I. UNITED KINGDOM HOUSE OF LORDS DECISIONS

A. INCO EUROPE LTD AND OTHERS V. FIRST CHOICE DISTRIBUTION (A FIRM) AND OTHERS [2000] UKHL 15; [2000] 1 WLR 586 (9TH MARCH, 2000)

(i) *HOUSE OF LORDS*

Lord Nicholls of Birkenhead Lord Jauncey of Tullichettle Lord Steyn Lord Clyde Lord Millett

(ii) *OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT*

(iii) *IN THE CAUSE*

INCO EUROPE LTD. AND OTHERS

(APPELLANTS)

v.

FIRST CHOICE DISTRIBUTION (A FIRM) AND OTHERS

(RESPONDENTS)

ON 9 MARCH 2000

LORD NICHOLLS OF BIRKENHEAD

My Lords,

Section 9 of the Arbitration Act 1996 empowers the court to stay legal proceedings brought against a party to an arbitration agreement in respect of a matter which under the agreement is to be referred to arbitration. The issue on this appeal is whether an appeal lies to the Court of Appeal from a decision of the first instance court made under section 9. Section 9 is silent on the point.

The circumstances in which this question has arisen are set out in the judgment of Hobhouse L.J. in the Court of Appeal, reported at [1999] 1 All E.R. 820, 822. Nothing turns on the particular facts, so I can be appropriately economical in my rehearsal of them. On 24 June 1997 the plaintiffs issued a writ in the Manchester District Registry of the High Court claiming damages in respect of the loss of a consignment of nickel cathodes being carried from Rotterdam to Hereford. One of the defendants, Steinweg (Handelsveem B.V.), made an application for an order under section 9 of the Arbitration Act 1996 staying the legal proceedings, on the ground that the proceedings had been brought in respect of a matter the parties had agreed by their contract to refer to arbitration in the Netherlands. His Honour Judge Hegarty Q.C., sitting as a judge of the High Court, dismissed the application. He held that the arbitration agreement was 'null and void, or inoperative'. In order to appeal against this interlocutory order Steinweg needed permission to appeal. Steinweg sought permission from the judge, but this was refused. Steinweg renewed its application to the Court of Appeal. One of the questions the Court of Appeal had to consider was whether it had any jurisdiction to entertain the appeal. The doubt arose from a provision in section 18 of the Supreme Court Act 1981. The material part of section 18(1), as amended by the 1996 Act, reads:

> 'No appeal shall lie to the Court of Appeal -
> . . .
> (g) except as provided by Part I of the Arbitration Act 1996, from any decision of the High Court under that Part;'

Inco's case was an extremely simple one. Judge Hegarty's decision was a decision of the High Court under Part I of the Act of 1996. The saving exception does not apply, because nowhere in section 9, or indeed anywhere else in Part I, is there provision for an appeal from a decision of the court under section 9. Ergo, so the argument runs, the decision sought to be appealed falls four-square withinsection 18(1)(g): no appeal lies to the Court of Appeal.

If section 18(1)(g) as amended by the Act of 1996 is read literally and in isolation from its context, this argument is unanswerable. However, the Court of Appeal, comprising Hobhouse, Thorpe and Mummery L.JJ., rejected the submission. Hobhouse L.J. examined with care the development of the status of arbitration clauses in English law, the genesis of the Act of 1996 and the statutory context of the amendment. The amendment made by the Act of 1996 to section 18(1)(g) of the Act of 1981 was made by section 107 of the Act of 1996. Section 107 was concerned with 'consequential' amendments. The conclusion of Hobhouse

L.J., at page 826e, was that a removal of the pre-existing right of appeal (with leave) from a decision whether or not to stay litigation covered by an arbitration clause would not be consequential upon anything contained in the Act of 1996. It would, he said, be a radical and additional provision. He continued:

> 'In my judgment such a change in the pre-existing law is not achieved by wording such as that used in section 107 of the 1996 Act. In my judgment the effect is that the amendment to section 18(1) of the 1981 Act must be understood as giving effect to the exclusions (and restrictions) on the right of appeal to the Court of Appeal laid down in Part I of the 1996 Act and no more. Thus, as is self-evident from the wording of the amendment, it is necessary to look at the provisions in Part I of the 1996 Act to ascertain to what extent the right of appeal to the Court of Appeal is excluded. If some provision of Part I does not exclude it, the right of appeal remains.'

Thorpe and Mummery L.JJ. agreed. The Court of Appeal granted permission to appeal from the decision of Judge Hegarty. Having considered the substantive grounds of appeal, the court then allowed the appeal and stayed further proceedings in the action brought by the plaintiffs against Steinweg.

Before this House is an appeal by the plaintiffs on the jurisdictional point. The plaintiffs do not seek to challenge the decision of the Court of Appeal if, contrary to their submissions, the Court of Appeal had jurisdiction to hear the appeal.

