# The Court of Appeal for Bermuda

**CIVIL APPEAL No. 4 of 2018**

**IN THE MATTER OF THE ARBITRATION ACT 1986**

**B E T W E E N:**

**BAS-SERCO LIMITED**

**Appellant**

**- v -**

**THE GOVERNMENT OF BERMUDA**

**Respondent**

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**Before:** **Baker, President**
**Bell, JA**
**Smellie, JA**

**Appearances:** Ben Adamson, Conyers Dill & Pearman Limited, for the Appellant
Gregory Howard, Attorney-General's Chambers, for the Respondent

**Date of Hearing:** **5 June 2018**
**Date of Judgment:**

**JUDGMENT**

*Appeal against arbitrator's award under the Arbitration Act 1986 – application of the test for the grant of leave and on the substantive appeal – whether the particular contractual indemnity covered legal costs incurred in relation to dealing with liabilities owed to employees*

**BELL JA**

**Introduction**

1. This appeal arises from an arbitration which took place in December 2017, and which resulted in an award ("the Award") being made by the appointed arbitrator, Saul M Froomkin, OBE, QC on 15 January 2018. The Award dealt with issues which were defined as "the Reserved Claims", being the balance of the claims made by the claimant in the arbitration proceedings, the appellant before this Court ("BAS"), against the Government of Bermuda ("the Government"), the respondent to the arbitration proceedings and to this appeal.

2. The appeal is concerned with only one of the matters covered in the Award, namely whether costs which had been incurred by BAS prior to the arbitration were covered by an indemnity ("the Indemnity") which had been contained in the contract ("the Contract") made between BAS and the Government in respect of services to be provided by BAS to the Government at the Bermuda International Airport ("the Airport").

**Background**

3. The Contract included a provision whereby if for any reason it was not extended beyond 31 March 2016, the Government promised to indemnify BAS in the following terms: -

> *"from and against any and all actions proceedings claims demands costs and expenses whatsoever which may arise as a result of any and all liabilities that [BAS] may have to its employees upon the termination of this Contract under the terms and provisions of the Employment Act 2000 in its then current form."*

4. In the event, the Contract was not extended beyond 31 March 2016, and instead, the Government awarded the contract to run the Airport after that date to a different facilities management company. The majority of the workforce employed by BAS at the Airport accepted employment with the new facilities management company, but did so without the continuity of their employment being preserved. This led to a large number of those employees bringing claims for severance against BAS under the Employment Act 2000 ("the 2000 Act"), the value of such claims being said to amount to approximately $800,000. The claims for severance had originally been approximately $900,000, but were settled by the Government, acting on behalf of BAS, according to BAS's submissions, for approximately $650,000. BAS claimed to have incurred legal costs dealing with these claims. A dispute arose between the parties as to whether the Government was required to indemnify BAS under the terms of the Indemnity in respect of various matters, which for the purpose of this appeal can be limited to the legal costs which BAS had incurred, and which included:

   i) advice as to the optimal way to structure the transition of employees to the new facilities management company, so as to reduce payments, and involving negotiation with the Government in regard to the same;
   ii) advice as to the implementation of such structure; and
   iii) advice and representation of BAS in relation to actions initiated by the former employees under the 2000 Act.

5. The learned arbitrator dealt with the issue of legal costs incurred by BAS in dealing with the pre-arbitration claims relatively shortly, and for this reason it is convenient to set out that part of the Award in full. This is in the following terms:

> *"Ruling on Issue #2 – LEGAL COSTS*
>
> *It is clear that the Indemnity clause under consideration is very broadly framed. It provides as follows:*

> *"In the event that this contract is for any reason whatsoever not extended pursuant to Clause 2.13 above, Bermuda will indemnify Bas-Serco from and against "any and all actions, proceedings, claims, demands, costs and expenses whatsoever that may arise as a result of any and all liabilities that Bas-Serco may have to its employees upon termination of this contract under the terms and provisions of the Employment Act 2000 in its current form." (underlining added.)*

*I find no ambiguity in the clause and accordingly the contra proferentem principle does not apply.*

*Further, I reject the Respondent's argument that the "costs and expenses" referred to are in respect of costs and expenses imposed pursuant to the terms of the Employment Act 2000.*

