Case No: A3/2011/1337

Neutral Citation Number: [2012] EWCA Civ 637
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'BENCH DIVISION
COMMERCIAL COURT (MR JUSTICE EDER)
[2011] EWHC 901(Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2012

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE LLOYD
and
LORD JUSTICE AIKENS

- -

Between :

Sucafina SA	**Appellant**
- and -	
Rotenberg	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Thomas Raphael (instructed by **Hill Dickinson LLP**) for the **Appellant**
Alexander Gunning (instructed by **Gordons Partnership LLP**) for the **Respondent**

Hearing date: 9 February 2012

- -

Judgment
As Approved by the Court

President of the Queen's Bench Division:

1. This principal issue in this appeal is the application of the provisions of the Arbitration Act 1996 (the 1996 Act) in relation to the making of arbitration awards to the arbitration rules of the Coffee Trade Federation.

The factual background

(i) The parties

2. Between June 1998 and March 2001 the appellants (Sucafina), a Swiss company specialising in coffee trading, entered into a series of coffee futures contracts with, it contended, the respondent to the appeal (Mr Rotenberg). Each of the contracts was subject to the European Contract for Coffee 1996 Edition. That contract provides for the parties to choose where the arbitration is to be held. The parties chose arbitration with the Coffee Trade Federation, the rules of which provided for a two stage procedure.

3. The Coffee Trade Federation's rules applied to all arbitrations commenced after 1 January 1999. Those rules provided for arbitration at the first stage (rules 1-31), for the appeal procedure (rules 32-52) and, as an alternative, for arbitration before a Board of arbitration (rules 53-71). The rules of the appeal procedure are the rules primarily relevant to this appeal. The Coffee Trade Federation's arbitration service has been superseded by the arbitration service provided by the British Coffee Association. Since 31 January 2012 arbitrations under the British Coffee Association have been on materially different terms to those previously used by the Coffee Trade Federation.

4. Mr Rotenberg was a Belgian citizen resident in the Democratic Republic of the Congo who was also managing director and a shareholder of a Congolese company known as ILFEC and an associate company CAFECA incorporated in the Central African Republic.

(ii) The commencement of arbitration

5. In September 2002 Sucafina commenced arbitration against Mr Rotenberg, ILFEC and CAFECA. In its statement of case served in pursuance of the rules it claimed only against Mr Rotenberg seeking $880,424.84 together with interest and costs. A tribunal was duly constituted. It became clear that the principal issue between Sucafina and Mr Rotenberg was whether the contracts had been made with Mr Rotenberg personally or with ILFEC or CAFECA.

6. By an award dated 22 August 2005, the Umpire held that the losses arising under the disputed contracts were recoverable from Mr Rotenberg and held him liable to pay $880,456.85 together with interest. He further awarded that Mr Rotenberg should pay to Sucafina costs of the arbitration amounting to $25,000 and arbitral fees of £4,500.

7. On 22 September 2005 Mr Rotenberg appealed to the Board of Appeal as provided for in the rules. A Board of Appeal consisting of five members was appointed. Following an application by Sucafina, the Coffee Trade Federation ordered Mr

Rotenberg to pay the sum of £25,000 by way of security for the fees of the arbitration. Mr Rotenberg paid that amount on 10 July 2006.

(iii) The first appeal interim award of the Board of Appeal

8. The Board of Appeal heard the appeal on 7 July 2006 and various subsequent dates. On 4 September 2007 the Coffee Trade Federation notified the parties that the Board had made an interim award; it would be published following the receipt of a further £10,000 by way of deposit against fees to be made by Mr Rotenberg. After an extension of time had been given to pay the further deposit, the sum was received by 28 September 2007.

9. On 1 October 2007 the Board of Appeal published what it described as an "appeal interim award". The award set out the findings of fact made by the Board of Appeal, the contentions of the parties and at paragraphs 90-110 its reasons for finding that most of the contracts had been made between ILFEC or CAFECA and Sucafina. It concluded:

> "Under the powers given to it by Rule 48 of the CTF Arbitration Rules the Board of Appeal hereby makes the following INTERIM AWARD:
>
> 111 That for the contracts where it found that ILFEC or CAFECA were the sellers, Sucafina's claim against Mr Rotenberg is dismissed and the Board of Appeal's jurisdiction ceases.
>
> 112 That for the contracts where it found that Mr Rotenberg was the seller, Sucafina's claim against Mr Rotenberg stands.
>
> 113 That therefore, but for the contracts mentioned in 112, the decision of the umpire is overturned and the appeal is upheld."