In my view the decision of the Court of Appeal was correct. Several features make it plain beyond a peradventure that on this occasion Homer, in the person of the draftsman of Schedule 3 to the Act of 1996, nodded. Something went awry in the drafting of paragraph 37(2) of Schedule 3. Paragraph 37(2) is the paragraph which set out the amendment made to section 18(1)(g) of the Act of 1981. Moreover, what paragraph 37(2) was seeking to do, but on a literal reading of the language failed to achieve, is also abundantly plain.

The starting point is to consider what was the purpose of section 18(1)(g) of the Act of 1981 as originally enacted. Sections 15 to 18 of the Act of 1981 are the statutory provisions regarding the jurisdiction of the Court of Appeal. Section 16 is the basic source of the Court of Appeal's jurisdiction to hear appeals from decisions of the High Court. Section 16(1) provides that 'subject as otherwise provided by this or any other Act' the Court of Appeal 'shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court'. Section 18 is concerned with restrictions on appeals to the Court of Appeal. As originally enacted, the relevant part of section 18(1)(g) read:

> '(1) No appeal shall lie to the Court of Appeal -
> . . .

> (g) except as provided by the Arbitration Act 1979, from any decision of the High Court -
> (i) on an appeal under section 1 of that Act on a question of law arising out of an arbitration award; or
> (ii) under section 2 of that Act on a question of law arising in the course of a reference;'

As paragraph (g) indicates, sections 1 and 2 of the Act of 1979 enabled the High Court to make decisions on questions of law arising out of arbitration awards or in the course of references to arbitration. These two sections contained restrictions on appeals to the Court of Appeal in respect of certain decisions. For instance, section 1(7) excluded an appeal to the Court of Appeal unless the High Court or the Court of Appeal gave leave and the High Court certified that the decision raised a point of law of general public importance. Thus, and this is the first feature to note regarding section 18(1)(g) in its original form, the phrase 'except as provided by the Arbitration Act 1979' did not mean 'except as enabled by the Arbitration Act 1979'. The Arbitration Act 1979 did not contain provisions empowering the Court of Appeal to hear appeals from decisions of the High Court on arbitration matters. As already noted, the source of the statutory power enabling the Court of Appeal to hear such appeals lies elsewhere, in the Act of 1981 itself. Rather, in this context the word 'provided' meant envisaged, or permitted. In more legalistic language, the phrase meant 'except in accordance with the provisions of the Arbitration Act 1979', those provisions being restrictions on appeal.

A second feature should also be noted. Section 18(1)(g) did not impose additional restrictions on the right to appeal to the Court of Appeal from decisions of the High Court mentioned in sub-paragraphs (i) and (ii) of section 18(1)(g). Section 18(1)(g) merely brought forward into section 18(1) restrictions on rights of appeal already expressed in the relevant sections of the Act of 1979. Presumably it was thought convenient and desirable that these restrictions, set out in another statute, should be expressly mentioned in Part II of the Act of 1981, concerned as it is with the jurisdiction of the Court of Appeal.

I now turn to the Act of 1996. Many sections in Part I provide for applications to the court. Some of them restrict appeals from decisions of the court. Typical is section 12, which concerns the power of the court to extend time for beginning arbitral proceedings. Section 12(6) provides that the 'leave of the court is required for any appeal from a decision of the court under this section'. The 'court' means the High Court or a county court (section 105). Other sections are wholly silent about appeals. Section 9 is such a section.

I derive two impressions from these sections. First, the draftsman was well aware that the source of any right to appeal lay elsewhere. Nowhere do the sections create a right of appeal. References to appeals are confined to restricting a right whose existence is assumed. Second, when the draftsman wished to limit the right

of appeal he said so. In section after section in Part I, restrictions similar to the restriction in section 12(6) are set out expressly. In some sections, such as section 32, the restriction on appeals is even more tightly framed. This style of drafting points strongly to the conclusion that where a section is silent about an appeal from a decision of the court, no restriction was intended. The draftsman must have intended that, save to the extent that an appeal was expressly circumscribed, parties to court decisions under the various sections would be able to exercise whatever rights of appeal were available to them from sources outside the Act itself.

