Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd (No 2) [2004] SGCA 11

Case Number : CA 57/2003

Decision Date : 26 March 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Choo Han Teck J

Counsel Name(s) : C R Rajah SC (Tan Rajah and Cheah) and Mary Ong (Hoh Law Corporation) for appellant; Monica Neo (ChanTan LLC) for respondent

Parties : Northern Elevator Manufacturing Sdn Bhd — United Engineers (Singapore) Pte Ltd

Arbitration – Award – Recourse against award – Appeal under Arbitration Act (Cap 10, 1985 Rev Ed) – Arbitrator allegedly failing to consider compensatory principle in assessment of damages – Whether question of law – Whether leave to appeal should have been granted by judge – Section 28 Arbitration Act (Cap 10, 1985 Rev Ed)

Arbitration – Award – Recourse against award – Appeal under Arbitration Act (Cap 10, 1985 Rev Ed) – Whether concerning general principle relating to assessment of damages or one-off point – Whether dispute raising issue of concern which is singular and unlikely to recur

26 March 2004

Choo Han Teck J (delivering the judgment of the court):

1 This was an appeal against the granting of leave to the respondent, United Engineers (Singapore) Pte Ltd ("United"), to appeal against an arbitration award, as well as an order that the award be remitted back to the arbitrator with the court's opinion on the question of law which was the subject of the appeal. We were of the opinion that leave should not have been granted, and allowed the appeal. We now give our reasons.

Facts

2 The facts of this case were largely undisputed. By an agreement dated 15 April 1995, United engaged the appellant, Northern Elevator Manufacturing Sdn Bhd ("Northern"), to be its specialist sub-contractor for the design, manufacture, supply and delivery of passenger and cargo lifts to two blocks of warehouses at Pandan Crescent/West Coast Highway.

3 Northern carried out the sub-contract work. Disputes subsequently arose between the parties as to the quality of work done. United claimed damages against Northern for, *inter alia,* defective installation of the lifts. Northern, in turn, counterclaimed for, *inter alia,* the balance sum due under the agreement. The parties went for arbitration before Yang Yung Chong ("the Arbitrator") in September 1998.

4 The arbitration was held in two parts – the first part dealt solely with the issue of liability, and the second part concerned the assessment of damages (if any). On 21 December 2001, the Arbitrator delivered his first interim award ("first award") in which he found that Northern had breached the agreement in failing to supply adequately-sized guide rails and the corresponding safety devices for the lifts. He awarded United the cost of replacing the guide rails, the brackets and the safety devices ("cost of rectification"), which sum was to be assessed. He also found for Northern on its counterclaim, holding that United was liable to Northern for the balance sum due under the agreement.

5 The assessment of damages was held on 4 September 2002. At the hearing, United presented quotations in regard to the cost of rectification. United claimed a total of $975,160, comprising the following sums:

(a) $845,600 being the lowest of three quotations obtained from independent contractors for lift installation.

(b) $84,560 for "overheads and administrative costs" assessed at 10% of the cost of rectification; and

(c) $45,000 to hire a professional engineer to supervise the rectification and submit a Certificate of Supervision to the Commissioner of Building Control.

6 Northern strongly disputed the quotations presented by United. Koay Teng Cheang, executive director of Northern, submitted an affidavit which dealt with pricing of parts and materials for the rectification works. In addition, Northern submitted a quotation from V Elevator Pte Ltd ("V Elevator"), also a contractor for lift installation, which cited a price of $64,000 for dismantling and fixing of the guide rails. In all, Northern submitted that the cost of rectification, including the cost for labour, parts and materials, but excluding the fees for a professional engineer, would be $262,501.92.

