided that there was nothing in the point, but that is not directly relevant.

Ultimately it must be a matter for the judge's discretion. But in this particular case, for reasons which I will revert to in a moment, I think that we are justified in interfering with the decision of Hirst J.

I then turn to the first question, which is: should the appeal be heard at all before the House of Lords has given judgment? We are told that the House of Lords will take nine to 12 months before it can get around to this appeal. It is not for me to interfere with listing in the House of Lords. It is for their Lordships' House to decide upon relative priorities, but I would make it clear, for my part, that, if there were a system whereby the Court of Appeal certified expedition, I have little doubt that we would have certified—certainly I would have certified—a need for a high degree of expedition in this case. There are very large sums of money involved, and not only the parties but other people do not know where they stand. This cannot be in the interests of the insurance market as a whole, let alone those who are directly concerned. Furthermore, this matter has arisen in the middle of an arbitration and if, as I think inevitable, there are knock-on effects on the remainder of the arbitration, this compounds the difficulties which have already arisen. So I express the personal view that I hope that their Lordships will give this matter the highest degree of priority which is consistent with competing claims by other appeals and, if it is possible, will hear the appeal long before the suggested time of nine to 12 months.

There are obvious advantages in the meantime in hearing the appeal to the High Court. There is bound to be some pause before the House of Lords hears this appeal and the time would be better spent hearing the appeal to the High Court now rather than waiting until their Lordships have decided the matter and then, if it is appropriate, going ahead with the appeal.

However, there is a problem and the problem arises in this way. Mr. Colman's clients want the judge's judgment on this appeal for use in a subsequent phase of the arbitration when the arbitrator will be dealing with what are apparently known as C.C.R. claims, C.C.R. standing for the Center for Claims Resolution. The House of Lords may affirm this court's decision, in which case a judge will have ruled in relation to this particular award in a way which will no doubt assist Mr. MacCrindle when he comes to the C.C.R. award.

If, on the other hand, the House of Lords were to reverse our decision, we should have the undesirable situation that Mr. MacCrindle was being referred to and invited to follow a judgment which should never have been given, because on that hypothesis the House of Lords would have decided that this was a Convention award and that there was no jurisdiction in the High Court to hear an appeal from it. But I think that it is possible to prevent it happening and at the same time to make progress pending the appeal to the House of Lords.

It cannot be right that that should happen. I would order that the Commercial Court judge be at liberty to go ahead with hearing the appeal from Mr. MacCrindle's award and that he should give a judgment in writing, which should be signed by him and placed in a sealed envelope to be opened only in the event of the decision of the House of Lords being that there was jurisdiction to hear that appeal. I would add that every eventuality should be covered because this is an arbitration in which every eventuality happens. Without wishing the judge, whoever it may be, who hears this appeal any ill, I think it should be made clear that, if he dies or retires before the envelope is opened, his written decision would still be a

A valid judgment, made at the time he signed it but taking effect only when opened.

I come back to the question of the reason why the appeal should I think be heard by a different judge. Hirst J. has expressed reasonably strong views upon the meaning of a particular clause. This is not a case of extreme urgency. We have a little time in hand before the House of Lords can give judgment. It may well be that any other judge would reach the B same conclusion but it would be more satisfactory if another judge heard the appeal. I recognise that the judge's decision was discretionary, but I think that we are entitled to interfere because in my judgment he erred in principle. It appears that he accepted the proposition that it was desirable that there should be a judgment in any event in order to assist with the later phase of the arbitration in relation to the C.C.R. claim. That cannot C be right. Any judgment given at this stage ought to be contingent upon the House of Lords dismissing the appeal from this court, and the way in which the judge contemplated that his judgment should be used was inconsistent with that approach.

Accordingly, I would order that the appeal to the High Court be heard by a different judge and that the appeal should go ahead.

