

SVEA COURT OF APPEAL
Department 02
Division 020111

JUDGMENT
28 August 2017
Stockholm

Case No.
T 756-16 and
T 4427-16

CLAIMANT

Wayne och Margareta´s Coffee Aktiebolag, Reg. No. 556345-1201
Drottninggatan 55
111 21 Stockholm

Counsel: Advokat Dan Engström and jur. kand. Elin Nilsson
Advokatfirman Nova AB
P.O. Box 55996
102 16 Stockholm

RESPONDENTS

1. Ammouris Kaffe AB, 556798-4538
c/o Ammouri
Eksättravägen 168
127 61 Skärholmen

2. Mr. AA
[INFORMATION OMITTED]

Counsel to 1 and 2: Jur. kand. Fadi Al-Aieshy
Kontra Juristbyrå AB
Olofsgatan 18
111 36 Stockholm

MATTER

Challenge of arbitration award given in Stockholm on 23 October 2015

Judgment of the Court of Appeal, see following page.

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JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal annuls the default judgment of 19 April 2016 in case no. T 756-16.
 2. The Court of Appeal rejects the Claimant's motions.
 3. Wayne och Margareta's Coffee Aktiebolag is ordered to compensate Ammouris Kaffe AB for its litigation costs before the Court of Appeal in the amount of SEK 100,000, comprising costs for legal counsel, plus interest pursuant to Section 6 of the Interest Act as from the date of the Court of Appeal's judgment until the date of payment.
 4. Wayne och Margareta's Coffee Aktiebolag is ordered to compensate Mr. AA for his litigation costs before the Court of Appeal in the amount of SEK 125,000, of which SEK 100,000 comprises costs for legal counsel, plus interest pursuant to Section 6 of the Interest Act on the former amount as from the date of the Court of Appeal's judgment until the date of payment.
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BACKGROUND

On 6 July 2011, Wayne och Margareta's Coffee Aktiebolag (Wayne's Coffee) and Ammouris Kaffe AB (Ammouris Kaffe) entered into a franchise agreement that included a rental agreement, with certain specified conditions. Ammouris Kaffe was a party to both agreements, and Mr. AA had, as the sole representative for Ammouris Kaffe, issued a personal guarantee for all of Ammouris Kaffe's obligations.

Wayne's Coffee commenced arbitration in order to collect unpaid rent in the amount of SEK 872,235 plus interest with reference to the parties' agreement. Ammouris Kaffe and Mr. AA (the Respondents) disputed the motions and objected that the parties had entered an oral agreement concerning waiver of the rent under certain conditions.

In the arbitral award rendered on 23 October 2015, the tribunal rejected most of Wayne's Coffee's action. Wayne's Coffee now challenges certain parts of the award.

On 19 April 2016, the Court of Appeal issued a default judgment against Mr. AA in case no. T 756-16 and has, in respect of him, annulled the arbitration award in certain parts. Mr. AA's applied for a re-trial, the proceedings have been reopened under case no. T 4427-16. Following a decision by the Court of Appeal, the two cases have been joined.

MOTIONS AND POSITIONS

Wayne's Coffee has moved that the Court of Appeal shall annul the following parts of the arbitration award

- Paragraph 67 as regards the motion concerning rent in the amount of SEK 872,235 plus interest, and
- Paragraph 71 in its entirety, and
- The second sentence of paragraph 73.

The Respondents disputed the claims.

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The parties have claimed compensation for their litigation costs before the Court of Appeal.

Pursuant to Section 1 of Chapter 53 and item 5 of the first paragraph of Section 18 of Chapter 42 of the Code of Judicial Procedure, the Court of Appeal has decided the action without a main hearing.

THE PARTIES' GROUNDS

Wayne's Coffee

Wayne's Coffee has maintained that the arbitrators exceeded their mandate by taking circumstances into account which had not been referenced by the parties (item 2 of the first paragraph of Section 34 of the Swedish Arbitration Act (1999:116)).