The Board then went on to state at paragraphs 114 and 115 that, after hearing submissions as to quantum, it would make an award as to the amount of Sucafina's claim under the nine contracts to which Mr Rotenberg was a party; after publishing the award in relation to quantum it would direct the parties to make submissions on costs. It made directions in relation to quantum adding that it would only look at submissions on quantum and it would ignore any submissions relating to any other matter.

10. On 26 October 2007 Sucafina applied to the Board under s.57(3)(a) of the 1996 Act to clarify the award and under s.57(3)(b) to make an additional award in respect of the claim that was presented to the Board but not dealt with in the award. The Board rejected that application.

(iv) The second award – the appeal interim award on quantum

11. After receiving submissions from the parties in relation to quantum and having sat on 13 December 2007 and subsequent dates, the Board published what it described as an

"appeal interim award" on quantum. On 21 November 2008 the Board found that $161,421.42 was due from Sucafina to Mr Rotenberg but that there was no dispute that ILFEC/CAFECA owed Sucafina $1,041,846.26. It made the following award.

> "Under the powers given to it by Rule 48 of the CTF Arbitration Rules the Board of Appeal hereby makes the following interim award:
>
> 42 That Sucafina pay Mr Rotenberg the sum of $161,421.42 but only after it has received payment for the outstanding balance from ILFEC/CAFECA.
>
> 43 That Sucafina pay Mr Rotenberg interest on the above amount from the date the amounts became due up to the date when payment is made but only after it has received interest payment on the amount due to it from ILFEC/CAFECA and at the same rate."

Earlier paragraphs of the award dealt with the rates of interest; the award concluded with directions for submissions on costs.

(v) The third award – the Final Award

12. Submissions were made by the parties between November 2008 and March 2009.

13. On 9 November the Coffee Trade Federation wrote to Mr Rotenberg's solicitors and to Sucafina stating that:

> "The appeal .. is now completed and the Final Award will be published and made available upon payment of fees and expenses of GBP 38,850 less the amount of the deposit held of £36,600 making a net amount of GBP 2,250…"

14. Payment was not made. So on 14 December, the Coffee Trade Federation wrote again referring the parties to Rule 52 of the Rules of the Coffee Trade Federation applicable to the proceedings. Rule 52, entitled "Taking up the Award" provided:

> a) The appeal award shall be sent by the board of appeal to the Secretary.
>
> b) The Secretary shall notify the parties that the appeal award is ready and can be taken up and will be published upon payment of the fees, costs and expenses.
>
> c) If the appeal award is not taken up within 30 days of the date of said notification the original award of the arbitrator(s) or umpire shall become final and binding immediately upon expiry of said period and
>
> (i) The fees, costs and expenses of the board of appeal and of the Federation shall be paid by the parties immediately. Such payment shall not affect the right of the party who

> makes it to recover such payment or any part thereof from the other party.
>
> (ii) If the Award has not been taken up the Federation may by action recover all outstanding fees, costs and expenses of the arbitration and of the board of appeal and of the Federation from any or all of the parties.
>
> d) For the avoidance of doubt, payment of the fees, costs and expenses after the expiry of the said period of 30 days shall not constitute the taking up of the award.
>
> …."

15. A further reminder was sent on 16 December 2009. On 16 December 2009, Sucafina remitted £2,250 stating that the payment was under Rule 52(c)(ii) and not by way of taking up by them of the Appeal Award; they therefore considered that the original Award of the Umpire was final and binding. On 22 December 2009, Mr Rotenberg's solicitor remitted £2,250 and sought the release of the Award. The same day the Coffee Trade Federation by its Secretary wrote to the parties stating that it was not permitted to publish the Award. Under Rule 52(c) the 30 day period expired on 9 December 2009; payment after the 30 day period did not constitute taking up the Award. The original award of the Umpire was therefore final and binding.

16. On 3 February 2010, Sucafina sent a demand for payment to Mr Rotenberg's solicitors and stated it would take all necessary steps to enforce the award.

(vi) The application to the Commercial Court

17. On 23 February 2010, Mr Rotenberg issued proceedings under s.79 of the 1996 Act seeking an extension of time for taking up the Award and a declaration that in the event that the final appeal award was not taken up, the interim awards of 1 October 2007 and 21 November 2008 should remain final and binding between the parties.

