UNISTRESS BUILDING CONSTRUCTION LTD v HUMPHREY'S ESTATE (FORRESTDALE) LTD - [1991] 1 HKC 519

HIGH COURT
KAPLAN J

CONSTRUCTION LIST NO 4 OF 1991

30 May 1991

Arbitration -- Determination of preliminary point of law by court -- Whether application should be entertained -- Savings in costs -- Whether leave to appeal likely to be given -- Applicability of Nema guidelines -- Arbitration Ordinance (Cap 341) s 23A -- HKIAC Rules for Domestic Arbitration

Arbitration -- Determination of preliminary point of law by court -- Procedure -- Whether court should decide on jurisdiction as a separate hearing from hearing of question of law itself -- Arbitration Ordinance (Cap 341) s 23A

The plaintiffs served a request for further and better particulars on the defendants in the course of a reference to arbitration. The defendants answered some of the requests but refused others. They sought the determination by the court under s 23A of the Arbitration Ordinance (Cap 341) as to whether the defendants should be ordered to provide the particulars. The arbitrator consented to the application to the court.

Held, refusing the application:

(1) The issue whether or not particulars should be given was not a point of law and certainly not the sort of point envisaged by s 23A. Even if it was such a question, there would be no saving in costs if the point were to be determined.
(2) The test was whether the determination of the issue might produce substantial savings to the parties. The court need not be satisfied that there might be a saving in costs however the question was decided. If the decision one way would save costs but not the other, this would still appear to be sufficient.
(3) The *Nema* guidelines cannot be appropriate when considering the jurisdiction under s 23A. The court cannot consider whether the award appears to be correct when there has not yet been any decision.
(4) As to the question whether leave to appeal would be likely to be given, all that the court can do is to look at the point of law raised and see whether, given its likely impact on the dispute and the parties, it is the sort of point which might be considered appropriate to go on appeal under s 23. The alleged point of law in this case is very much a 'one off' situation, involving the adequacy or otherwise of the particulars supplied, and is not one in respect of which leave to appeal would be given.
(5) Section 23A required a two-stage approach, first an initial application for leave and, if granted, a date fixed for the hearing of the arguments.

Cases referred to

A-G v Technic [1986] HKLR 542

Farrell v Secretary of State for Defence [1980] 1 WLR 172

Imperial Leatherware Co v Macri and Marcellino (1991) 22 NSWLR 653

JE Taylor v Paul Brown [1993] 1 HKLR 285

Lam Construction v Korea Shipbuilding (MP 696/88, unreported) default

Mideco Manufactory Pty v Tait [1989] VR 50

Nema, The; Pioneer Shipping v BTP Tioxide [1982] AC 724

Olteria, The; Babanaft International Co SA v Avanti Petroleum Inc [1982] 2 Lloyd's Rep 99

Olteria, The [1982]1 Lloyd's Rep 448

PT Dover Chemical Co v Lee Chang Yung Chemical Industry Corp [1990] 2 HKLR 257

South Australian Superannuation Fund Investment Trust v Leighton Contractors, (1990) 55 SASR 327

Vasso, The [1983] 2 Lloyd's Rep 346

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) ss 23A, 23C, 23(3)(b), 23(4) -

(HK) Domestic Rules of the Hong Kong International Arbitration Centre r 15

(HK) Rules of the Supreme Court O 18

Other legislation referred to

Mustill& Boyd The Law and Practice of Commercial Arbitration in England (2nd Ed) pp 319, 325, 380, 381, 624 -

Supreme Court Practice p 180

Uncitral Model Law for International Arbitrations

Application

This was an application by the plaintiffs to the court under s 23A of the Arbitration Ordinance. The facts appear sufficiently in the following judgment.

Peter Graham (Kwok & Chu) for the plaintiffs.

John Scott (Robert Lee & Fong) for the defendants.

