Neutral Citation Number: [2017] EWHC 1500 (TCC)

Case No: HT-2016-000235

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2017

Before :

MRS JUSTICE O'FARRELL DBE

- -

Between :

IAN ROLLITT **(trading as CD CONSULT)**	**Claimant**
- and –	
CHRISTOPHER LEONARD BALLARD	**Defendant**

- -
- -

Paper application determined without a hearing
in accordance with CPR PD62

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. This is an application by the claimant, Ian Rollitt, for:

   i) an extension of time for appealing against an arbitration award dated 12 May 2016 made by Mr D J Cartwright MA, FRICS, FCIArb, FAMINZ(Arb), MEWI, MaPS, FFB ("the Award") pursuant to section 79(1) of the Arbitration Act 1996 ("the Act");

   ii) permission to adduce further grounds and evidence in support of the application for an extension of time;

   iii) permission to appeal pursuant to section 69 of the Act on a point of law; and

   iv) permission to challenge a further arbitration award dated 24 October 2016 ("the Costs Award") for serious irregularity pursuant to section 68 of the Act.

2. The application is opposed by the defendant, Christopher Ballard, on the grounds that the appeal was brought outside the 28 day time limit for such applications provided by section 70(3) of the Act and there are no sufficient grounds for extending the time limit.

3. The background to the dispute can be summarised as follows. In June 2007 the parties entered into a contract under which the defendant engaged the claimant to provide project management services in relation to property known as High Cane, Golf Club Road, Sandy Lane, St, James, Barbados.

4. A dispute arose as to the fees payable in respect of the project management services provided and on 9 November 2010 the claimant issued a notice of arbitration. The first arbitrator appointed resigned and Mr Cartwright was appointed by the CIArb on 4 November 2015.

5. On 3 February 2016 the defendant made an application to the arbitrator for a ruling on substantive jurisdiction pursuant to section 30 of the Act. The arbitrator determined that the contract incorporated by reference the RICS Project Management Agreement and conditions of Engagement (Third Edition) ("the PMA Conditions") but that the reference to the PMA Conditions was not sufficient to incorporate the arbitration agreement. Further, there was a tiered dispute resolution procedure that required the claimant to adjudicate before any entitlement arose to refer the dispute to arbitration. In any event, the defendant was operating as a consumer for the purpose of the Unfair Terms in consumer Contract Regulations 1999 ("the UTCCR") and the arbitration agreement would, even if incorporated, be invalid.

6. The award was dated 12 May 2016. On that date the arbitrator sent an email to the parties' representatives, informing them that the Award on the preliminary issues had been completed and that it would be published on cleared payment for his fees of £4,052.88 (including VAT).

7. In accordance with section 70(3) of the Act, the statutory 28 day period for an application for permission to appeal under section 69 of the Act expired on 9 June 2016.

8. On 19 July 2016 the claimant sent a cheque in respect of the arbitrator's fees by post.

9. On 8 August 2016, following receipt of the cleared funds, the arbitrator issued the Award.

10. On 5 September 2016 the claimant issued the Arbitration Claim Form in these proceedings, seeking an extension of time and permission to challenge the award pursuant to sections 69 and 79 of the Act.

11. On 24 August 2016 the defendant claimed its costs in respect of the jurisdictional challenge and, in the absence of payment, by letter dated 13 September 2016 applied to the arbitrator for an award in respect of the same.

12. On 14 September 2016 the claimant wrote to the arbitrator inviting him to await the outcome of the arbitration challenge before proceeding to deal with the defendant's costs application and raised a question as to the arbitrator's jurisdiction by reason of the defendant's failure to sign the arbitrator's terms and conditions.

13. On 29 September 2016 the arbitrator notified the parties that (i) both parties had conferred jurisdiction on the arbitrator to determine the defendant's challenge on jurisdiction and (ii) the arbitrator had power to award costs in respect of the jurisdictional challenge.