18. In a judgment given on 8 April 2011, Eder J held that the first and second interim awards of the Appeal Board were binding on the parties. The award on costs, absent an extension under s.79, could not be made or published. As he refused an extension under s.79, this meant that Mr Rotenberg could not recover the costs of the appeal. As the effect of the interim awards was to set aside the original award of the Umpire, costs of the proceedings before the Umpire had not been determined and could not now be determined.

19. Sucafina appealed with the permission of the single Lord Justice against the decision on the declaration. Mr Rotenberg cross appealed the decision on s.79. On 3 February 2012, shortly before the hearing of the appeal, Mr Rotenberg made it clear that his appeal in respect of the decision under s.79 should be dismissed, if Sucafina's appeal failed, as he would not be able to show substantial injustice.

Issue 1: Was Mr Rotenberg entitled to the declaration sought?

20. The first question is whether the appeal interim awards take effect as partial awards under s.47 of the 1996 Act or whether that section is displaced by the rules?

(i) Were the appeal interim awards final and binding?

21. The express powers of the Board of Appeal to make orders and awards were set out at Rules 47-49:

> Interim order
>
> 47. The board of appeal shall have the power to make such order(s) as it may think fit for the interim protection, warehousing, sale or disposal of the subject matter of the arbitration.
>
> Interim Award
>
> 48. The board of appeal shall have power to make an interim award or awards.
>
> Appeal Award
>
> 49. Within a reasonable time from the date of the hearing, the board of appeal shall make in writing and shall sign a reasoned award which shall constitute the arbitration award and, subject to any valid appeal to the High Court (if available under these rules), shall be final and binding. The board of appeal may deal with the appeal and any cross-appeal together but the parties shall not be entitled to require separate awards. The award shall state the seat of the arbitration.

22. However, the powers of the Board of Appeal are not conferred simply by these Rules. The Rules of the Coffee Trade Federation provided by Rule 2 that the provisions of the 1996 Act should apply to every arbitration "save insofar as such provisions [are] expressly modified by, or are inconsistent, with these rules".

23. The 1996 Act contemplates three categories of adjudication – decisions, orders and awards - and confers powers to make them which each tribunal has on the basis that either (1) they are conferred unless expressly excluded by the agreement to arbitrate or (2) they must be expressly included in the agreement to arbitrate. The category of adjudication described as decisions is not relevant as it relates to procedural or evidential matters. It is necessary, however, to set out the distinction between orders under s.38 and awards under s.39 and s.47.

i) S.38 permits the parties to agree on powers exercisable by the arbitral tribunal and expressly provides for certain powers, unless the parties agree to the contrary. Amongst those powers are powers for the detention and preservation of property.

ii) S.39, entitled "provisional awards", permits the parties expressly to agree to the arbitral tribunal having power to order on a provisional basis any relief which it would have power to grant in a final award. The powers include making a provisional order for the disposition of property. Subsection (3) makes clear that any such order is provisional and is subject to the tribunal's final adjudication and final award on the merits. Such powers are not given in

the absence of express agreement to include them. The section expressly provides: "This does not affect its powers under s.47 (awards on different issues, etc)."

iii) S.47 permits the arbitral tribunal to make awards on different issues (commonly called "partial awards"), unless the parties agree otherwise. The provision in s.47 was regarded by the Departmental Advisory Committee on Arbitration Law (chaired by Saville LJ as he then was) in its 1996 Report on the Bill (the 1996 DAC Report) as "a very important provision" (see paragraph 226); it encouraged arbitrators to use the power. The Committee observed at paragraph 233 that it had not used the term "interim", as it had become a confusing term. S.59 provides that such awards are final and binding on the parties

24. Sucafina's position was that an award under Rule 48 was not restricted to provisional awards under s.39. It could include an award intended to resolve aspects of the merits which would resemble a partial award under s.47. It accepted that both appeal interim awards did purport to decide liability and quantum. However it was contended that awards under Rule 48 had a subordinate role and it was only the award under Rule 49 that constituted an award that was final and binding. Until that stage the appeal interim awards under Rule 48 were not final and binding or only conditionally final and binding. Although they represented the Board of Appeal's final decision on the matters with which they dealt and which it did not intend to revisit, they remained conditional until the Award under Rule 49 was made which then operated to ratify them.

25. I cannot accept this contention. First the issue to be determined is whether there is an agreement to the contrary which excludes the power under s.47 to make partial awards. There is nothing in the language of Rule 48 or 49 or elsewhere in the rules which amounts to an agreement that that an arbitral tribunal under the Coffee Trade Federation rules should not have power under s.47 to make partial awards. Nor are Rules 48 and 49 inconsistent with the provisions of s.47. As there is no express or implied agreement to the contrary, there is power under s.47.