KAPLAN J

I have before me an originating motion dated 17 April 1991 which seeks my acceptance of jurisdiction under s 23A of the Arbitration Ordinance (Cap 341) to determine the following question of law which is said to have arisen in the course of the above-mentioned reference:

> Whether, as a matter of law, the plaintiffs are entitled to have those particulars underlined in red (as shown in the appendix hereto) which the defendant refused to give in its answer to the plaintiffs' request for further and better particulars of the points of defence and counterclaim dated 1 March 1991.

The researches of counsel were not able to disclose any Hong Kong decision on this section although I was referred to three English and one Australian decisions. I reserved judgment in order to be able to consider the matter in some detail and to be able to give some guidance to practitioners as to how this somewhat difficult section works.

The plaintiffs are claimants in a construction arbitration. By a written contract dated 24 October 1989, they agreed to carry out certain works at a property belonging to the respondents. Clause 35 of the contract contained an arbitration clause in common form.

Disputes arose and the claimants served a notice of arbitration dated 12 October 1990. On 29 October 1990, Mr Michael Charlton was appointed the sole arbitrator. Points of claim were served on 26 November 1990 and on 25 January 1991, the points of defence were served. On 6 February 1991, the claimants served a request for further and better particulars of the points of defence and counterclaim. The respondents responded to this request by answering some and refusing others. By his first order for directions, the arbitrator ordered, inter alia, that the Domestic Rules of the Hong Kong International Arbitration Centre should apply to this arbitration. By his second order for directions, the arbitrator ordered, inter alia, that the hearing should commence on 21 October 1991.

On 13 February 1991, the arbitrator, in his third order for directions, ordered that the respondents should serve its answers to the claimants' request for further and better particulars of the points of defence and counterclaim dated 6 February 1991 by 1 March 1991.

Having received the respondents' answer to only some of the requests and having been told that they were not entitled to the rest, the claimants' solicitors wrote to the arbitrator on 4 April 1991 in the following terms:

> We write with reference to the claimants' request for further and better particulars of the points of defence and counterclaim and the respondents' reply thereto.
>
> From the respondents' reply, you could note that it refused to provide the bulk of the further and better particulars requested by the claimants and without which the claimants are unable to properly prepare its case.
>
> On account of the respondents' cavalier attitude towards the claimants' request, it is unlikely that the respondents will supply the further and better particulars requested without a court order, the non-compliance with which may lead to the striking out of those parts of the respondents' pleadings to which the claimants' request relates.
>
> As the HKIAC Rules for Domestic Arbitration do not endow the arbitrator with the power to strike out the respondents' pleadings or any part thereof, in any circumstances, we should therefore be grateful if you would consent to the making by the claimants of an application to the court for an order in the terms of the draft originating summons enclosed herewith.
>
> We look forward to your making an early order giving your consent to the claimants' application to court.

On 10 April, the arbitrator invited comments from the respondents' solicitor. On 12 April, they said, 'It is our contention that the claimants are not entitled to certain particulars requested and we are prepared to stand by our contentions in court if necessary.'

On 12 April, the arbitrator replied in the following terms:

> I refer to your letter dated 4 April 1991, reference ESK/166/BL.
>
> The parties are at liberty to address me on the matter of the claimants' request for further and better particulars of the points of defence and counterclaim and the respondents' reply thereto. I would be prepared to hear the views of both parties, and give an order in respect of same, if that is their wish.

> However, I note your request to apply to the court by way of originating summons, and the reasons stated. You are quite entitled to make such an application, and I hereby give my consent.

On 17 April 1991, the claimants issued the originating notice of motion which is now before me.

Section 23A of the Arbitration Ordinance which is in identical term to s 2 of the 1979 Act provides as follows:

> 23A Determination of preliminary point of law by Court
>
> (1) Subject to subsection (2) and section 23B, on an application to the Court made by any of the parties to a reference --
>
> (a) With the consent of an arbitrator who has entered on the reference or if an umpire has entered on the reference with his consent or

(b) with the consent of all the other parties

the Court shall have jurisdiction to determine any question of law arising in the course of the reference.