14. On 24 October 2016 the arbitrator issued the Costs Award.

15. On 21 November 2016 the claimant issued an arbitration application seeking to adduce further grounds and evidence in support of its application for an extension of time and seeking permission to challenge the Costs Award on the basis of serious irregularity.

16. The issues to be determined are: (i) whether it is appropriate to extend the period for issuing the arbitration claim from 9 June 2016 until 5 September 2016; (ii) if so, whether permission to appeal should be granted; and (iii) whether permission to amend should be granted to challenge for serious irregularity.

Arbitration Act 1996

17. The material provisions of the Act are as follows:

> **"68 Challenging the award: serious irregularity**
>
> (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…
>
> (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) …

(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.

69 Appeal on points of law

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings…

(2) An appeal shall not be brought under this section except –

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied –

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question was one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award-

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

70 Challenge or appeal: supplementary provisions.

(1) The following provisions apply to an application or appeal under section 67, 68 or 69…

(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process…

79 Power of court to extend time limits relating to arbitral proceedings.

(1) Unless the parties otherwise agree, the court may by order extend any time limit agreed by them in relation to any matter relating to the arbitral proceedings or specified in any provision of this Part having effect in default of such agreement…

(2) An application for an order may be made-

(a) by any party to the arbitral proceedings (upon notice to the other parties and to the tribunal), or

(b) by the arbitral tribunal (upon notice to the parties).

(3) The court shall not exercise its power to extend a time limit unless it is satisfied-

(a) that any available recourse to the tribunal, or to any arbitral or other institution or person vested by the parties with power in that regard, has first been exhausted, and

(b) that a substantial injustice would otherwise be done."

18. There are strict time limits for any challenges to arbitration awards, reflecting the stated purpose of the Act to obtain a fair resolution of disputes by a tribunal without unnecessary delay or expense and to promote the finality of arbitration awards.

Application for an extension of time

19. The principles applicable to the court's discretion to extend time were summarised by Popplewell J. in *Terna Bahrain Holding Co. WWL v Al Shamsi* [2012] EWHC 3283 at [27] to [31]:

> "27. The principles regarding extensions of time to challenge an arbitration award have been addressed in a number of recent authorities, most notably in *AOOT Kalmneft v Glencore International AG* [2002] 1 Lloyd's Rep.128, *Nagusina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147, *L Brown & Sons Ltd v Crosby Homes (North West) Ltd* [2008] BLR 366, *Broda Agro Trading (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2011] 1 Lloyd's Rep.243, and *Nestor Maritime SA v Sea Anchor Shipping Co Ltd* [2012] 2 Lloyd's Rep.144, from which I derive the following principles:
>
> (1) Section 70(3) of the Act requires challenges to an award under sections 67 and 68 to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the Act, and which is enshrined in section 1(a). The party seeking an extension must therefore show that the interests of justice require an exceptional departure from the timetable laid down by the Act. Any significant delay beyond 28 days is to be regarded as inimical to the policy of the Act.
>
> (2) The relevant factors are:
>
> (i) the length of the delay;
>
> (ii) whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so;
>
> (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;
>
> (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;
>
> (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration, or the costs incurred in respect of the arbitration, the determination of the application by the court might now have;

(vi) the strength of the application;

(vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.

(3) Factors (i), (ii), and (iii) are the primary factors.

28. I add four observations of my own which are of relevance in the present case. First, the length of delay must be judged against the yardstick of the 28 days provided for in the Act. Therefore a delay measured even in days is significant; a delay measured in many weeks or in months is substantial.