26. Secondly, an award which had the effect suggested by Sucafina would be a species of award unknown to arbitration law and practice; an award is either final and binding or it is not. The draftsmen of rules which were intended to facilitate arbitration in London under the provisions of the 1996 Act would never have intended to create such a species of award. It is unfortunate that the draftsman of the rules used the term "interim" as it is capable of giving rise to confusion and also unfortunate that the distinction I have drawn in paragraph 23 above was not reflected exactly in the rules. Instead the draftsman seems to have provided by Rule 47 for the powers under s.38 and s.39, under Rule 48 for the powers under s.39 and possibly under s.47 and under Rule 49 for the usual position where there is a single award. However it is not necessary to resolve the extent of the power under Rule 48, as the question is not whether it confers a power, but whether there is an agreement to exclude the power under s.47. I have no doubt, however that the power to make partial awards under s.47 was not excluded and the Board of Appeal had power to make partial awards.

27. The terms of both interim appeal awards which I have set out made it clear beyond doubt that the Board of Appeal considered each award was final and binding on the

issues determined by it. Thus in my view, the judge was plainly right when he held at paragraph 60 that each of the appeal interim awards was an award under s.47 and final and binding by the terms of s.58.

(ii) In the circumstances, did Rule 52 have the effect of restoring the original award of the Umpire and displacing the appeal interim awards?

28. However, the submission of Sucafina as advanced by Mr Raphael was that Rule 52 had the effect in the circumstances that had arisen of restoring the award of the Umpire and displacing the two appeal interim awards. It was contended that the rules formed a code which was intended to have a clear effect and to provide a very stringent degree of protection to the Coffee Trade Federation; the rules used the final appeal award under Rule 49 to secure payment of its fees. The award in respect of which the Coffee Trade Federation gave notice to publish on 9 November 2009 was the "appeal award" under Rule 49; the notification under rule 52(b) triggered the time limit under Rule 52(c). As the funds were not paid within the time limit, the original award of the Umpire became final and binding under Rule 52(c)(i). Sucafina had the right under Rule 52(c)(ii) to pay the outstanding fees in order that it might enforce the original Umpire's award. As that original award was inconsistent with the two appeal interim awards and the original award could be enforced under Rule 52, the appeal interim awards could no longer have any legal effect.

29. It was pointed out by Mr Raphael that Rule 52 was but one of the several Rules that had a similar stringent effect. Rule 33 gave the Board of Appeal power to dismiss an appeal if a party failed to comply with directions given by the Board of Appeal; if it exercised the power, the appeal was deemed to be withdrawn. Rule 34 provided that if the appellant did not pay a deposit, the appeal was deemed to be withdrawn. Rule 42(g) provided that if the appellant did not send his statement of case within the requisite time, the appeal was deemed to be withdrawn. The consequence of each of these provisions which deemed a withdrawal of the appeal and the rule which provided for the right of the appellant to withdraw his appeal (Rule 41) was that the original award of the arbitrator or Umpire became final and binding. The effect of the scheme of the rules was clear: the consequence of non compliance during the appeal process was that the original award became enforceable. It was a scheme designed to secure the fees of the arbitral body and to prevent abuse of the appeal procedure.

30. Elegantly presented as the argument was, I cannot accept it. First it seems to me that no arbitral body of standing in London would have drafted in Rule 52 a provision that was intended to have the effect that a final and binding award on an issue would be rendered nugatory because a fee for a subsequent award was not paid, given powers to take security for its fees (see Rule 34) and the powers in s.56 of the 1996 Act. The construction contended for by Sucafina would, far from making any commercial sense, be damaging to the standing of the arbitral body and inimical to the proper conduct of arbitration, in the light of the common practice to make partial awards existing at the time the rules were drafted and as is reflected in the 1996 DAC report. No one with any understanding of arbitration law and practice or commercial dealing could have intended such a result.

31. Second, I agree with the judge that Rule 52(c) only makes commercial sense if construed as being normally applicable to arbitrations where there is a single award (see paragraph 53 of his judgment). Before the judge both parties were of the view

that the award notified to the parties as the "final award" on 9 November 2009 was an award to which the provisions of Rule 52 applied (see paragraph 62 of his judgment).

32. However, it was contended before this court on behalf of Mr Rotenberg that an appeal award under Rule 49 was not necessary in an arbitration such as the present where the Board of Appeal had made partial awards and therefore Rule 52 was inapplicable. However, it was not contended that, absent an application under s.79 of the 1996 Act, Mr Rotenberg was entitled to ask for the final appeal award to be published. That was consistent with his overall position that he only sought to uphold the decision of the judge.