*The reference to the Employment Act 2000 only modifies the phrase "the liabilities that Bas-Serco may have to its employees under the terms and provisions of the Employment Act 2000….." Additionally, the said Act makes no provision for the payment of "costs" save as provided in section 4(3) whereby the Supreme Court may, on an appeal, order costs.*

*However, the Indemnity only covers "costs" etc. "which Bas-Serco may have to its employees." The Claimant claims for costs are as follows:*

*i) "All legal costs incurred by Bas as to the optimal way to structure the transition of employees to C12 to reduce severance redundancies and negotiating with Government in relation to same;*
*ii) Advising Bas on the transition of transferring employees to C12 and liaising with Government in relation to same;*
*iii) Advising and representing Bas in and about tribunal actions by the Employees.*

*Those "costs" in my opinion were costs incurred by the Claimant, not resulting or arising from any liability it had to the employees in respect of claims they had under the Employment Act 2000, rather they were costs "…..imposed because of (its) contract with (its) lawyers." (see Enterprise Oil Ltd., supra at para. 193). Those*

> *costs were incurred by the Claimant for the purpose of reducing its liability to the employees in defending itself against 'the employees' severance claims.*
>
> *Accordingly, I find that those costs do not fall within the parameters of the Indemnity and I refuse to grant the declaration prayed for in that regard."*

**Grounds of Appeal**

6. In relation to the issue of costs and the scope of the Indemnity, BAS claimed that the learned arbitrator was wrong to conclude that the Indemnity was not wide enough to cover the legal costs in question. It is to be noted that the terms of the Indemnity, set out in paragraph 3 above, are said to be in respect of liabilities which BAS might have to its employees upon the termination of the Contract. The learned arbitrator's interpretation, set out above, was said to be "far too narrow and wrong as a matter of law." BAS claimed that if it had any liability to its former employees upon the termination of the Contract by operation of the 2000 Act, then any costs and expenses which might arise as a result were covered by the terms of the Indemnity. In this case, it was claimed, legal costs and expenses had arisen, and it was said that the fact that they were not liabilities owed by BAS to its former employees was irrelevant; the only issue was that those costs and expenses arose "as a result of…liabilities" that BAS may have had to the former employees.

7. The arbitration took place pursuant to the provisions of the Arbitration Act 1986 ("the 1986 Act"), and accordingly for the Award to be challenged in this Court, leave to appeal was required pursuant to section 29(3)(b) of the 1986 Act. Subsection 2 of section 29 provides that *"an appeal shall lie to the Court of Appeal on any question of law arising out of an award"*, and the grant of leave is further circumscribed by subsection 4 of section 29, which provides that:

> *"The Supreme Court shall not grant leave…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…"*

8. There is relevant case law as to the basis upon which leave to appeal should be granted in England and Wales, but that aspect of matters is academic, given that the Chief Justice granted leave to appeal to BAS on 8 March 2018. There remains the question as to the basis upon which this Court should determine the correctness or otherwise of the learned arbitrator's decision, and the answer to that question is by no means straightforward. It was canvassed extensively in argument before us, and counsel subsequently submitted authorities with a view to satisfying the Court as to the appropriate test to be applied by this Court on the hearing of the appeal.

**The Authorities, and the basis upon which the Award may be set aside**

9. The first point to be made is that the position governing the grant of leave in England is different from that in Bermuda. In Bermuda, the grant of leave is governed by section 29 of the 1986 Act, and section 29 (3) (b) provides that an appeal may be brought by any of the parties to the reference with the consent of all other parties to the reference, or (subject to section 31 of the Act, which relates to exclusion clauses and is not relevant for these purposes), with the leave of the Supreme Court. Section 29 (2) indicates that the appeal lies to the Court of Appeal, but nothing more is said about the role of the Court of Appeal or as to the manner in which appeals should be determined. In relation to that last matter, section 29(4) provides in relation to the grant of leave that leave shall not be granted unless the court considers, having regard to all the circumstances, that the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement. That language mirrors that of the equivalent English legislation.

