Neutral Citation No [2003] NIQB 14 | *Ref:* **COGC3866**

Judgment: approved by the Court for handing down | *Delivered:* **13/02/2003**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

IN AN ARBITRATION APPLICATION BETWEEN:

BOOTS THE CHEMIST LIMITED

Applicant;

and

WESTFIELD SHOPPING TOWNS LIMITED

Respondent;

and

IN THE MATTER OF AN APPLICATION BETWEEN:

WESTFIELD SHOPPING TOWNS LIMITED

Claimant;

and

BOOTS THE CHEMIST LIMITED

Respondent.

COGHLIN J

[1] This is an application by Boots The Chemist Ltd ("the applicant") pursuant to section 69(2)(*b*) of the Arbitration Act 1996, for leave to appeal to the court from an interim award made by the Arbitrator Mr Brian Kennedy FRICS, FCIArb. For the purposes of the application, the applicant was represented by Mr Horner QC while Mr Hanna QC appeared on behalf of Westfield Shopping Towns Ltd ("the respondent"). Section 69(5) of the Arbitration Act 1996 ("the Arbitration Act") provides that the court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required. In this case it did seem to me that a hearing was required and, consequently, I notified the parties as to the matters about which I would wish to hear oral submissions. I am grateful to both counsel for the clarity and economy of their oral submissions from which I derived considerable assistance.

The Statutory Framework

[2] The relevant parts of section 69 of the Arbitration Act provide as follows:

> "69-(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. ...
>
> (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 is 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."

The Relevant Case Law

[3] Section 69(3)*(c)* of the Arbitration Act was passed to give statutory effect to guidelines articulated by the House of Lords in cases decided prior to the passage of the Act. In Pioneer Shipping Ltd v B C P Tioxide Ltd (the "Nema") [1982] AC 724 Lord Diplock stated at page 742-3:

> "Where, as in the instant case, a question of law involved is the construction of a 'one-off' clause the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge

upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the Arbitrator is obviously wrong. But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impressions to the contrary, that the Arbitrator might be right, he should not grant leave; the parties should be left to accept, for better or for worse, the decision of the Tribunal that they had chosen to decide the matter in the first instance. The instant case was clearly one in which there was more than one possible view as to the meaning of the 'one-off' clause as it affected the issue of divisibility ...

For reasons already sufficiently discussed, rather less strict criteria are in my view appropriate where questions of construction of contracts in standard terms are concerned. That there should be as high a degree of legal certainty as is practicable to obtain as to how such terms apply upon the occurrence of events of a kind that it is not unlikely may reproduce themselves in similar transactions between other parties engaged in the same trade, is a public interest that is recognised by the Arbitration Act 1979 particularly in section 4. So, if 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 in a case sufficiently substantial to escape the ban imposed by the first part of section 1(4) 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. But leave should not be given even in such a case unless the judge considered that a strong prima facie case had been made out that the Arbitrator had been wrong in his construction; and when the events to which the standard clause fell to be applied in the particular arbitration were themselves 'one off' events, stricter criteria should be applied on the same lines as those that I have suggested as appropriate to 'one off' clauses."

[4] The Nema guidelines were confirmed by Lord Diplock in Antaios Compania Navira SA v Salen Rederierna AB [1985] AC 191 although, in the latter decision, he added that the Guidelines were not intended to be all embracing or immutable but subject to adaption to match changes in practices when these occurred or to refinement to meet problems of kinds that were not foreseen. Finally, in the recent decision of CMA CGM SA v Beteiligungs – Kommanditgesellschaft "The Northern Pioneer" [2002] EWCA Siv 1878 at paragraph 60 Lord Phillips MR, giving the judgment of the Court of Appeal, expressed the view that the test imposed by section 69(3)*(c)(ii)* of the Arbitration Act, namely, that the decision of the Arbitrator should be at least open to serious doubt, was broader than Lord Diplock's

requirements in the Nema that permission to appeal should not be given "unless the judge considered that a strong prima facie case had been made out that the Arbitrator had been wrong in his construction."

Applying the Statutory Test

[5] I have carefully read the written materials which were placed before the Arbitrator together with his interim award dated 14th October 2002. I have also taken in to account the affidavits submitted by the parties in relation to the application for leave to appeal and the helpful oral submissions from counsel. Having done so, I am satisfied that the question which the applicant seeks to raise for the opinion of the Court of Appeal is one which the Arbitrator was required to decide and that the determination of this question will substantially affect the rights of the parties. However, having done so, I am quite satisfied that the decision of the Arbitrator could not be described as "obviously wrong".

[6] In relation to the issue as to whether the question is one of "general public importance" I note that, at paragraph 7 of his affidavit dated 25th November 2002, Mr Cockcroft, the solicitor acting on behalf of the respondent, accepted that this "general form of lease" is one which is widely used in the Castle Court Shopping Centre in Belfast. The affidavit sworn by Mr Kenneth Crothers, Chartered Surveyor, confirms that he acted on behalf of Eason & Son (NI) Ltd in negotiating a rent review with regard to units held by that company in the respondent's Castle Court Centre in the course of which the floor area taken up by an escalator was excluded. Apart from the applicant, no other leases have been placed in evidence but I am prepared to accept that leases with similar terms relating to rent review are "widely used" in Castle Court. However, I remain unpersuaded by the applicant's submissions that such circumstances constitute the relevant provisions in this lease a question of general public importance. Such a description is usually reserved for contracts on standard terms of a type that are commonly encountered in the commercial world. In the 21st Edition of "Russell on Arbitration" (Sweet & Maxwell Ltd 2003), the learned authors give as examples Lloyds form of insurance policies, various forms of building contracts and charter parties. It does not seem to me that leases in the Castle Court Shopping Centre, even if "widely used" in that centre, fall easily within this class of document. Furthermore, the question which the applicant seeks to refer to the Court of Appeal, namely, "was the Arbitrator correct in determining that under Part V in the event that the existing stairway reduces rental value of the premises (which is a matter of rental evidence) clause 2.4 will apply and any diminution in the rental value attributable to the stairway is thus to be discarded in arriving at the rental value at review", appears to be dependent upon the specific circumstances and contractual provisions in this particular lease and I bear in mind the opinion expressed by Lord Diplock in the Nema that when the events to which the standard clause falls to be applied in the particular arbitration are themselves "one-off" events, stricter criteria should be applied on the same lines as those that he had suggested where appropriate to "one-off" clauses, namely, that the court must form the view that the Arbitrator was "obviously wrong". In the circumstances, I do not consider that the applicant has established that the question

sought to be raised is one of general public importance within the meaning of section 69(3)(*c*)(*ii*).

Is the Arbitrator's decision "open to serious doubt".

[7] In view of my conclusion in relation to the issue as to whether a question of general public importance has been raised, it is not strictly necessary for me to consider this issue. However, I do so for the sake of completeness and out of deference to the submissions of counsel and the decision of the Arbitrator. I have carefully read the section of the interim award in which the arbitrator set out his reasoning in relation to the relevant question at paragraphs 9.12 to 9.23. Suffice it to say that while, as with most legal issues, it is possible to discern both arguments and counter-arguments, I am unable to form the view that the decision is open to "serious doubt".

[8] Accordingly, I dismiss the application for leave to appeal.