Alternatively, Wayne's Coffee has maintained that a procedural error occurred in the arbitration (item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act). The error occurred by the arbitral tribunal not informing Wayne's Coffee that it had taken factual circumstances into account although these had not been duly invoked by the Respondents. Thereby, the arbitral tribunal deprived Wayne's Coffee of its right to argue these legal facts, since Wayne's Coffee assumed that circumstances which had not been invoked would not be taken into account in the arbitral award. The procedural error occurred without having been caused by Wayne's Coffee, and constitutes such a material procedural error that it materially affected the outcome of the arbitration.

The Respondents

The Respondents have disputed that the arbitral tribunal exceeded its mandate or insufficiently guided the proceedings such that it affected the outcome of the arbitration.

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FURTHER DETAILS

Wayne's Coffee

The arbitral tribunal exceeded its mandate

In its review, the arbitral tribunal took into account the fact that Mr. AB had informed Mr. AS, who was authorized to represent Wayne's Coffee, about the oral agreement which, according to the Respondents, had been reached. This is a factual circumstance that the Respondents had not invoked as a legal fact in the arbitration. The only objection raised by the Respondents in the arbitration was that Ammouris Kaffe had entered the oral agreement with Mr. AB. The Respondents never invoked as a circumstance that Mr. AB subsequently had informed Mr. AS about the oral agreement. Mr. AB was not authorized to enter oral or written agreements on behalf of Wayne's Coffee, which was indeed confirmed by Mr. AB in his witness testimony.

By taking the aforementioned circumstance into account in its review, the arbitral tribunal concluded *that* Mr. AS, when he was informed by Mr. AB about the rent-free arrangement which was not taken up in the written agreement, ought to have realized the risk of a misunderstanding between the parties concerning the conditions of the lease, *that* Wayne's Coffee as against Ammouris Kaffe was obliged to clarify the contents of the lease, *and that* Wayne's Coffee must have realized that the omitted invoicing constituted a confirmation of the oral agreement. These conclusions, which are based solely on the non-invoked circumstance that Mr. AS had been informed about the oral agreement, led to the arbitral tribunal's conclusion that the oral agreement was binding and to the decision to reject Wayne's Coffee's claims in respect of rent.

When determining the contents of the agreement, the arbitral tribunal also took into account the circumstance that Wayne's Coffee adjusted the contents of the lease with the main lessor to cover alternative premises in the shopping center. The change of premises entailed that Wayne's Coffee undertook to pay higher rent to the main lessor. This is a legal fact which was never invoked by the Respondents. By considering this circumstance as having been invoked by the Respondents, the

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arbitral tribunal concluded that a new lease had been entered into between Wayne's Coffee and the main lessor, but, as far as can be gathered, not between Wayne's Coffee and Ammouris Kaffe. Therefore, the arbitral tribunal concluded that it had not been established that Ammouris Kaffe had accepted the new, higher rent.

The arbitral tribunal has committed a procedural error

The arbitral tribunal has, in any event, insufficiently guided the proceedings by not informing Wayne's Coffee that the arbitral tribunal had interpreted the Respondents' arguments to include factual circumstances as though the Respondents had invoked them, although the Respondents had in fact not invoked them.

This constitutes a material procedural error, since Wayne's Coffee had no reason to assume that the arbitral tribunal would take the aforementioned circumstances into account. This meant that Wayne's Coffee was not made aware of all legal facts upon which the arbitral tribunal subsequently based its decision. Thereby, the arbitral tribunal deprived Wayne's Coffee of the opportunity to argue these legal facts. Because these legal facts were taken into account in the decision, the procedural error obviously affected the outcome of the arbitration.

The Respondents

The arbitral tribunal did not exceed its mandate

The Respondents' grounds for disputing Wayne's Coffee's motions in the arbitration were that Ammouris Kaffe and Wayne's Coffee had entered an oral agreement on waiver of rent on certain conditions. Thus, the issue to be resolved in the arbitration was whether or not there was a binding oral agreement on waiver of rent between the parties. The fact that Mr. AB had informed Mr. AS about the agreement is an evidentiary fact supporting the Respondents' claim that the parties had reached an oral agreement on waiver of rent. However, this circumstance alone was not determinative for the conclusion that the oral agreement was binding – instead, the arbitral tribunal undertook a general review of all the referenced evidence. In its arbitration award, the arbitral tribunal argues for and against the

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binding effect of the agreement, and also deemed important the circumstances surrounding the entering of the agreement as well as the fact that Wayne's Coffee had not invoiced rent to Ammouris Kaffe.