Let me add one other thing. It has become apparent in the course of D this hearing that it would be open to Mr. MacCrindle in the C.C.R. tranche of the arbitration to consent to an application under section 2 of the Arbitration Act 1979, which is in these terms:

> "(1) Subject to subsection (2) and section 3 below, on an application to the High Court made by any of the parties to a reference—(*a*) with the consent of an arbitrator who has entered on the reference or, if E an umpire has entered on the reference, with his consent, or (*b*) with the consent of all the other parties, the High Court shall have jurisdiction to determine any question of law arising in the course of the reference."

So it would appear that Mr. MacCrindle, in the context of the C.C.R. part of the reference, could consent to the High Court determining the F question of law which, as Mr. Colman says, has arisen in the present appeal and will arise in the C.C.R. tranche.

That in itself discloses a further complication. It was common ground that the only reason why Mr. MacCrindle's award was a Convention award was that after that phase of the arbitration was concluded he signed the award in Paris. It must follow that the powers of the High Court, as G supervising court, were fully exercisable throughout the course of the arbitration up to the moment when the award was signed. Thereafter, in the view of the majority of this court [1991] 2 W.L.R. 1321, they ceased to be exercisable. This leads to the conclusion that an arbitrator appointed to conduct an arbitration in London under English curial law can by signing his award in another Convention country execute an "exclusion award" having in some respects an even wider effect than an exclusion agreement H executed by the parties under section 3 of the Arbitration Act 1979, since it extends to, for example, section 22 of the Arbitration Act 1950. I only wish that I had thought of the point originally, but I now have an opportunity of adding an addendum to my judgment of 11 March.

For the reasons that I have expressed somewhat inadequately—and I mean that because it has been very much an extempore judgment—I, for my part, would say that another judge should hear this appeal, the appeal should go ahead and the decision on the appeal, that is to say the reasons,

should be sealed until such time as the House of Lords has decided the appeal from this court, which I hope will be in the very near future.

McCowan L.J. I agree that this appeal should be allowed for the reasons given by Lord Donaldson of Lymington M.R.

Leggatt L.J. I too agree. I would only add that this is in my judgment a proper case in which, in the interests of the market as well as of the parties, to make to the House of Lords an application to expedite the hearing of the appeal.

*Appeal allowed with costs.*

*Solicitors: Elborne Mitchell; Fishburn Boxer.*

D. E. C. P.

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[PRIVY COUNCIL]

*MINISTER OF FOREIGN AFFAIRS, TRADE AND INDUSTRY . . . . . Appellant

AND

VEHICLES AND SUPPLIES LTD. AND ANOTHER . . Respondents

[APPEAL FROM THE COURT OF APPEAL OF JAMAICA]

1991 April 22; May 13

Lord Keith of Kinkel, Lord Ackner, Lord Oliver of Aylmerton, Lord Lowry and Sir Edward Eveleigh

*Jamaica—Practice—Prerogative orders—Ex parte application for leave to apply for prerogative orders relating to minister's exercise of statutory powers—Judge granting leave and ordering stay of minister's decision—Whether proceedings properly instituted against minister—Whether "proceedings" capable of being stayed—Jurisdiction to set aside stay—Crown Proceedings Act, ss. 13(2), 18(2)—Judicature (Civil Procedure Code) Law (c. 177), s. 564B(4)—R.S.C., Ord. 32, r. 6*

Section 13(2) of the Crown Proceedings Act[1] provided that civil proceedings against the Crown, defined in section 18(2),

[1] Crown Proceedings Act, s. 18(2): "Subject to the provisions of this section, any reference in this Part to civil proceedings against the Crown shall be construed as a reference to the following proceedings only—(*a*) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by any such proceedings as are mentioned in paragraph 2 of Schedule 1; (*b*) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by an action against the Attorney-General or any officer of the Crown as such or by proceedings taken by virtue of any of the enactments set out in Schedule 2; and (*c*) all such proceedings as any person is entitled to bring against the Crown by virtue of this Act . . ."