Neutral Citation Number: [2007] EWHC 2544 (TCC)
Case No: HT 07 257

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 2nd November 2007

Before :

MR JUSTICE AKENHEAD

- -

Between :

PENWITH DISTRICT COUNCIL **Cla**

- and -

VP DEVELOPMENTS LIMITED (IN COMPANY VOLUNTARY ARRANGEMENT) **Defe**

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William Webster (instructed by **Penwith District Council**) for the **Claimant**

Simon Lofthouse QC (instructed by **Donald Pugh**) for the **Defendant**

Hearing dates: 26 October 2007

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Judgment

MR JUSTICE AKENHEAD:

Introduction

1.
Pursuant to its arbitration claim form, Penwith District Council ("Penwith") seeks to appeal against the Interim Award of an Arbitrator, Mr Ian Salisbury, dated 3 July 2007. This case is a prime example of a wholly unjustified application.

2.
By a written contract under seal dated 5 May 1987, Penwith employed the Respondent to this claim, VP Developments Ltd ("VP"), to carry out planned maintenance works at the Alverton Estate, Penzance, Cornwall. There was an arbitration agreement in that contract. That contract made provision for interim payments and ultimately a final payment to VP. The works were practically complete in September 1988.

3.

In March 1996 VP served a notice of arbitration. The arbitration overall appears to have proceeded very slowly. It is still proceeding. Following the death of the first arbitrator, Mr Salisbury was appointed as Arbitrator in June 2003.

4.
Essentially, VP's claims in the arbitration relate to sums due to them on their final account. The net sum claimed is just over £350,000. There was a first substantive hearing before Mr Salisbury in May 2007, apparently resulting in an award in favour of VP. Many of the items adjudicated upon by the Arbitrator were small and, I was informed, further hearings on disputed account issues are planned for the week commencing 29 October 2007.

5.
However, a further important issue arose between the parties, namely relating to whether or not VP was entitled to compound interest on any principal sums awarded to it.

6.
To that end, a hearing took place on 2 July 2007, with Penwith represented by counsel and VP by its solicitor. In essence, the issue before the Arbitrator was whether or not there was a sufficient foundation based on the second limb in the rule in **Hadley v Baxendale** to justify an award of compound interest. Prior to that hearing there was a substantial exchange of submissions and evidence, including contemporaneous documents and witness statements. At the hearing two witnesses (at least) were orally questioned, namely Mr Murton, Chief Housing Technical Officer at Penwith prior to this contract being entered into, and Mr Venn, who was the controlling force behind VP.

7.
In his Interim Award on VP's application for compound interest of 3 July 2007, the Arbitrator essentially found that VP had succeeded in demonstrating that the second limb of **Hadley v Baxendale** applied. He therefore formed the view that the financial loss so suffered was to attract compound interest from 1 October 1989.

The Award

8.
This Award is relatively short, comprising eight pages, some 10 preamble paragraphs and some 12 substantive paragraphs. The preamble paragraphs set out the background and the course of the hearing. It is clear that much legal authority was quoted to the Arbitrator. Given the date of the Award, it is unsurprising that the parties were unable to refer the Arbitrator to the later important House of Lords' decision in **Sempra Metals v Inland Revenue Commissioners** [2007] UKHL 34. Three parts of the preamble are relevant to the argument before me:

"F. While denying paragraph 41 of the claim, contending that any award should attract simple interest at the annual rate of 7.61% from 1 October 1989, the Respondent [Penwith] has conceded the following:

i) that I have the discretion to determine that interest is to be compounded under subsection 19A(2) of the 1950 Act and the second limb of **Hadley v Baxendale**.

ii) that if I find that compound interest is applicable, then the rate to apply is 3% above base rate with 3-monthly rests;

iii) that interest should run from 1 October 1989 to the date of my award (on the substantive issues) (the Claimant contending for a start date of 29 September 1989), and

iv) that even though the Claimant has years when its accounts show no levy of interest, there shall be no fallow periods.

G. Both parties agreed that although nuanced by later decisions, the rule of the second limb in **Hadley v Baxendale** remains absolute. Mr Pugh [for VP] however had drawn the criteria which he contended the Claimant must satisfy from **The Lips**, where Neill LJ elaborated the **Hadley v Baxendale** principle to include not only that the facts must be such as to lead the parties to contemplate that late payment would lead to loss,

'... but where the proved facts are such as to lead to the inference that the parties would have reasonably contemplated the relevant special loss[,] the loss can be properly recovered.'