29. Secondly, factor (ii) involves an investigation into the reasons for the delay. In seeking relief from the Court, it is normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. In the absence of such explanation, the court will give little weight to counsel's arguments that the evidence discloses potential reasons for delay and that the applicant "would have assumed" this or "would have thought" that. It will not normally be legitimate, for example, for counsel to argue that an applicant was unaware of the time limit if he has not said so, expressly or by necessary implication, in his evidence. Moreover where the evidence is consistent with laxity, incompetence or honest mistake on the one hand, and a deliberate informed choice on the other, an applicant's failure to adduce evidence that the true explanation is the former can legitimately give rise to the inference that it is the latter.

30. Thirdly, factor (ii) is couched in terms of whether the party who has allowed the time to expire has acted reasonably. This encompasses the question whether the party has acted intentionally in making an informed choice to delay making the application. In Rule 3.9(1) of the Civil Procedure Rules, which sets out factors generally applicable to extensions of time resulting in a sanction, the question whether the failure to comply is intentional is identified as a separate factor from the question of whether there is a good explanation for the failure. This is because in cases of intentional non-compliance with time limits, a public interest is engaged which is distinct from the private rights of the parties. There is a public interest in litigants before the English court treating the court's procedures as rules to be complied with, rather than deliberately ignored for perceived personal advantage.

> 31. Fourthly, the court's approach to the strength of the challenge application will depend upon the procedural circumstances in which the issue arises. On an application for an extension of time, the Court will not normally conduct a substantial investigation into the merits of the challenge application, since to do so would defeat the purposes of the Act. However if the Court can see on the material before it that the challenge involves an intrinsically weak case, it will count against the application for an extension, whilst an apparently strong case will assist the application. Unless the challenge can be seen to be either strong or intrinsically weak on a brief perusal of the grounds, this will not be a factor which is treated as of weight in either direction on the application for an extension of time. If it can readily be seen to be either strong or weak, that is a relevant factor; but it is not a primary factor, because the court is only able to form a provisional view of the merits, a view which might not be confirmed by a full investigation of the challenge, with the benefit of the argument which would take place at the hearing of the application itself if an extension of time were granted."

20. I have applied the above test in assessing the merits of the claimant's application.

Length of delay

21. In this case the delay after the expiry of the statutory period was from 9 June 2016 until 5 September 2016, a period of 88 days. That is a substantial delay compared with the yardstick of 28 days provided for in the Act.

Reasonableness of the claimant's delay

22. The initial period of delay arose as a result of the parties' dispute as to which party should pay the arbitrator's fees, or whether they should be shared equally.

23. The arbitrator's terms of engagement provided:

> Clause 3.1
>
> "The parties shall be jointly and severally liable for due and timely payment of my fees and expenses in any event."
>
> Clause 3.4
>
> "Any award shall be taken up by one or other of the Parties upon payment of my fees and expenses …"

24. When the Award was completed, the arbitrator stated clearly that he required payment of his fees before the Award would be released. He restated that position in his email

of 30 June 2016. It is common ground that the arbitrator was entitled to exercise a lien over the Award, pending receipt of such payment pursuant to section 56 of the Act.

25. In *S v A&B* [2016] EWHC 846 Eder J cited with approval the observations of Hobhouse J in *The Faith* [1993] 2 Lloyd's Rep 408 at 411 in respect of cases where the delay is said to be explained by reference to delays in collecting or paying for the Award:

> "It is not open to a party to argue, as have the charterers here, that they were waiting for the other party to take up the award; that they did not know that there was any point they wanted to raise on the award. They have to take that decision for themselves. The position is, in a sense, a stark one: a party who wishes to reserve his right to take the matter to the Court either by way of appeal or under s. 22 of the 1950 Act must ensure that the award is taken up in time to enable the application to be made."

26. In this case the fees were very modest and the onus was on the claimant to take appropriate steps to ensure that he preserved any right to challenge the Award.

27. Further delay occurred, following clarification by the defendant that he would not pay any of the fees, and the arbitrator's reiteration of his position at the end of June 2016 that the Award would not be released until payment. This further delay was caused by the claimant's decision to pay the arbitrator's fees by cheque sent by post, rather than a quicker method of transfer of the outstanding fees. It was a matter for the claimant as to the method of payment used but the time taken for the funds to clear does not give him an excuse for the further delay until 8 August 2016.