Also the circumstance that Wayne's Coffee had altered its lease with the main lessor to cover other premises in the shopping center constitute an evidentiary fact in support of the assertion that there was an oral agreement on waiver of rent, and thus no specific reference thereof is required. Moreover, the circumstance was undisputed in the arbitration. However, in the arbitration the Respondents invoked the circumstances concerning the change of premises in support of the fact that the rent had been waived. This was done during the testimonies of Messrs. AB, AA and NA, as well as in the closing statement. The Respondents stated that the change of premises was done on the initiative of Wayne's Coffee, and the Respondents had not been involved in the decision to change premises and had not been consulted on the matter. The Respondents also stated that the relocation, and the related costs, were paid by Wayne's Coffee. These circumstances constitute evidentiary facts in support of the waiver of the rent. In addition, the arbitration award states that Wayne's Coffee had invoked the circumstances surrounding the change of premises in support of its motions, and thereby they were aware of all facts upon which the decision was based.

The arbitral tribunal did not commit a procedural error

Wayne's Coffee was present through its counsel during the hearing, and the company was able to address all aspects of the arbitration. The arbitral tribunal is not obligated to inform Wayne's Coffee. The company, through its counsel, ought to have realized the circumstances that would be taken into account in the arbitral award. Therefore, Wayne's Coffee was aware of all circumstances upon which the arbitration award was based.

THE INVESTIGATION

The parties have referenced documentary evidence.

GROUNDS

General starting points

Item 2 of the first paragraph of Section 34 of the Swedish Arbitration Act provides that an arbitration award shall be wholly or partially annulled if the arbitrators exceed their mandate. In arbitrations, the starting point is that the arbitrators are obliged to settle the dispute based on the circumstances the parties invoke in support of their respective cases. If an arbitrator bases his/her decision on a circumstance which has not been invoked by a party, he/she shall generally be considered to have exceeded his/her mandate. (See Government Bill 1998/99:35 p. 145, cf. also Section 3 of Chapter 17 of the Code of Judicial Procedure.) In this context, a circumstance is a factual circumstance which has a direct impact on the legal consequences, i.e. a legal fact. Evidentiary facts or ancillary facts need not be invoked but must be stated in the arbitration. Although it is not explicitly set out in law, case-law from the Court of Appeal and jurisprudence have established that an excess of mandate which did not in any way affect the outcome of the arbitration cannot lead to the annulment of an arbitration award (see Svea Court of Appeal's judgment of 25 June 2015 in case no. T 2289-14 and Lindskog, Skiljeförfarande (1 May Zeteo), the commentary to Section 34 of the Swedish Arbitration Act).

Item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act provides that an arbitration award shall be annulled if a procedural error occurred that likely affected the outcome. This can be the case in the event of a material deficiency in the arbitral tribunal's guidance of the proceedings, e.g. if a party was not granted the opportunity to properly argue its case in some aspect (see Lindskog, Skiljeförfarande (1 May Zeteo), the commentary to Section 34 of the Swedish Arbitration Act).

Did the arbitral tribunal exceed its mandate?

In the arbitration, Wayne's Coffee claimed – as far as is now relevant – payment for unpaid rent. The motion was based on the parties' written agreement. In support of its objection, the Respondents invoked that the parties, through Mr. AB on behalf of Wayne's Coffee and Mr. AA on behalf of Ammouris Kaffe, had reached an oral

agreement that Ammouris Kaffe would not pay rent as long as the monthly turnover did not reach SEK 200,000. The Respondents further stated that it was on this basis that Ammouris Kaffe assumed the operations of the coffee shop, which was done three weeks prior to the execution of the franchise agreement. Further, the Respondents stated that Wayne's Coffee, during the validity of the franchise agreement, disregarded most of the provisions set out in the written agreement, and instead applied the provisions of the oral agreement.

Thus, the issue to be settled by the arbitral tribunal was whether the Respondents should be ordered to pay rent to Wayne's Coffee as per the provisions of the written agreement, or whether the parties by way of an oral agreement and Wayne's Coffee's subsequent application of their agreement had agreed on a waiver of the rent.