H. I accept this proposition and also Mr Pugh's submission that I consider the facts in relation to the law as to the recovery of damages at common law for a breach of contract which consisted of the late payment of money as it was particularly described by Hobhouse J in **International Minerals and Chemical Corporation v Karl O Helm AG**, and cited with approval by Neill LJ in **The Lips**, summarised by Mr Pugh in his written submission but as originally stated:

'It follows that the plaintiff, where he is seeking to recover damages for the late payment of money, must prove not only that he has suffered the alleged additional special loss and that it was caused by the defendant's default, but also that the defendant had knowledge of the facts or circumstances which make such a loss a not unlikely consequence of such a default. In the eyes of the law, those facts or circumstances are deemed to be special, whether in truth they are or not, and knowledge of them must be proved. Where, as in the present case, the relevant facts or circumstances are commonplace, the burden of proof will be easy to discharge and the courts may well be willing to draw an inference of knowledge; in other cases, there may be a question which would, in any event, have had to be dealt with under the second rule in **Hadley v Baxendale** , and then the burden of proof will be more significant.'"

9.
It now emerges, and both Counsel accepted, that the concession made at F i) was not in fact made by Penwith or its Counsel, albeit that it was accepted that the Arbitrator did have a discretion under Section 19A(2) of the Arbitration Act 1950.

10.
The Arbitrator at Paragraphs 1 to 4 examined and considered the documentary evidence (correspondence) and the witness evidence. The relevant correspondence summarised in the Award related to an exchange of correspondence in February and March 1987 between VP and Penwith, which was after VP's tender had been submitted but before the contract was entered into:

(a) In its letter to Penwith of 26 February 1987, VP wrote as follows:

"A problem, to us, has arisen with our window suppliers as far as our credit facilities are concerned and seek your help in an effort to resolve the situation.

The problem lies in the fact that the cost of the windows for the first stage amounts to around £16,000 Plus VAT and we have no credit limit above £10,000 (inc. VAT) with any other supplier for a reference to the window supplier. The window supplier, Ideal Williams, have granted us credit facilities of up to

£10,000 but would require us to remit to them the difference on the day of delivery. We are not in a position to finance this difference and would ask, if, for this reason that an interim payment of the difference could be arranged by yourselves.

We trust you will appreciate our predicament and await your favourable reply."

(b) Mr Murton wrote back to VP on 13 March 1987:

"Your letter dated 26th February has been passed to me for my comment. I am afraid that your request as stipulated in the third paragraph is not possible through the Contract.

I have discussed the matter with the Chief Executive and Treasurer, and understand that the Chief Executive will be arranging to see you regarding this matter in his capacity as the 'Employer', possibly with a view to discussing an alternative outside the scope of the Contract."

(c) On 18 March 1987, Penwith wrote to VP, materially, as follows:

"I would like to point out that upon checking with the Council's Legal Department, it was found that the contract documents were not tied up yet due to your difficulty with your credit facilities for the supply of new window frames. I would advise you to contact the Council's Legal Department to sort out any outstanding items in the contract document as soon as possible. I also point out that the contract must not start until this problem is cleared up."

11.
Materially, at Paragraphs 3 and 4 of his Award, the Arbitrator referred to the following evidence:

"3 Mr Venn was asked by Mr Webster [Penwith's Counsel] whether the letter he had written was the usual and expected commercial reaction to the credit barrier that his company faced and reflected no special circumstances. But Mr Venn replied that his company was already in debt at the bank, and that the consequence of the Respondent's refusal was, of necessity, an increase in the Claimant's borrowing from the bank by means of an increase in the company's arranged facility. Mr Venn produced his company's accounts and I accept the account he gave of the Claimant's financial position. [It was accepted that this showed interest payments to VP's bank.]

4 Mr Murton's evidence supported [Mr Venn's] contention. … He told me that at that time Mr Venn was a member of the Council, also carrying office in his political party. Mr Murton described Mr Venn as a 'powerful man' and stressed that in consequence it was important to him that meticulous care was taken to ensure that this contract was dealt with properly. Mr Murton, understandably cautious about his recollection of the facts after a period of 20 years, nevertheless assured me that if Mr Venn had presented his company as being in serious financial difficulty, the Respondent would not have agreed to employ it. This accords with a warning given to the Claimant in a second letter dated 18 March 1987, where the Respondent makes it clear that unless the Claimant resolved its credit arrangements for the supply of the new windows the contract could not start."

12.
This led the Arbitrator to his factual conclusion in Paragraph 5 of the Award:

"In my view these letters lead to the clear inference that the parties would have contemplated, reasonably, that in order to proceed with the works the Claimant would have to do precisely what it was that Mr Venn told me it did, namely to increase its borrowing at the bank. By the application of the rule from **International Minerals** it is not necessary for the Respondent to have had actual knowledge of the Claimant's financial circumstances. The Claimant's letter and an intimate knowledge

of contracting arrangements lead conclusively to the inference that increased borrowing would be the solution, indeed the only likely solution, to the Claimant's predicament. The Respondent could, at this stage, have prevented the contract from starting but did not. It was aware that if the Claimant proceeded with the contract, it would do so on the basis of these circumstances. I impute that knowledge to it."