28. The final period of delay, of almost one month, for which there is no reasonable explanation, occurred between the publication of the Award on 8 August 2016 and the issue of these proceedings on 5 September 2016.

29. I am satisfied that there was no deliberate decision to delay making the application but the claimant has no reasonable explanation for the delay of 88 days following expiry of the statutory period for issuing a challenge to the Award.

Contribution to delay by others

30. The claimant seeks to rely on the further grounds set out in the amended arbitration claim and the second witness statement of Peter Webster dated 18 November 2016 in support of its submission that the delay in the release of the Award was, at least in part, the defendant's responsibility. The matters relied on are that the defendant initially refused to sign the arbitrator's terms and conditions and refused to pay half of the arbitrator's fees and expenses.

31. The arbitrator's terms and conditions stated expressly that the parties would be jointly and severally liable for his fees and expenses and that payment would be required before release of the award. The defendant refused to sign the terms and conditions but the claimant did sign them and therefore must have been aware that it could be required to pay the arbitrator's fees and expenses if the defendant declined to do so.

32. The arbitrator exercised his lien in respect of the Award, pending payment of his fees in full, as was his entitlement. The defendant refused to pay any of the fees because his position was that the arbitrator had no jurisdiction to determine the dispute. Neither of those matters can be relied on by the claimant as contributing to the delay for the reasons set out above.

Strength of the application

33. The arbitrator made a finding of fact that the PMA conditions were incorporated into the contract between the parties. It was not disputed that the PMA conditions contained an arbitration agreement. The claimant seeks permission to appeal on the following issues of law:

    i) the arbitrator erred in law in finding that the arbitration agreement was not incorporated by reference into the contract between the parties;

    ii) the arbitrator erred in law in finding that there was a tiered dispute resolution process in the contract with which the parties failed to comply;

    iii) the arbitrator erred in law in finding that the arbitration agreement was invalid on the basis that the defendant was a consumer.

34. Section 69 of the Act restricts appeals against arbitral awards to questions of law arising out of the award.

35. In the circumstances of this dispute, which does not raise matters of general importance, leave to appeal will only be granted where the question of law identified (a) will substantially affect the rights of one or more of the parties, (b) was one which the tribunal was asked to determine, (c) the determination was obviously wrong and (d) it is just and proper for the court to determine the question.

36. The first question of law identified, namely, the incorporation of the arbitration agreement by reference in the contract to standard terms and conditions, is one on which the claimant appears to have a strong case. The arbitrator was asked to determine the issue. His conclusion that the arbitration agreement could not be incorporated by reference to the PMA conditions failed to take account of, and was contrary to, the law on this matter as explained by Clarke J. in *Habas Sinai VE Tibbi Gazlar Isthissal Endustri AS v Sometal SAL* [2010] EWHC 29.

37. The second question of law identified, namely, the proper construction of the dispute resolution procedure and whether there was a mandatory tiered dispute resolution process, was also one that the arbitrator was asked to determine. It is a short point of contractual interpretation on which the claimant appears to have a strong case. Contrary to the arbitrator's determination, the words used in the contract do not appear to require the parties to adjudicate before an entitlement to arbitrate arises.

38. However, the third question, namely, whether the arbitration agreement was invalid under the UTCCR, raises mixed questions of law and fact which fall outside the proper scope of a challenge under section 69 of the Act. The arbitrator was asked to determine this issue. His finding that the defendant was a consumer was a finding of fact. His finding that the UTCCR was engaged was a mixed finding of fact and law.

The claimant's complaint is the arbitrator appears to have dealt with this issue in a perfunctory manner. It is also submitted that the arbitrator gave inadequate explanation for his finding that there was unfairness so as to render the arbitration agreement invalid under the UTCCR. Those complaints, if established would not amount to errors of law and would certainly not amount to obvious errors of law.

