STINGING JUDICIAL CRITICISM, LOSS OF CONFIDENCE AND ERRORS OF LAW NOT SUFFICIENT TO SET ASIDE AN AWARD

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In 2002 a dispute started when a partner left a firm of accountants to set up his own practice. Numerous disputes arose between the firm and the partner relating to the balance in the former partner's current account, payment of his pension and repurchase of his shares. In 2008 an accountant was appointed to arbitrate the dispute in England under the CIArb Rules. Nine years later that dispute is still running.

In April 2016 the arbitrator issued his fifth award dealing with the issue as to which party should bear the costs related to the dispute concerning repurchase of the retiring partner's shares. In the award the arbitrator decided that, as the retired partner "was substantially more successful than the claimant firm", the firm should pay the costs of the retired partner. The firm applied for permission to challenge that award under section 69 Arbitration Act 1996 on grounds that it was based on an error of law. Additionally, and this is the most interesting aspect of the case, the firm applied for the award to be set aside, rather than remitted to the arbitrator for reconsideration, because of 'stinging' judicial criticism of the arbitrator, his errors of law and their lack of confidence in his ability given his mistakes.

Maurice J Bushell & Co v Graham Irving Born [2017] EWHC 2227 (Ch)

Reasons for permitting a challenge

In July 2016 the firm was granted permission by Snowdon J to challenge the award as he was satisfied that the arbitrator had erred in law when reaching his decision that the former partner was 'substantially more successful'. Snowdon J found that the arbitrator had erred in two respects. His first error was to take into account the fact that in another dispute, not involved in the arbitration and including other parties, the former partner had received a favourable settlement from the firm. It was an express term of that settlement that it was not and should not be construed as an admission of liability or wrong doing on the part of any of the parties. His second error was that a substantial aspect of the dispute had not yet been dealt with so he was premature in concluding that overall the retired partner was substantially more successful than the firm.

The remedy - set aside or remission?

At the appeal hearing Rosen J agreed with Snowdon J that the arbitrator had erred in law. In the circumstances, the principle issue to be decided was what was the correct remedy. Section 69(7) Arbitration Act 1996 provides that on an appeal on a point of law the court may:

- Confirm the award;
- Vary the award;
- Remit the award to the arbitrator in whole or in part; or
- Set aside the award in whole or in part.

Additionally, section 69(7) provides that the court should not exercise its power to set aside an award 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.

The firm argued that it had lost confidence in the arbitrator given his mistakes. Additionally, they argued that 'stinging criticisms' made by a judge in respect of the arbitrator's manner of dealing with an issue in an appeal of another aspect of the dispute should also be taken into account, particularly as the arbitrator had flouted the judge's decision and embarked on a '*frolic of his own*'. Conversely, the retired partner refuted the criticisms of the arbitrator and argued that an error in law did not merit setting aside the award so remission was appropriate.

Referring in particular to the decision in *Fence Gate – v – NEL Construction Ltd* [2001] 82, Rosen J decided that the principle to apply in determining this issue was whether an objective bystander might reasonably conclude that one of the parties will not obtain a fair and impartial hearing. In determining that setting aside was not appropriate, Rosen J decided that it was notable that the grounds of the application were an error of law and not misconduct or irregularity and the firm did not raise any grounds for impugning or seeking to cast doubt on the impartiality of the arbitrator.

Rosen J concluded that there was no evidence to impugn or cast doubt on the arbitrator's impartiality so there was no justification for setting aside the award and having regard to the fairness between the parties and the primacy of the arbitration process it was appropriate to refer it back to the arbitrator for reconsideration. Rosen J noted that to find remission inappropriate would require there to be a real risk that, even with the benefit of the Court's judgment as to how to proceed, the arbitrator would still be consciously or unconsciously biased against the firm.

Implications for the future?

Clearly this arbitration has been hard fought at every corner causing it to drag on but the very fact that it has been going on for eight years and relates to matters 15 years ago suggests that something has gone badly wrong with the process. At one level it is not surprising that one of the parties had lost confidence in the arbitrator but if there is any lesson to be learnt from this it must be that an application to set aside an award will need evidence of some misconduct or irregularity and not just a loss of confidence in the arbitrator's ability.

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