13.
He then applies those facts to the law in Paragraph 6:

"These were special circumstances within the meaning of **Hadley v Baxendale**. It is not necessary, as was suggested in correspondence by Mrs Sprague [Penwith's solicitor] to Mr Murton and the prospective witnesses that the Claimant should have been in financial difficulty early in 1987 for the second limb of **Hadley v Baxendale** to apply. It was only necessary that the Respondent would reasonably conclude that in order to proceed with the order for windows, the Claimant would increase its borrowing at the bank. I have no doubt that this was the contemplation of both parties at the time when this correspondence was exchanged and in consequence of that exchange."

14.
In Paragraph 9 of his Award, he rejected an analysis by Penwith's Counsel that by the time the Contract came into being (two to three months after the correspondence in question) it can have had no meaningful impact on the parties' intentions. At Paragraph 9 he wrote:

"I have carefully read the authorities to which my attention has been drawn and I have not found any means whereby the second limb of **Hadley v Baxendale**, as a condition precedent, can subsequently be disapplied. In my view, the correspondence exchanged between the parties was of sufficient significance for them later not to be discounted. For these were not, despite the signatures merely clerical letters but were considered by senior officers at the Respondent's offices, including Mr Murton. In particular it seems to me that the rule, as it has more recently been expressed in **Victoria Laundry**, may be applied. First, the loss that actually resulted was reasonably foreseeable at the time of the contract as liable to result from the breaches that later occurred; secondly, at the time when the contract was made the interest later paid by the Claimant was reasonably foreseeable by the Respondent; and thirdly, the knowledge which may reasonably be imputed to have been possessed by the Respondent of the Claimant's special circumstances will have led in the ordinary course of things to the reasonable conclusion that in consequence of late payment, the Claimant would be subject to pay compound interest to its bank."

15.
He therefore concluded at Paragraph 10 as follows:

"I therefore find that the Claimant succeeds in demonstrating that the second limb of **Hadley v Baxendale** applies and award that the Claimant succeeds in proving special damages. The financial loss so suffered by the Claimant shall, under subsection 19A(2) of the 1950 Act, attract interest from 1 October 1989 at 3% over the Bank of England's base rate, compounded quarterly."

It was accepted that, although the Arbitrator may well mistakenly have allowed interest under the discretionary provision in Section 19A(2), it matters not, given the other accepted contentions set out in Preamble F.

These proceedings

16.

In the claim form, Penwith put its case as follows:

"3.1 … that the arbitrator erred in law in holding on the basis (a) of an exchange of correspondence (3 letters) between the parties in February/March 1987, and (b) the written and oral evidence of Geoffrey Venn … and Hugh Murton … that the second limb of **Hadley v Baxendale** had been made out (ie special circumstances) thereby entitling the Respondent to compound interest as damages rather than as interest on damages …

3.4 It is the Appellant's case that not only did the arbitrator fall into error in holding that the Respondent was entitled to special damages under the second rule of **Hadley v Baxendale**, but he also erred in law in holding that such evidence as was put to him entitled the Respondent [VP] to compound interest on any sum due to be paid to the Respondent whereas the Appellant would say that it should be confined to the net sum of £6,000 which was all the Respondent required for the purchase of the windows from his supplier …"

17.
Given that this arbitration was commenced before the Arbitration Act 1996 came into effect, this application is necessarily subject to the law as it pertained at that time, namely the Arbitration Act 1979 and authorities which followed it.

18.
There has been an exchange of a large quantity of witness statement evidence and exhibits, which included notes of the evidence before the Arbitrator, witness statements, the correspondence and the parties' skeleton arguments before the Arbitrator.

Law and Practice

19.
Section 1(3) of the 1979 Arbitration Act makes it clear that an appeal generally can only be brought with the leave of the Court. Section 1(4) states as follows:

"The High Court shall not grant leave under subsection (3)(b) above 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 …"

20.
Judicial guidance on this subsection was given by the House of Lords in two principal cases, **BTP Tioxide v Pioneer Shipping Co** [1981] 3 WLR 292 **(The Nema)** and **Antaios Compania Naviera SA v Salen Redierna AB** [1985] AC 191 **(The Antaios)**. From **The Nema** and **The Antaios** (and much jurisprudence which followed those) the following principles are applicable:

(a) There is no fetter on the judicial discretion to refuse leave under Section 1(3)(b): (see Lord Diplock in **The Nema** at 739F.)

(b) There is a presumption of finality with arbitral awards (ibid 739H and 742F).

(c) Save where issues relate to the construction of standard terms, the Arbitrator must be shown to have been obviously wrong (ibid 742H, 743A-F).

21.
It is clear that what is appealable (if leave is given) is a question of law. That might involve the construction of a contract term or it might involve the application of general principles of law.