7 Both parties summoned witnesses who were duly cross-examined on the vast differential in the quotes given. On 23 January 2003, the Arbitrator released his second interim award ("second award"), where he assessed the costs of rectification at $320,699.12. This comprised the following:

(a) $4,800 being the professional engineer's fees for load test;

(b) $64,000 being labour for rectification works;

(c) $72,367.52 being the cost of 33kg guide rails and fishplates;

(d) $57,360 being the cost of car rail brackets c/w fastening items;

(e) $23,900 being the cost of modifying car/cwt combination brackets;

(f) $57,600 being the cost of safety gears c/w mounting brackets; and

(g) $40,671.60 being the cost of car guide shoes.

8 United took issue with the grounds on which the Arbitrator determined the cost of rectification, alleging that the Arbitrator had not applied the compensatory principle in his assessment of damages. United then filed a motion seeking leave to appeal against the second award.

Proceedings in the court below

9 Before the judge, both parties agreed that the arbitration proceedings were governed by the old Arbitration Act (Cap 10, 1985 Rev Ed) ("the Act"). The relevant provision of the Act is s 28 which reads:

Judicial review of arbitration awards

28.—(1) Without prejudice to the right of appeal conferred by subsection (2), the court shall not

have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award.

(2) Subject to subsection (3), an appeal shall lie to the court on any question of law arising out of an award made on an arbitration agreement; and on the determination of such an appeal the court may by order —

(a) confirm, vary or set aside the award; or

(b) remit the award to the arbitrator or umpire for reconsideration together with the court's opinion on the question of law which was the subject of the appeal,

and where the award is remitted under paragraph (b) the arbitrator or umpire shall, unless the order otherwise directs, make his award within 3 months of the date of the order.

10 United contended that the following question of law arose for determination:

Whether on the facts set out in his [second] award, there were any grounds upon which the Arbitrator could properly at law have assessed damages in the manner he did?

United conceded that for leave to be granted, it needed to show that the appeal came within the guidelines laid down by the House of Lords in *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 ("*The Nema*") and in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 ("*The Antaios*"), which were affirmed by this court in *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 2 SLR 609.

11 The *Nema-Antaios* guidelines for determining whether leave should be granted may be summarised thus: Where the question of law raised is a "one-off" point, leave to appeal should not be given unless it is apparent to the court that the arbitrator was obviously wrong on the face of the record. Where the question does not concern a "one-off" issue, leave to appeal should not be given unless the court considers that a strong *prima facie* case has been made out that the arbitrator was wrong.

12 In this regard, United's argument here and below was that the question of law in this case was one which concerned the general principles relating to the assessment of damages, and any decision on this point would have an impact on the assessment of damages in future claims. As such, United argued that this was not a "one-off" point of law. United then submitted that it was clear on the face of the record that the Arbitrator had erred.

13 Northern opposed the motion, contending that leave to appeal should not be granted because United had not identified a valid question of law arising from the award. It submitted that the question posed was actually a question of fact disguised as a question of law. In any case, Northern submitted that the question, even if valid, was a "one-off" point and did not warrant leave to be granted, since there was nothing obviously wrong with the Arbitrator's decision.

Decision of the court below

14 In granting United leave to appeal, the judge stated that she was "of the view that the Arbitrator had erred in law on the amount of damages he awarded on their claim". She found that the Arbitrator, in distinguishing the case of *Ruxley Electronics and Construction Ltd v Forsyth* [1995] 3 All ER 268, appeared to have thought that the compensatory nature of damages did not apply to

the assessment of damages. This was a stance she found to be "untenable". Further, she agreed that the Arbitrator had erred by overlooking several factors in his assessment of damages, namely:

(a) the fact that another contractor, and not Northern would be carrying out the rectification works;

(b) the fact that the quotation presented by United was the lowest of three received from reputable lift contractors and there was no basis to suggest that this quotation was not genuine or had been inflated; and

(c) the fact that the price of the brackets at $240 were based on 18kg brackets and not 33kg brackets as required by the rectification works.

15 The judge ordered that the award be remitted to the Arbitrator for reassessment, taking into account the errors stated in her judgment. Northern appealed.