(2) The Court shall not entertain an application under subsection (1)(a) with respect to any question of law unless it is satisfied that --

(a) the determination of the application might produce substantial savings in costs to the parties; and

(b) the question of law is one in respect of which leave to appeal would be likely to be given under section 23(3)(b).

(3) A decision of the Court under subsection (1) shall be deemed to be a judgment of the Court within the meaning of section 14 of the Supreme Court Ordinance (Cap 4) (appeals to the Court of Appeal), but no appeal shall lie from such a decision unless the court or the Court of Appeal gives leave.

(4) (Repealed 64 of 1989 s 15)

It can readily be seen that an application under the section can only be brought if all parties consent or if a party brings it with the consent of the arbitrator. Mr Graham for the claimants submits that the arbitrator has clearly consented.Mr Scott for the respondents submits that the purported consent of the arbitrator has been vitiated by the misleading way in which the matter was presented to the arbitrator. I will return to this point shortly.

Subsection (2) of s 23A requests the court not to entertain the application unless two criteria are met. Firstly, it must be satisfied that the determination of the application might produce substantial savings in costs to the parties; and secondly that the question of law is one in respect of which leave to appeal would be likely to be given under s 23(3)(b).

Section 23 replaced the special case procedure with a system of appeals against awards only with leave. Subsection (4) of s 23 provides as follows:

The court shall not grant leave under (3)(b) 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 ...

It follows, therefore, that the following points arise for my determination:

(1) Is the issue raised a question of law?

(2) Has the arbitrator consented to the application?

(3) Is the court satisfied that the determination of the application might produce substantial savings in costs to the parties?

(4) Is the question of law one in respect of which leave to appeal under s 23(3)(b) would be likely to be given?

A further point arises, namely, whether the section contemplates a two-stage application, firstly an application to invite the court to entertain jurisdiction, and if necessary, a subsequent later hearing of the question of law itself.

Mr Scott asked me to bear the following matters in mind during my deliberation.

Firstly, the respondents agreed that the arbitrator did have power to order them to give these particulars.

Secondly, the respondents do not dispute that the arbitrator can hear such an application.

Thirdly, the respondents accept that if the arbitrator orders these particulars to be given and they still refuse to give them, then the arbitrator or the claimants can make an application under s 23C which could result, inter alia, in the respondents not being permitted to rely upon those paragraphs of their defence and counterclaim which they had refused to particularize.

Is the issue raised a question of law?

I have already set out the issue which appears in the originating notice of motion. Mr Graham pointed out that r 15 of the Domestic Rules of the Hong Kong International Arbitration Centre provides as follows:

> *The pleadings*
>
> (a) The pleadings shall contain the statement of the party's case in sufficient detail to enable the arbitrator and all other parties to comprehend:
>
> (i) the matters of fact relied on;
>
> (ii) so far as practical the quantum of the claim, counterclaim or set-off as the case may be.
>
> (b) A Statement of Defence or Defence to Counterclaim shall respond to the facts alleged in the Statement of Case or Counterclaim as the case may be and any facts not specifically responded to shall be taken to be admitted, unless the arbitrator allows an amendment under Rule 16.
>
> *[1991] 1 HKC 519 at 524*
>
> (c) The Arbitrator shall not order further particulars of pleadings unless they are required to satisfy Rule 15(a).
>
> (d) Nothing in this rule shall prevent a party pleading any matters of law if that party so chooses.

In his skeleton argument, Mr Graham submits that 'a point of law has arisen as to whether r 15 of the Hong Kong International Arbitration Centre Rules of Domestic Arbitrations has been complied with in respect of the outstanding unanswered or unsatisfactory answered requests for further and better particulars'.

He then referred to p 319 of *Mustill & Boyd's Commercial Arbitration* (2nd Ed) where there is a passage extolling the virtues of pleadings in arbitration. He also referred to a passage from *Farrell v Secretary of State for Defence* 1980 1 WLR 172, 180 quoted at p 180 of the *Supreme Court Practice* which makes it clear that it is bad law and practice 'to shrug off a criticism as a mere pleading point'.