However, one must differentiate between facts and the law. As Mustill J (as he then was) in **Finelvet AG v Vinava Shipping Co Ltd** [1983] 1 WLR 1469 at 1475A said, there are three stages (generally):

"(1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute.

(2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached.

(3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision."

As he goes on to say at page 1475D, it is only Stage (2) of that process which is the proper subject matter of an appeal under the 1979 Arbitration Act.

22.
The learned editors of Mustill and Boyd in The Law and Practice of Commercial Arbitration in England (Second Edition) say at page 592:

"A decision of type '(b)', often called a 'pure' finding of fact, or a finding of 'primary' fact, or of type (c), often called a 'secondary' finding of fact or an inference of fact, is in principle not subject to review."

That properly represents the law and practice in relation to appeals under the 1979 Act.

23.
As this Court and the Commercial Courts have said on many occasions, parties must not come to the Court seeking leave to appeal on an apparent question of law which on any sensible analysis is in reality an appeal on a question of fact. The Court will not and should not treat what may arguably be an incorrect finding of fact as a question of law. One cannot and should not "dress up" a question of law in the way in which Penwith has done on this application, namely a challenge based on a finding of fact which no reasonable or rational arbitrator allegedly should have come to. The authorities referred to and observations made by Ramsey J in **London Underground Ltd v Citylink Telecommunications Ltd** [2007] BLR 391 at Paragraphs 53 to 65 are of general application not only to applications under the Arbitration Act 1996 but also to those applicable under the earlier 1979 Act. There may be other redress when the Arbitrator in making findings of fact has acted perversely and (conjunctively) in breach of the rules of natural justice,

This case

24.
Mr Webster, Counsel for Penwith, argued strenuously that there was not only a question of law but that the Arbitrator had got it wrong. In 39 pages of skeleton argument and also for one hour orally, he sought to present a case to show not only that the Arbitrator was at least muddled on issues of law but had also reached a decision which no reasonable Arbitrator could have reached. There was, however, no application alleging any misconduct on the part of the Arbitrator (and quite properly so). He was reduced to saying that the Arbitrator had behaved contrary to the **Wednesbury** principles and had acted in an irrational way. He did accept, however, that the **Wednesbury** principles (applicable in the field of public law) were not on any proper analysis applicable here. He did, properly, however, concede that on its face the Arbitrator was "plausibly correct".

25.
Mr Lofthouse QC, Counsel for VP, responded both in writing and orally in much shorter order, the gravamen of his argument being that upon analysis there was not any question or error of law which could properly be the subject matter of any appeal. He also sought to argue that the Arbitrator's findings of fact could not be described as irrational but were, if anything, obviously right.

26.
I indicated at the conclusion of the argument that leave to appeal was not granted. My reasons are as follows:

(a) The Arbitrator made findings of primary fact in relation to the exchange of letters that took place between the parties prior to the entering into of the Contract.

(b) He then drew an inference from those letters and from oral evidence which he had heard.

(c) He then applied the law, namely that in relation to the second limb of the rule in **Hadley v Baxendale**, to those inferred facts. In effect he said that he inferred both parties pre-contract actually had in contemplation exactly the type of loss which was the subject matter of the Award, namely that related to the funding of an overdraft, that is compounded interest.

(d) He has clearly and correctly applied the law to those facts as found.

(e) Not that it is strictly relevant, in my view the Arbitrator's findings were rational and certainly not irrational.

27.
That is essentially the end of the argument on the authorities. There is no question of law which arises. Criticism of the Arbitrator, which I consider unfounded in any event, that there may have been some muddled thinking on the way to his conclusion, is immaterial. If the Arbitrator has made proper findings of fact and applied the material law to it, it matters not that he may have misread or misquoted an authority. For instance, a criticism that he misused the term "reasonably foreseeable" instead of "within the reasonable contemplation" is peripheral. My review of the Arbitrator's wording does not demonstrate any material error of law at all, and it is only material errors of law which can legitimately be the subject matter of an application for leave or permission to appeal.

28.
Thus, on any proper analysis, this application for leave to appeal from the Arbitrator's Award was without any merit.

General Observations

29.
The TCC and the Commercial Court are here to deal with proper applications for leave to appeal under the Arbitration Acts 1979 and 1996. For there to be a question of law there must be a properly arguable error of law.

30.
Applications for leave to appeal on questions of law must not be dressed up as questions of law when they are, on proper analysis, criticisms of the Arbitrator's findings of primary or secondary fact. It is not enough to say on an application for leave to appeal on a question of law that the Arbitrator made findings of fact which no reasonable Arbitrator could or should have made. It is not for the Court to substitute its own view of the facts for that of the Arbitrator. Whilst one can understand the

frustration of a party against whom an Arbitrator has made a controversial finding of fact, that frustration does not justify an application to the Court for leave to appeal on a question of law.