10. The position in England in relation to appeals from arbitral awards is different in two respects. While the application for leave is made to a judge of the

English High Court, that is the same level as an application for leave to appeal an arbitrator's award in Bermuda, so too is the substantive appeal dealt with at the High Court level, while in Bermuda the substantive appeal is argued before the appellate court, as in this case. Further, in England and Wales, there is an appeal from the grant of leave, whereas that does not appear to be the case in Bermuda, as Mr Adamson conceded. The manner in which the process works in England and Wales is shown by the law report of the case of *The Nema* [1981] 2 All ER 1030, the reference being to the report of the case when it reached the House of Lords. This was the first case in which the basis upon which leave to appeal should be granted had been considered since the passage of the UK Arbitration Act 1979. The judge granting leave also heard the substantive appeal, although the issue of the grant of leave had been appealed to the Court of Appeal, which had upheld the grant of leave. The judge proceeded to set aside the award of the arbitrator. When the appeal from that decision found its way back to the Court of Appeal, Lord Denning opined that the Court of Appeal had jurisdiction to entertain an appeal from either the grant or refusal of leave, noting that the Court of Appeal had determined that it should not interfere with the judge's grant of leave, something which he then expressed regret over, saying that it was a pity that the judge had given leave, and "a pity too that we affirmed his decision". *The Nema* was a case where the parties were looking for a speedy resolution, given the particular circumstances of the case, and in the event, resolution was anything but speedy.

11. I will next address the test to be met on the argument of the substantive appeal. There would not appear to be any difference between the test to be applied in the English High Court, and that to be applied in the Bermuda Court of Appeal. Both courts are acting at the same stage of the process. Mr Adamson had conceded that the appropriate test which the learned Chief Justice ought to have applied for the grant of leave in the first place was whether the learned arbitrator was plainly or obviously wrong in the decision at which he arrived, a matter which, as I have said, is now rendered moot by the

fact that we are now at the stage of arguing the substantive appeal, leave having been granted. However, Mr Adamson then argued that following the grant of leave, the substantive appeal fell to be determined on "the usual basis", meaning that it would be dealt with on a different basis than the grant of leave, as if the award had been the decision of a first instance judge. This meant, as Mr Adamson conceded, that the filter afforded by the mechanism for the grant of leave to appeal imposed a more rigorous test than did the substantive appeal.

12. Before going any further, it will no doubt be helpful to consider the test to be applied on the grant of leave - that mentioned above - as enunciated by Lord Diplock in *The Nema*. Lord Diplock essentially affirmed what Lord Denning had said in the Court of Appeal, namely that leave should not normally be given unless it was apparent to the judge, on a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator was "obviously wrong". This test is to be applied particularly rigorously in the case of a one-off clause (which Mr Adamson agreed the subject clause in this case was).

13. It is interesting to me that in the case of *The Nema* in the Court of Appeal, Lord Denning in allowing the appeal said that the judge was in error in granting leave, and ought not to have reversed the decision of the arbitrator. That seems to me inconsistent with the concept of one threshold for the grant of leave and another to be applied on the substantive hearing of the appeal. For my part I am firmly of the view that in considering the merits of an appeal in this Court, when leave has been granted by the Supreme Court, the same question must be considered; was the arbitrator "obviously wrong" in the construction of the clause in issue before him. This question can be put in different forms; can it be shown that the arbitrator misdirected himself in law or had reached a decision which no reasonable arbitrator could have reached? But on any basis, the threshold is a high one.

14. Before leaving this aspect of matters, I should refer to the further authority on the relevant test which counsel made available to us following the hearing. We were directed to the case of *MRI Trading AG v Erdenet Mining Corp LLC* [2012] EWHC (Comm) 320 (in the Commercial Court), and [2013] EWCA Civ 156 (in the Court of Appeal). That case concerned an arbitration at the London Metal Exchange ("the LME"), where the arbitral tribunal held that MRI's claim failed. Christopher Clarke J (as he then was) gave leave to appeal in respect of two identified questions of law. The judge, Eder J, indicated that while he did not necessarily accept that the test he was being invited to apply was the correct one, he was content to proceed on the basis that, in order to intervene in the circumstances of the case, the court had to be satisfied that no reasonable tribunal correctly applying the relevant legal principle could have reached such a conclusion. The judge declined to remit the award.