He developed this point by submitting that 'this question of the interpretation and application of the HKIAC Rules for Domestic Arbitrations and relationship of r 15 (Pleadings) to O 18 of the Rules of the Supreme Court gives rise to a potentially important point of law'. He submits that 'a matter of pleading practice and procedure is a matter of law potentially of vital importance'. He adds that the court's decision on this point is likely to be an important precedent as to pleading, affecting many future domestic arbitrations in Hong Kong. (In fact, new domestic rules are soon to be promulgated by HKIAC but I accept that there are still many arbitrations pending to which the existing rules still continue to apply.)

Mr Scott submits that the issue raised is not a question of law. He points out that the respondents were never asked to agree to the taking of the preliminary question nor he submits have the steps indicated in *Mustill & Boyd* at pp 380-38l been taken.

Mr Scott recognizes that he cannot argue that it is not a point of law merely because the arbitrator has not been asked to decide it first. The whole point of s 23A is to provide a procedure whereby parties to a reference can 'nip down the road to pick the brains of one of her Majesty's judges, and, thus enlightened, resume the arbitration' (Donaldson LJ in *The Olteria; Babanaft International Co SA v Avanti Petroleum Inc* 1982 2 Lloyd 's Rep 99 at 106).

Mr Scott submits that the claimant seems to assume that the Rules of the Supreme Court apply to commercial arbitrations and thus the relationship between O 18 and r 15 of the Domestic Rules is said to be the point of law. He referred me to the illuminating judgment of Deputy Judge Sharwood in *JE Taylor v Paul Brown* 1993 1 HKLR 285 which makes it quite clear that an arbitrator is not obliged (absent agreement of both parties) to observe the technical requirements of court proceedings. In that case, it was boldly asserted that the arbitrator's failure or refusal to order discovery

[1991] 1 HKC 519 at 525

amounted to misconduct. The learned judge disagreed and I agree completely with his decision.

At this point, I think it may be helpful to refer to some observations of Rogers CJ Comm D in his important decision in *Imperial Leatherware Co Pty Ltd v Macri and Marcellino Pty Ltd* 1991 22 NSWLR 653. In that case, his Honour was disagreeing with some observations of the Supreme Court of South Australia in *South Australian Superannuation Fund Investment Trust v Leighton Contractors* 1990 55 SASR 327.White J in that case had said:

> ... procedural justice requires that arbitrators should in long complex arbitrations, follow as nearly as reasonably practical the pre-trial pleading discovery and other procedures of the court.

In expressing his strong disagreement with this statement, Rogers CJ put the matter thus at pp 15 and 16 of the transcript of the judgment:

> With due respect, the concession by the builder, which was accepted by his Honour as correct, was flying in the face of accepted current theories of arbitration. I would venture to suggest that one reason why parties submit to arbitration is so that they should avoid 'pre-trial pleading discovery and other procedures of the court'. This is so, whether the arbitration is long and complex or short and simple. The heart of the arbitral procedure lies in its ability to provide speedy determination of the real issues. Those aims, to a large extent, are made impossible of achievement if the procedures of a court are mimicked. Nor is there anything in the requirement to provide 'procedural justice' which requires adoption of the pleadings and procedures of courts. What is required is that the parties enjoy the benefits of natural justice consistently with the requirements of arbitrators for dispensing with technicalities, with discovery and doing away with interrogatories. The proper requirement that each party have full notice of the case to be made by the other and a full opportunity to prepare and to answer that case does not require pre-trial pleading discovery and other procedures of the court. In other words with due respect, I do not follow his Honour in the view that arbitrators are required to 'follow as closely as reasonably practicable the pleading practice of the Supreme Court' (p 3). I would suggest that *Russell on Arbitration* (20th Ed) pp 222-224 (cited at p 2 of the judgment) does not provide any support for such a proposition. *Hudson's Building and Engineering Contracts*(10th Ed) published in 1970, pp 858-861 (quoted with approval p 22 ff) undoubtedly supports the view taken by his Honour. With respect, I suggest that the learned author may well be inclined to make reference to more recent thinking on the topic when the next edition falls due. A much preferable view is set out in Mustill & Boyd , *Commercial Arbitration*(2nd Ed). The learned authors point out that 'the arbitrator is under no duty to order pleadings or other written statements of case as a matter of course'.