This, then, is the scheme of the Act of 1996, so far as appeals are concerned. The absence, from section 9 and other sections, of restrictions on appeal is not surprising. The principal purpose of the Act, as recited in its preamble, was to restate and improve the law relating to arbitration pursuant to an arbitration agreement. Its genesis was several reports of a Departmental Advisory Committee on Arbitration Law. In its report of June 1989 the committee concluded that current statute law was not serving business well, but advised against adopting the United Nations Commission on International Trade Law (UNCITRAL) model law on international commercial arbitration. The committee recommended that, instead, there should be a new and improved Arbitration Act, not limited to the subject matter of the model law. In February 1994 the Department of Trade and Industry published a consultation document and a draft Bill. In July 1995 the Department published a further consultation paper and a revised draft Bill. In February 1996 the departmental advisory committee, in a further report, discussed the Bill introduced into Parliament in December 1995 and recommended some changes. The committee published a supplementary report in January 1997. These reports and consultation papers commented in detail on each clause of the Bill or draft Bill and drew attention to changes in the law. For instance, the report of February 1996 noted that under clause 12 leave to appeal from a court decision would require the leave of that court: see paragraph 74. None of these reports and consultation papers contained any criticism of the existing right of appeal against court decisions on stay applications. None of them suggested this right should be abolished or restricted. Nor was there any suggestion or indication that any concern had been expressed to the committee or the Department on this matter, or regarding any of the other clauses in the Bill which as enacted contain no restrictions on appeals from court decisions.

Mr. Kendrick Q.C. placed some reliance on section 1(c) of the Act of 1996. The provisions of Part I are founded on three principles and are to be construed accordingly. The third principle is that in matters governed by Part I the court should not intervene except as provided in that Part. I do not think section 1(c) assists the plaintiffs. Section 9 does not empower the court to intervene in the arbitral process. When a stay application is made under section 9 court proceedings are already on foot. The question raised by the stay application is whether those existing legal proceedings shall be stayed or permitted to continue. Further, section 1(c) does not touch upon the question of appeals from court decisions. Section 1(c)

is concerned with a different question: whether the court should intervene at all. Section 1(c) throws no light on the present question.

Against this background one comes to section 107. Section 107 bears the heading 'Consequential amendments and repeals'. Section 107(1) provides that the enactments specified in Schedule 3 are amended in accordance with that Schedule, 'the amendments being consequential on the provisions of this Act'. Schedule 3 contains 62 paragraphs of consequential statutory amendments. One of the consequential amendments necessitated by the Act of 1996 was an amendment to section 18(1)(g) of the Act of 1981. The Act of 1996 repealed the Act of 1979, and Part I of the Act of 1996 contained its own restrictions on appeals to the Court of Appeal in certain cases. The consequential amendment called for was replacement of the existing section 18(1)(g) by a new paragraph (g) which carried forward into section 18(1) the restrictions on appeals set out in Part I of the Act of 1996. As drafted and enacted, the new paragraph (g), read literally, went much wider than this. The new paragraph (g) carried these restrictions into section 18(1). Unfortunately, the new paragraph (g), read literally, also made a major legislative change which was not consequential on any provision of the Act of 1996. By including within its scope every court decision under Part I, the new paragraph abolished an appeal to the Court of Appeal from all court decisions made under Part I of the Act save for decisions made under sections containing restrictions on such an appeal. This abolition, moreover, was achieved by a paradoxical drafting technique: when the draftsman intended to restrict the right of appeal, he did so expressly, but when taking the more far-reaching step of wholly excluding a right of appeal he said nothing about this in the section. Instead, on the literal reading of the new paragraph (g), the abolition was effected by an obscure provision, supposedly no more than consequential, in one of the schedules to the Act.

I am left in no doubt that, for once, the draftsman slipped up. The sole object of paragraph 37(2) in Schedule 3 was to amend section 18(1)(g) by substituting a new paragraph (g) that would serve the same purpose regarding the Act of 1996 as the original paragraph (g) had served regarding the Act of 1979. The language used was not apt to achieve this result. Given that the intended object of paragraph 37(2) is so plain, the paragraph should be read in a manner which gives effect to the parliamentary intention. Thus the new section 18(1)(g), substituted by paragraph 37(2), should be read as confined to decisions of the High Court under sections of Part I which make provision regarding an appeal from such decisions. In other words, 'from any decision of the High Court under that Part' is to be read as meaning 'from any decision of the High Court under a section in that Part which provides for an appeal from such decision'.

I freely acknowledge that this interpretation of section 18(1)(g) involves reading words into the paragraph. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable

cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross' admirable opuscule, *Statutory Interpretation*, 3rd ed., pp. 93-105. He comments, at page 103:

> 'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74, 105. In the present case these three conditions are fulfilled.

Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In*Western Bank Ltd. v. Schindler* [1977] Ch. 1, 18, Scarman L.J. observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation. None of these considerations apply in the present case. Here, the court is able to give effect to a construction of the statute which accords with the intention of the legislature.

For these reasons, which are substantially the same as those of the Court of Appeal, I would dismiss this appeal.

LORD JAUNCEY OF TULLICHETTLE

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Nicholls of Birkenhead. For the reasons he has given I would also dismiss the appeal.

LORD STEYN

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Nicholls of Birkenhead. For the reasons he has given I would also dismiss the appeal.

LORD CLYDE

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Nicholls of Birkenhead. I agree with it, and for the reasons he gives I too would dismiss the appeal.

LORD MILLETT

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Nicholls of Birkenhead. I agree with it, and for the reasons he gives I too would dismiss the appeal.