Issues arising on appeal

16 Before this court, Northern submitted that the judge had erred on three grounds: first, Northern contended that the judge erred in accepting that a valid question of law arose from the award. Second, if at all there was a question of law, it was a matter unique to the facts of the present case and should have been regarded as a "one-off" point. As such, the Arbitrator needed to be obviously wrong before leave should have been granted. Lastly, Northern contended that the judge failed to consider the fact that the question of law did not substantially affect the rights of any party since it only concerned a differential in the assessment of damages of approximately $15,000.

Whether there was a question of law arising from the award

17 Section 28 of the Act confers upon the High Court a power to grant leave to appeal against an arbitration award if there is a "question of law", arising from the award, to be determined. As a preliminary point, it is essential to delineate between a "question of law" and an "error of law", for the former confers jurisdiction on a court to grant leave to appeal against an arbitration award while the latter, in itself, does not.

18 An opportunity arose for comment in *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [2000] 1 SLR 749. In that case, G P Selvam JC (as he then was) stated at [7]:

> A question of law means a *point of law in controversy* which has to be resolved after opposing views and arguments have been considered. It is a matter of substance the determination of which will decide the rights between the parties. … If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court. [emphasis added]

19 To our mind, a "question of law" must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere "error of law" (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.

20 It would be necessary to examine United's main contentions against the Arbitrator's second award in order to determine whether a question of law had arisen in this case. Its first point was that

the Arbitrator had wrongly based his assessment of damages on Northern's quotations, which were at cost, and did not have a profit element. Secondly, it argued that the Arbitrator had wrongly assessed the price of guide rail brackets on the basis of 18kg guide rails and not 33kg guide rails as required in the rectification. United contended that these errors demonstrated that the Arbitrator had disregarded the compensatory principle in his assessment of damages and that there were no grounds on which he could base his assessment.

21 United's case was, therefore, founded on the premise that the Arbitrator had committed an *error of law* in failing to apply the compensatory principle. That was a wrong premise. The onus of crafting the question of law that required the court's determination lay with United. Neither party, however, disputed that the compensatory principle is a principle of law that applies in the assessment of damages for breach of contract. The Arbitrator himself readily acknowledged the compensatory principle when he stated at [157] of his first award:

> I agree on the application of the principle in the Court of Appeal case of *Kassim Syed Ali* that "Damages are compensatory, and one cannot seek compensation *in vacuo*. Compensation must be measured against the loss suffered."

22 From the foregoing passage, it appeared to us that the Arbitrator had rightly based his assessment of damages on the compensatory principle. If there was a problem, it lay in the factors he considered or omitted to consider when computing the quantum of the cost of rectification. For example, the judge below had found that the Arbitrator had failed to consider the fact that Northern's quotations were at cost, and would not be adequate compensation. This was an error in his application of the compensatory principle. We were, therefore, of the opinion that the question of law formulated by United was artificial. On the facts, the real issue turned on the validity of the factors that the Arbitrator had taken into account when assessing the quantum of damages. United's application for leave should not have succeeded on the grounds above. In any event, we went on to address the secondary issue of whether, on the assumption that there was a question of law to be determined, leave should have been granted. The crux of this issue concerned the question whether the appeal involved a "one-off" point that would have no interest beyond that of the parties themselves.

Whether the question of law raised was a "one-off" point

23 What would constitute a "one-off" point depends on the circumstances of each case. In *The Nema*, Lord Diplock held at 743 that:

> [I]f the decision of the question of construction in the circumstances of the particular case would *add significantly to the clarity and certainty of English commercial law* it would be proper to give leave … bearing in mind always that a superabundance of citable judicial decisions arising out of slightly different facts is calculated to hinder rather than to promote clarity in settled principles of commercial law. [emphasis added]

Where the issue relates to the interpretation of clauses in standard form contracts, this is usually an indication that it is not a "one-off" point. Where it does not involve the construction of the terms of an agreement, the approach set out by this court in *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 3 SLR 682 at [29] is instructive:

> Confronted with the problem of characterisation – as to whether a question of construction falls within or without either guideline – the better approach, suggests Thomas [in his *Appeals from Arbitration Awards* (Lloyd's of London Press Ltd, 1999)], is not to embark on the exercise by first

attempting an all-embracing definition of a "one-off" contract or clause, or of a standard form contract or clause, but by emphasising the underlying rationale associated with the characterisation. *Thus the essence of the "one-off" concept is that it*

> *raises an issue of concern which is confined to the particular contracting parties and "in which the general market and commercial fraternity has no interest". It is a "question of a singular character unlikely to recur"*. It is this associated philosophy which calls for initial emphasis, so that the threshold question comes to be framed not in terms of seeking a meaning of the phrase "one-off'"when used in relation to contracts, but as an enquiry into the degree of interest in the resolution of the contractual dispute in issue: at para 5.2.3.13.

Conversely, the crux of the "standard" concept is that "the potential interest extends beyond the immediate contracting parties to the community at large or to a determinable section of the community" …

[emphasis added]

24 In the present case, we found that the dispute turned on the Arbitrator's application of an established principle of law to the particular facts of the case. The purported errors committed by the Arbitrator were dependent on events that were of a singular character, unlikely to recur. We were thus of the opinion that the findings on this dispute would have little application beyond the parties and the matter should have been regarded as a "one-off" point.

Whether the Arbitrator was obviously wrong

25 Since the dispute involved a one-off point, the established authorities required United to show that the Arbitrator was obviously wrong: *Invar Realty Pte Ltd v JDC Corp* [1998] SLR 444 and *The Nema*. Turning to the reasoned award of the Arbitrator, we were of the view that it could not be said that he was obviously wrong. United had contended that the Arbitrator was obviously wrong on three counts:

(a) the Arbitrator was wrong to have assessed the price of guide rails brackets at $240/unit as these were based on 18kg brackets, and not 33kg brackets, as required by the rectification works;

(b) the Arbitrator under-compensated United when he assessed the damages based on Northern's quotations, failing to consider the fact that Northern was not the company carrying out the rectification; and

(c) the Arbitrator had been inconsistent in his findings.

26 In relation to the first alleged error, United's counsel argued that it arose from the Arbitrator's reliance on an invoice tendered by Northern, which listed the unit price of guide rail brackets at a rate of $240. During the arbitration, United's expert was cross-examined on his quoted price of $420, and queried on the large differential. His answer was simply that there could be a difference in quality. The Arbitrator found United's quoted price of $420 to be excessive. At [49] of his second award, he held that "in the absence of any explanation as to how the respective unit rates were derived, I assess the sum of S$57,360.00 (S$240.00 x 239 pieces) for this item".

27 It later transpired that the price listed in the invoice was referring to 18kg brackets, and not 33kg brackets, as required by the rectification works. This was a point not raised with the Arbitrator

either by counsel or the witness under cross-examination. The Arbitrator could not be faulted for that. At the appeal, counsel for United conceded that this was not an error evident from a perusal of the reasoned award.

28 Turning to the second alleged error, we were of the view that this was similarly not apparent from the award. In his second award, the Arbitrator had set out comprehensive grounds justifying his rejection of United's quotes as excessive. We would just cite a few examples. In rejecting United's quotation for guide rails, the Arbitrator stated at [45]:

> Even after considering Mr Tan's explanation that his unit rate of 550 for guide rails included a mark up, that it included fishplates, transport, freight etc, and that it was from a different source (Savera, Spain) (NE28), I find this unit rate to be excessive in the absence of further relevant details.

In comparing the quotations from ES-1, United's lift contractor, and V Elevator, Northern's lift contractor, the Arbitrator found at [36] and [39]:

> I am of the view that both the "completion period" of 3 weeks per lift stipulated in the Claimants' [United's] said letter and the 18 days assessed by Mr Tan were excessive … Although ES-1's quotation included S$2,000.00 per lift for "Rental fee for welding set and generator set for site modification work", Mr Tan admitted that it was not necessary to have a welding set because "the sub-contractors can do welding" (NE22); nor did Mr Tan convince me on the need to rent a generator set. For these reasons, Mr Tan was therefore unable to justify this part of the quotations.