I agree with these observations which are in line with modern thinking and give effect to the legislative intent made plain by the amendments to Australia's law of arbitration in the wake of the 1979 English Act.

[1991] 1 HKC 519 at 526

Although I agree that a decision by the arbitrator is not a prerequisite for the existence of a point of law, nevertheless, I do think that the point of law alleged to arise must in fact have arisen and not been plucked out of the air as it was in this case. All the respondents have said is that they have answered such of the requests to which they think the claimants are entitled under the normal rules of pleadings. Further, nothing has been shown to me which indicates that the respondents will refuse to answer these requests if they are so ordered by the arbitrator.

I am not satisfied that a question of law 'arising in the course of the reference' has in fact arisen. It does not arise merely because the claimants pose it. Further, I am not satisfied that the issue, whether or not particulars should be given, is a point of law, and it is certainly not the sort of point envisaged by s 23A. I arrive at this conclusion in the light of the circumstances which led to the passing of the 1979 Act (adopted in Hong Kong in 1982). I also take into account the legislative intent behind these amendments. These amendments showed a strong shift away from court interference towards party autonomy. In Hong Kong, this movement has found its ultimate expression in the adoption of the Uncitral Model Law for International Arbitrations. I cannot accept that the simple issue whether further and better particulars should or should not be ordered can ever have been intended to be the sort of point with which s 23A was intended to deal.

Has the arbitrator consented to this application?

Mr Scott submits that the arbitrator was wholly misled by the claimants' solicitors' letter dated 4 April. He points out that there is no evidence to support the suggestion that 'it is unlikely that the respondent will supply the further and better particulars requested without a court order.' He also points out that the draft summons attached to the letter of 4 April is materially different to the notice of motion before me. In the attached draft originating summons (which Mr Scott helpfully attached to his skeleton argument), there was provision for parts of the defence and counterclaim to be struck out in default of compliance with the order for particulars. The arbitrator would know that he had no such power either under the Domestic Rules or under the Or-

dinance, and thus he may have been misled into thinking that the striking out sanction, when coupled with the order for the particulars, amounted to a point of law. Had he known that only the particulars were being sought under the guise of an issue of law, he may well have refused his consent and decided the matter for himself as he made clear he was quite prepared to do.

I think there is a lot of force in Mr Scott's submissions on this point, but I am not prepared to go beyond the terms of the arbitrator's letter of 12 April. However unsatisfactory the situation was, nonetheless, he was giving his consent to this application and I so hold.

[1991] 1 HKC 519 at 527

Mr Scott pointed out that at p 380, *Mustill & Boyd* make the following comment:

> Even where he (the arbitrator) is minded to consent, he would do well to consider and to suggest that the parties consider whether the purpose might not be better served by an interim reasoned award.

Footnote 16 adds 'Particularly if the question concerns his procedural powers rather than the merits of the dispute'.

I agree with these observations and would recommend them to arbitrators who find themselves in the same position as Mr Charlton in this case. I make no criticism of Mr Charlton whatsoever, but on reflection, I think he will consider that it would have been wiser to have given a decision as to the adequacy of these particulars.

Saving in costs?

On the assumption that this was a question of law, the test is whether the determination of the issue 'might produce substantial savings in costs to the parties'. I emphasize the use of the word 'substantial'. Not every saving in costs comes within this subsection. Mr Graham ingeniously argued that if the particulars were answered, the claimants would know more about the respondents' case, and thus, the hearing might last less time; alternatively, there was a possibility that a showing of the strength of the respondents' case might cause the claimants to abandon or limit their claims.