39. If the claimant were refused permission to appeal on the third question, success on the first and/or second questions would not lead to a different outcome on the issue of jurisdiction. Even if the arbitration agreement were incorporated into the contract and there was no requirement to adjudicate before commencing the arbitration, the arbitrator's finding of invalidity of the arbitration agreement would lead to the same conclusion on jurisdiction. Therefore, the claimant could not satisfy limb (a) of section 69(3) of the Act. It would follow that it would not be just and proper in those circumstances for the court to determine the first two questions.

40. For these reasons, even if the application for leave to appeal had been made in time, it would be refused on its merits.

Section 68(2)(a) challenge

41. The claimant's challenge is that the arbitrator's decision to proceed with the determination of the costs issues consequent on the Award was irrational given the claimant's pending application in respect of the Award. The submission is that the arbitrator's conduct was in breach of the general duty set out at section 33(1)(b) of the Act and amounted to a serious irregularity affecting the tribunal, proceedings or award.

42. The application to amend the arbitration claim was made within 28 days of the date of the Costs Award and therefore, if permission were given to amend, would be in time.

43. The principles applicable to a challenge under section 68(2)(a) of the Act were set out in *Terna Bahrain Holding Co. v Al Shamsi* (above) per Popplewell J at paragraph 85:

> "(1) In order to make out a case for the Court's intervention under s. 68(2)(a), the applicant must show:
>
> (a) a breach of s. 33 of the Act; i.e. that the tribunal has failed to act fairly and impartially between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent, adopting procedures so as to provide a fair means for the resolution of the matters falling to be determined;
>
> (b) amounting to a serious irregularity;
>
> (c) giving rise to substantial injustice.
>
> (2) The test of a serious irregularity giving rise to substantial injustice involves a high threshold. The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process.

> (3) A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the Court's intervention. Relief under s. 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could be reasonably be expected from the arbitral process, that justice calls out for it to be corrected.
>
> (4) There will generally be a breach of s.33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.
>
> (5) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of s. 33 or a serious irregularity.
>
> (6) The requirement of substantial injustice is additional to that of a serious irregularity, and the applicant must establish both.
>
> (7) In determining whether there has been substantial injustice, the Court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome."

44. In this case, the claimant's complaint falls far below the high threshold imposed by section 68. It is not disputed that the arbitrator had power to make the Costs Award under section 63 of the Act. The claimant had referred the dispute to the arbitrator and signed his terms and conditions. Although the defendant had refused to sign the arbitrator's terms and conditions, he had made the jurisdictional challenge and therefore submitted to the tribunal for that purpose.

45. The arbitrator had a wide discretion as to whether to proceed to make the Costs Award or to await the outcome of the arbitration claim in court. The arbitrator gave both parties an opportunity to make submissions on costs. The claimant contends that the arbitrator's decision to proceed was irrational but it was within the range of decisions open to him and there was no procedural unfairness.

46. In any event, given that the arbitration challenge to the Award has failed, the arbitrator's determination of costs has not resulted in any injustice.

Conclusion

47. In my judgment, there was no deliberate delay on the part of the claimant in issuing its arbitration application but there was substantial delay for which the claimant has no reasonable excuse. I grant permission for the claimant to raise the additional grounds and rely on the additional evidence in support of the application for an extension of time but it does not alter the fact that the claimant was responsible for the delay. The merits of the arbitration claim are weak as explained above.

48. Therefore, I refuse to exercise my discretion to grant an extension of time for bringing the arbitration claim pursuant to section 79(1) of the Act. For the same reasons, the application for leave to appeal pursuant to section 69(2) of the Act is also refused.

49. The application for permission to amend the claim form to challenge the Costs Award on the basis of serious irregularity is refused on the ground that it is not properly arguable and there is no real prospect of success.