33. As Mr Rotenberg had taken this position, it is not necessary to resolve the question of whether the award notified as a "Final Award" was an appeal award under Rule 49 or whether the Board of Appeal could have issued a further partial award or whether the appeal interim awards were in fact "appeal awards" within the meaning of Rule 49. I will proceed on the basis of the position taken by Mr Rotenberg before the judge and favourable to Sucafina that it was an award to which Rule 52 applied.

34. There is, however, nothing in the language of Rule 52(c) which could have the result contended for by Sucafina, namely that the two appeal interim awards which were expressed to be and were final and binding awards were set aside and the award of the Umpire restored. On the assumption that Rule 52 is applicable, effect can be given to paragraph (c) by reading it as applicable to that part of the Umpire's award that remains extant after the previous awards. I cannot accept that this would cause any real uncertainty beyond that which might arise where decisions on issues do not make clear what has been decided and what remains to be decided. The only issue is whether the first and second appeal interim awards left extant the Umpire's award on costs or set it aside and superseded it. It is to that issue I now turn.

Issue 2: Is either Mr Rotenberg or Sucafina entitled to the costs of the appeal arbitration and of the original arbitration?

35. As I have set out the judge held at paragraphs 62-63 that the effect of the first appeal interim award was to set aside the award of the Umpire on costs. The issue as to whether the judge was correct is a short point of construction of the awards which the judge found the most difficult point before him.

36. As the judge accepted, the Board of Appeal did not specifically set aside in either of the two appeal interim awards the decision of the Umpire on costs under which he ordered the payment by Mr Rotenberg of $25,000 by way of costs to Sucafina and of £4,500 by way of arbitration fees and arbitration costs. The terms of paragraphs 111-115 of the first appeal interim award do not set aside the award on costs. What the paragraphs do is to set aside the decision in relation to the issue as to who were the parties to the contract, not the award on costs. The Board made it clear in that award that they would consider costs later.

37. Nor was the award on costs set aside by necessary implication from the terms of the first appeal interim award. The issues on costs were by no means straightforward. It was contended by Sucafina that Mr Rotenberg was the author of the confusion as to the identity of the parties. The Appeal Board in the second appeal interim award

decided that Mr Rotenberg was only to be paid the sum of $161,421.42 after Sucafina had received payment of the amount due from ILFEC/CAFECA.

38. As there was no express decision setting aside the award on costs and as it by no means necessarily followed that the award was set aside by implication, the effect must be that the original award of the Umpire on costs stands. Sucafina are therefore in my view entitled to enforce that part of the Umpire's award relating to costs and fees.

Issue 3: Is Mr Rotenberg entitled to an extension under s.79 of the 1996 Act?

39. S.79 of the 1996 Act enables a party, unless the arbitration agreement otherwise provides, to apply to extend a time limit agreed in relation to the arbitral proceedings, if the available recourse to the tribunal had been exhausted and "a substantial injustice" would otherwise be done.

40. Although Sucafina contended that Rule 52(d) excluded s.79 and the available recourse to the Coffee Trade Federation had not been exhausted, the judge proceeded on the basis that Rule 52(d) did not and that the available recourse had been exhausted. He held that substantial injustice would not be caused to Mr Rotenberg if an extension was not granted. He also decided that the court should not exercise the discretion to grant relief under s.79.

41. His decision was premised on the basis that the first and second appeal interim awards were final and binding and that Mr Rotenberg was not liable for the Umpire's award of $25,000 by way of costs and £4,500 by way of arbitral fees. As I have set out at paragraph 19, Mr Rotenberg made it clear that he would not pursue his appeal against this part of the judge's judgment if he succeeded in upholding the judgment of the judge on the appeal brought by Sucafina.

42. Although we have dismissed the appeal on the main issue, we have allowed the appeal on costs. As this was a possible outcome, the court canvassed with those advising Mr Rotenberg what his position would be if we allowed the appeal in so far as it related to costs and arbitral fees. In the light of the formidable difficulties that Mr Rotenberg faced in the light of the judgment of the judge, it was not surprising that it was indicated at the close of the hearing that he would not, in those circumstances, pursue his appeal.

Conclusion

43. I therefore would allow the appeal to the very limited extent set out at paragraph 38.

Lord Justice Aikens:

44. I agree.

Lord Justice Lloyd:

45. I also agree.