I fail to see how the determination of this alleged question of law could possibly produce any savings in costs, let alone substantial savings. As Mr Scott rightly points out, the nature of the evidence will appear from written proof of evidence and experts' reports, which will be exchanged in ample time before the commencement of the hearing pursuant to the fifth order for directions made by the arbitrator. No question of surprise can arise when evidence is exchanged in this manner.

The sort of point that clearly comes within this subsection is a time bar point. If one of the claims in arbitration is subject to a time bar, the determination of that issue might well save substantial costs if the determination of that point resulted in that claim being in fact barred and no longer being in issue in the arbitration. One can think of many other examples. It is worth noting that the court need not be satisfied that there might be a saving in costs, however the question is decided. If the decision one way would save costs but not the other this would still appear to be sufficient (see *The Vasso* [1983] 2 Lloyd's Rep 346).

Is the question of law one in respect of which leave to appeal would be likely to be given under s 23(3)(b)?

The court does not grant leave to appeal under s 23 unless it considers 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'.

[1991] 1 HKC 519 at 528

At p 624 of *Mustill & Boyd* can be found a discussion of this difficult provision. I say difficult because s 23A posits a situation where the arbitrator has not yet made a decision. As the learned author of *Mustill & Boyd* point out:

> Plainly, criteria relating to the grant of leave to appeal cannot be transferred bodily to a situation where there is nothing against which to appeal.

Gobbo J in *Mideco Manufactory Pty Ltd v Tait* default [1989] VR 50 at 53 in dealing with an identical section said:

> There is something of a conundrum in asking the court to decide whether leave to appeal would be given when there is no answer to the question as yet and the implications of the actual answers cannot analyzed.

In *The Nema; Pioneer Shipping v BTP Tioxide* default [1982] AC 724 Lord Diplock laid down guidelines for the exercise of the discretion under the English equivalent of our s 23(4). They are too well known to be repeated. The latest consideration of this section in Hong Kong is the Court of Appeal decision in *PT Dover Chemical Co v Lee Chang Yung Chemical Industry Corp* default [1990] 2 HKLR 257 which considered some post *Nema* default cases.

It seems clear to me that all the *Nema* guidelines cannot be appropriate when considering the jurisdiction under s 23A. How can the court consider whether the award appears to be correct when there has not yet been any decision?I agree with *Mustill & Boyd* at p 624, where they conclude that s 2(2) of the 1979 Act applies without the *Nema* guidelines. (That is the same as our s 23A(2).) It may be unsatisfactory in principle because the court is exhorted to have regard to the question whether leave to appeal would be granted. Further, the position under s 23 is very different to that under s 23A. Under the former, it is likely that the application for leave to appeal will be opposed by the successful party. Under the latter and assuming a two-party dispute, it will be brought with the consent of the arbitrator and one party, thus making up two-thirds to those concerned with the issue.

In my judgment, all the court can do when asked to consider entertaining this jurisdiction is to look at the point of law raised and see whether, given its likely impact on the dispute and the parties, it is the sort of point which might be considered appropriate to go on appeal under s 23. The alleged point of law before me is very much a 'one off' situation, involving the adequacy or otherwise of the particulars supplied.

It is worth noting that as far as I am aware, in the nine years since the 1982 amendments were made, there has been only one successful application for leave to appeal under s 23 of the Ordinance (see *Lam Construction v Korea Shipbuilding* default (MP 696/88, 24 May 1988, unreported). Both *A-G v Technic* [1986] HKLR 541 and the *PT Dover Chemical* case were unsuccessful appeals against the judges' refusal of leave to appeal.

Mr Scott referred me to some authorities to show the sort of point which the court has considered appropriate to decide under this section. In *The Olteria* [1982] 1 Lloyd's Rep 448, Bingham J (as he then was) had to consider whether a clause in a charter party afforded charterers an effective defence of time bar. If it did then he had to go on to consider whether s 27 of the 1950 Act gave the court a discretion to extend the 90-day time limit provided in the charter party.