29 From these paragraphs, it appeared to us that the Arbitrator was trying to ascertain, from the evidence, which was the more reasonable price between the varying quotations tendered by each party. The Arbitrator had rejected a number of United's quotations because he was of the opinion that the figures presented by its independent contractor had been exaggerated, and could not be justified. He reached that conclusion after listening to the oral evidence of the witnesses who had been called to testify on the accuracy and veracity of the quotations. It was clear that he was fully entitled to reach the conclusion that he did, and in any case, his conclusions were amply supported by the grounds stated in his reasoned award. Given the foregoing, we could not accept that the reasoned award showed an obvious error on the Arbitrator's part.

30 Finally, in relation to the third alleged error, we do not think that the Arbitrator had been inconsistent in his findings. He had computed the quantum of damages by drawing from quotations tendered by United, and at other times, on the prices submitted by Northern. There is no rule of law that requires the assessor to either accept the figures submitted by one party wholly or not at all. The Arbitrator was fully entitled to consider which of the two varying quotations tendered were more reasonable, in the light of the testimony given by the witnesses from each party. On a perusal of the reasoned award, this appears to be what the Arbitrator had done. There was no indication on the face of the record that he had under-compensated United by assessing damages on the basis that rectification was to be done at cost.

31 Consequently, we found that even if there were a valid question of law arising from the award, leave should not have been granted as it involved a "one-off" point and it could not be shown, from a mere perusal of the award, that the Arbitrator was obviously wrong on it.

Whether the question of law substantially affected the rights of the parties

32 Before we dispose of the appeal, we would address one final submission given by counsel for Northern. Counsel relied on s 28(4) of the Act, which reads:

> The court shall not grant leave under subsection (3)(b) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and the court may grant any leave subject to such conditions as it considers appropriate.

Here, Northern contended that the determination of the question of law did not have a substantial effect on the award, as it would have made a difference of only $15,000 in the quantum of damages since United was only contesting the Arbitrator's assessment on part of the award. The sum of $15,000 was the differential between United's quotations and Northern's quotations of $150,000. Assuming that the Arbitrator then made allowance for a profit element in Northern's quotations, Northern contended that this would at most have been about 10% of the differential. The profit margin must be ascertained through evidence, and in this case, the margin can be gauged through the difference in the quotations. United was unable to persuade us otherwise. In *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd*, this court accepted the interpretation of the English Court of Appeal in *Pioneer Shipping Pte Ltd v BTP Tioxide Ltd* [1980] QB 547 (*The Nema*) at 564, where Lord Denning MR found that the phrase "substantially affect the rights' meant that the point of law must be a "point of practical importance – not an academic point – nor a minor point". The question as to how "substantially" was to be measured, remained. Whether a claim was substantial or not can sometimes be considered in absolute terms. We could arbitrarily say that $10 is insubstantial. There will come a point where one might not be able to declare confidently that the given sum is substantial or otherwise, without considering the context of the claim. In *The Evimeria* [1982] 1 Lloyd's Rep 55, the court was of the view that the claim for $20,000 was not substantial in the context of that case. There, the arbitrator found against the applicant on seven of eight grounds. The other grounds were not contested in the application for leave to appeal against the arbitrator's award. We agree with the court in *The Evimeria* that the granting of leave is a discretionary exercise and as such, is not governed by rules, provided that the statutory criteria are satisfied. Hence, a judge's exercise of her discretion to grant leave should not be disturbed if there was an error of law in the award. This point had no material effect in the present case since we are of the view that leave should not have been granted as no question of law arose for determination from the award. The question of substantiality is largely a matter of discretion, and such issues are best discussed if they are necessary, and clearly defined. In the present appeal, the question as to whether the court below exercised its discretion correctly on the substantiality point did not arise because the substantiality issue was not raised there.

Appeal allowed.