15. Eder J nevertheless gave leave to appeal to the Court of Appeal. Tomlinson LJ giving the judgment of the court started his judgment by saying "Two judges of the Commercial Court, very experienced in commercial disputes, have concluded that an arbitration award made by arbitrators pursuant to the rules and regulations of the LME is, in the words of Christopher Clarke J who gave permission to appeal against it, obviously wrong and, in the words of Eder J, who determined the appeal, somewhat surprising if not bizarre. For good measure, Eder J also concluded that no reasonable tribunal correctly applying the relevant law could have reached such a conclusion." The Court of Appeal agreed with the views expressed by Eder J and dismissed the appeal.

16. So the case supports the view which I have expressed in paragraph 13 above, in regard to the basis upon which this Court is entitled to interfere with the arbitrator's award. The test to be applied in arguing the substantive appeal is the same as that to be applied when considering the grant of leave.

**The Clause in Question and the Arbitrator's Finding**

17. There was in fact relatively little between counsel with regard to this aspect of matters. The clause in question is that set out starting at page 3, and counsel for both sides focused on the underlined portion. Mr Adamson maintained that the key words from that single sentence were the words "that may arise". Mr Howard emphasised that the sentence must be read as a whole, with attention paid to the prepositions which hold the sentence together. Hence it was necessary to look at the whole, which he suggested could be read as requiring three matters to be established for the Indemnity to be operative. First, there had to be no renewal of the contract. Secondly, there had to be liabilities owed to BAS's employees; and thirdly, those liabilities had to arise under the terms and provisions of the 2000 Act. Mr Adamson agreed those three matters, but said that there was a fourth proposition, which is that for the Indemnity to bite, the costs in question had to arise as a result of the three matters contained in Mr Howard's summary.

18. The point made by Mr Adamson to meet Mr Howard's emphasis that the costs and expenses must arise under the terms and provisions of the 2000 Act was that this made no provision for an award of costs. Mr Howard in turn met that argument with reference to the case of *AstraZeneca Insurance v XL Insurance (Bermuda)* [2013] EWCA Civ 1660, where there was a clause dealing with the recovery of defence costs, as defined, but when such costs were not recoverable as a matter of law.

19. To my mind, the arguments back and forth emphasise the reality that while on one view, it might appear that the interpretation of the clause for which Mr Adamson contended could be sustained, so too (in broad terms) could the interpretation for which Mr Howard contended. For my part, I find it impossible to look at the arbitrator's finding in relation to the Indemnity and say, without more, that his interpretation of the clause came anywhere close to being "obviously wrong". Rather, one can see on a perusal of the Award why the

arbitrator reached the conclusion that he did. The arbitrator was looking at the BAS claims in the form in which they appeared in the Points of Claim. Mr Adamson conceded in the course of argument that the first two parts of the claim, paragraphs (i) and (ii), might not be covered, but maintained that paragraph (iii) clearly was. Thereafter, he restricted his claim to paragraph (iii), covering costs "advising and representing BAS in and about tribunal actions by the (BAS) Employees". Mr Adamson advised that these costs were in the region of $80,000. What the arbitrator found in respect of that claim, like the first two, was that those costs were costs incurred by BAS, not resulting or arising from any liability which BAS had to the employees under the 2000 Act, but rather arising from BAS's contract with its attorneys. The arbitrator indicated that he relied upon the case of *Enterprise Oil Ltd v Strand Insurance Co Ltd* [2006] All ER (D) 185, in which it was held that defence costs were not sums which the insured was obliged to pay because of a liability imposed on him by law – they were imposed by virtue of his contract with his lawyers.

20. Looking at the terms of the Award, I find it impossible to say that the Award was obviously wrong, the test which I have indicated is in my view the appropriate one, and for my part I would dismiss the appeal. I would expect costs to follow the event, and would so order in the absence of any application to be heard on costs, to be made, if so advised, within 21 days.

**Postscript**

21. As I understand it, there are no Bermudian authorities dealing with the basis upon which awards of arbitrators might be set aside. There are considerable numbers of arbitrations taking place in Bermuda, both domestic and international. I think it is important to emphasise the importance of finality in domestic arbitrations in this jurisdiction, and to make clear that the principles of *The Nema*, now more than 35 years old, are applicable to such arbitrations in this jurisdiction.

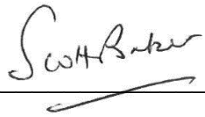
**SMELLIE JA**

22. I have had the benefit of reading my Lord's judgment in draft and I agree.

**BAKER P**

23. I also agree.

**Bell JA**



**Baker P**

**Smellie JA**