In *The Vasso* [1983] 2 Lloyd's Rep 346, Lloyd J (as he then was) had before him three issues. Firstly, whether an arbitrator had power to make an order for inspection of property. Secondly, if so, did he have power to make it in a salvage arbitration where the property in question was a ship and where the application was made not by the salvors but by cargo.Thirdly, if so, was the order one which the arbitrator could, in the exercise of his discretion, properly make. As will be evident, the substantive point raised interesting questions about the scope of s 12(6) of the 1950 Act (our s 14(6)). He answered the first two questions in the affirmative. Mr Scott relied upon the passage at p 348 where in relation to the third question the learned judge said this:

> I can dispose of question (3) at the outset. It does not raise any question of law at all but a question for the decision of the arbitrator in his discretion. Even if I had been disposed to disagree with the way in which the arbitrator had exercised his discretion, which on the material before me I am not, I would have been unwilling to interfere.

Mr Scott submits that the situation in the present case is analogous. It is clear and not disputed that the arbitrator can order particulars to be given. However, it is not possible, he submits, to characterize his decision one way or the other as a question of law.

As I have said, I am quite satisfied that the question allegedly raised is not a question of law. Were I wrong on this, I would still not entertain jurisdiction because I am not satisfied that there would be or might be any

substantial savings in costs and I am further quite satisfied that the issue is not one in respect of which leave to appeal should be given. In my judgment, the question whether these particulars should be given is essentially one for the arbitrator and I think it is a great shame that he was not asked to consider this matter before all these costs were incurred. It will be apparent that I have not given any consideration to the adequacy or otherwise of these particulars, confidently leaving it in the safe and capable hands of Mr Charlton.

Procedure

Mr Scott further submitted that the claimants used the wrong procedure by combining an application for a question of law to be determined with a request that the court do determine it. He submitted that this section

clearly contemplates a two-stage process similar to applications for leave to appeal. Firstly, you seek leave and if successful, the matter is then set down to be argued at a later date.

For this proposition, he relies upon the terms of the section itself and upon observations by both *Mustill & Boyd* and Lloyd J in *The Vasso*. At p 325, *Mustill & Boyd* states, 'when s 2(2) applies, an application must be made to the court for a date for the hearing of the main argument and no date will be fixed, unless the court is satisfied of the matters set out in the section'.

At pp 348-349 in *The Vasso,* Lloyd J said:

> At the conclusion of the application under s 2, it was obviously expected of me by the parties that I would go on to determine the question of law there and then. I decided to do so, having regard to the urgency of the matter. But I would echo in this case what was said by Mr Justice Bingham in *The TFL Prosperity* [1982] 1 Lloyd's Rep 617. Normally, the court will not determine questions of law under s 2(1)(a) immediately after a successful application any more than it will hear an appeal under s 1. It is important that applications, whether under s 1 or s 2(1)(a), should be dealt with expeditiously and should not become full dress hearings as they would if the application normally led straight on to the appeal.

I respectfully agree with this approach. The section itself and common sense require a two-stage approach. Why should the parties be put to the expense of briefing lawyers to argue a point which the court may not decide to consider. I can see no difference between the procedure to be adopted under s 23A and that under s 23. In all future cases, where recourse is had to s 23A, the initial application must be for leave, and if granted, a date fixed for the hearing of the argument. It is clear that Lloyd J in *The Vasso* only combined the two stages because the matter was urgent and the parties expected an answer to both the application for leave and the issues thereunder. The decision of Lloyd J on the very special facts of that case should not be taken as condoning a combined procedure.

In the present case, it was agreed by the parties and myself that I would consider only the question of whether the court would entertain jurisdiction, and if in favour of the claimants, the adequacy or otherwise of the particulars would be argued at a later stage.

For all the reasons given above, this application is refused with costs.