As part of its review of whether the parties had agreed on waiver of rent, the arbitral tribunal, amongst other things, deemed relevant a circumstance which had been uncovered during the testimony of Mr. AB – that he had informed Mr. AS about the oral agreement. The arbitral tribunal concluded that Wayne's Coffee, through Mr. AS, ought to have realized that a misunderstanding concerning the obligation to pay rent was likely, and that Wayne's Coffee therefore ought to have clarified that rent was due irrespective of the turnover. Thereafter, the arbitral tribunal stated that Wayne's Coffee by, amongst other things, omitting to invoice the rent during 2011 had contributed to confirm Ammouris Kaffe's understanding that the rent had been waived. The arbitral tribunal's conclusion was that Wayne's Coffee, due to what it ought to have realized concerning Ammouris Kaffe's understanding of their agreement, had become bound by its manner of applying the conditions of their agreement.

According to the arbitral tribunal, the grounds for Wayne's Coffee being bound as per the above, were strengthened in 2012 when Wayne's Coffee, without Ammouris Kaffe's approval, altered its primary lease with the main lessor to cover other premises in the shopping center and also undertook to pay substantially higher rent. In addition, the arbitral tribunal concluded that what had been uncovered concerning Wayne's Coffee's invoicing during 2012 further

strengthened Ammouris Kaffe's understanding that the oral agreement would continue to apply. In sum, the arbitral tribunal concluded that Wayne's Coffee had failed to establish its claim for rent.

The relevant circumstances – i.e. that Mr. AB informed Mr. AS about the oral agreement and that the primary lease with the main lessor had been altered – do not, according to the Court of Appeal, constitute legal facts in the action at issue. Instead, these circumstances are evidentiary circumstances in support of the parties having, by way of the oral agreement and Wayne's Coffee's application of the provisions of the agreement, agreed on a waiver of the rent. Therefore, the Court of Appeal's conclusion is that the arbitral tribunal did not base its decision on any legal fact which had not been invoked by a party, and it has thus not exceeded its mandate.

Did a procedural error occur?

In light of the Court of Appeal's conclusion that the relevant circumstances do not constitute legal facts, but rather evidentiary facts, the arbitral tribunal was not obliged to inform Wayne's Coffee that it intended to take them into account. Thus, the conclusion of the Court of Appeal is that no procedural error occurred.

Summary

What Wayne's Coffee has invoked in support of its action does not give grounds to annul the arbitration award. Therefore, the claims shall be dismissed.

Litigation costs

Upon this conclusion, Wayne's Coffee shall be ordered to compensate the Respondents for their litigation costs. The Respondents have claimed compensation for their litigation costs in a total amount of SEK 371,875, of which SEK 297,500 comprises costs for legal counsel and SEK 74,375 relates to value added tax. The Respondents have not, despite the Court of Appeal's request, specified how the costs have been allocated among them. Therefore, the Court of Appeal will assume that the litigation costs have been borne equally between them. Wayne's Coffee has attested a total amount of SEK 26,400.

The Court of Appeal has decided the case without a main hearing. The issue to be decided by the Court of Appeal was well defined. The parties' exchange of submissions and the invoked evidence have been of rather limited scope. Against this background, the amount claimed for legal counsel by the Respondents appears unreasonably high. In sum, the Court of Appeal finds that Ammouris Kaffe shall be reasonably compensated for its litigation costs by an amount of SEK 100,000 for legal counsel. Ammouris Kaffe shall not be compensated for value added tax on that amount, since the tax is not a cost for the company. Reasonable compensation for Ammouris Kaffe's litigation costs shall be determined to SEK 125,000, of which SEK 100,000 comprises costs for legal counsel, and SEK 25,000 comprises value added tax.

APPEALS

The second paragraph of Section 43 of the Swedish Arbitration Act provides that the judgment of the Court of Appeal may be appealed only if the Court finds that it is of importance for the development of case-law that an appeal is reviewed by the Supreme Court. The Court of Appeal finds no reason to grant leave to appeal.

The judgment of the Court of Appeal may not be appealed.

The decision has been made by: Senior Judge of Appeal PC, and Judges of Appeal GS and LF (reporting).