COMMERCIAL COURT CONFIRMS ABUSE OF PROCESS TEST

Hashwani v Jivraj [2015] EWHC 998 (Comm)

Introduction

By a judgment handed down on 23 April 2015 in *Hashwani v Jivraj* [2015] EWHC 998 (Comm), the English Commercial Court (Walker J) held that it was an abuse of process for a party to contend that an arbitral award had been made and that that award had been produced by a valid arbitrator where that party had adopted the position, in earlier litigation, that the relevant person had not been an arbitrator at all.

Background

In 1981, Mr Hashwani and Mr Jivraj entered into a joint venture agreement ("the JV Agreement"), which contained an arbitration clause which stipulated that disputes were to be referred to a tribunal consisting of three respected members of the Ismaili community – the community to which both of the parties also belonged.

In 1988, the parties agreed to part company and, despite the arbitration clause, agreed to submit outstanding issues to arbitration or conciliation by a single member of the Ismaili community, namely Mr Zaher Ahamed. Mr Ahamed issued a determination in 1993.

The 2008 proceedings

In separate proceedings ("the 2008 proceedings"), Mr Hashwani unsuccessfully challenged the validity of the arbitration clause contained in the JV Agreement because Mr Hashwani's purported appointment of an arbitrator had been declared invalid (the appointee had not been an Ismaili). Mr Hashwani denied that there had been an arbitration before Mr Ahamed and denied that Mr Ahamed's determination constituted an arbitral award.

The 2013 proceedings

In March 2013, Mr Hashwani brought fresh proceedings ("the 2013 proceedings"). As part of the 2013 proceedings, contrary to the position he had adopted in the 2008 proceedings, Mr Hashwani contended that Mr Ahamed had acted as an arbitrator and that the determination in 1993 was a partial arbitral award.

Mr Ahamed passed away in 2014 and Mr Hashwani applied to the Commercial Court for directions for the selection of an arbitrator and an order that there be no stay of any High Court proceedings to resolve disputes relating to the JV Agreement. Mr Jivraj submitted that the fresh proceedings should be struck out as an abuse of process on the grounds that the fresh proceedings were vexing Mr Jivraj, and engaging the court's resources, twice in respect of the same subject matter. Furthermore, Mr Hashwani's contentions ought to have been forward in the 2008 proceedings (if only as alternative arguments).

Decision

Walker J gave judgment for Mr Jivraj.

On the facts, there was a "formidable case of abuse of process" on the part of Mr Hashwani. The arguments forming the basis of Mr Hashwani's claim in the 2013 proceedings could and should have been expressly notified and advanced, even if only as alternative claims or arguments, in the 2008 proceedings. However, Mr Hashwani had not even hinted at these arguments in the course of the 2008 proceedings.

There was a strong public interest in the finality of litigation, and that public interest was not qualified in any way in relation to alternative claims. Furthermore, there was a general rule that litigants should bring all their claims at the same time and had no right to bring their case in piecemeal fashion. At the very least the court should have been told if there were alternative grounds that were reserved.

Mr Hashwani's decisions not to assert that Mr Ahamed had been an arbitrator and not to seek the court's assistance when Mr Ahamed was still alive had been deliberate and tactical decisions. It was wrong for Mr Hashwani to try to use fresh proceedings as a way of making claims that he should have, but failed, to make in the 2008 proceedings.

As to abuse of process, Mr Hashwani had argued that if there was merit in a claim then, in the absence of bad faith, the court should not strike out that claim. Walker J rejected this argument as incompatible with existing case law on the principles of abuse of process. There was no requirement of bad faith, although there will rarely be a finding of abuse of process unless the fresh proceedings involve 'unjust harassment'. Walker J had "no doubt" that Mr Hashwani's fresh proceedings constituted unjust harassment of Mr Jivraj and an abuse of the court's process.

Concluding Remarks

The decision contains a strong restatement of the principles of abuse of process in English procedural law and demonstrates the importance of identifying arguments early in order to bring claims in a clear and complete state. To bring a claim in an incomplete state to the English courts leaves litigants vulnerable to a strike out application.

This litigation was previously the subject of an important decision of the UK Supreme Court regarding the question of whether the arbitration clause was unlawful because it discriminated on the grounds of religion contrary to UK employment regulations: *Jivraj v Hashwani* [2012] UKSC 40. The Supreme Court confirmed that an arbitrator's role was an independent provider of services, not a relationship of subordination or employment, and therefore the relevant regulations did not apply.

The Supreme Court also refused to refer the case to the Court of Justice of the European Union ("CJEU") because the relevant issues had already been resolved by the CJEU in a number of cases. A complaint by Mr Hashwani to the European Commission in relation to the failure to refer the matter to the CJEU has yet to be resolved.

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