Privy Council Appeal No. 27 of 2003

Michael Carter (trading as Michael Carter Partnership) *Appellant*

v.

Harold Simpson Associates (Architects) Limited *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 14th June 2004

Present at the hearing:-

Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Dame Sian Elias

*[Delivered by **Lord Hoffmann**]*

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1. The parties are both firms of architects who entered into a written partnership agreement dated 7 November 1994 for the purpose of a single joint venture to provide architectural services for the construction of the Montego Bay Civic Centre. Their Lordships will refer to the two firms, one of which was incorporated, by the names of their principals, Mr Simpson and Mr Carter. The partnership agreement contained an arbitration clause.

2. Differences having arisen between the parties, they made a joint written submission to arbitration on 5 December 1997. The submission read:

> "We jointly agree to the appointment of Maurice Stoppi acting as mediator/arbitrator to determine the issue(s) in the current dispute between us. We further agree that we share equally his charges of J$4,000 per hour and his reasonable reimbursable costs and that his Award when given in writing will be accepted by us as final and binding."

3. It appears that substantial sums were held in partnership bank accounts and the parties agreed that in order to allow the award to be taken up as soon as possible, the arbitrator's costs and charges would in the first instance be paid out of partnership money. This agreement was recorded in a letter dated 24 July 1998 from Ms Carol Davis, Mr Simpson's attorney, to Messrs Ripton Macpherson, Mr Carter's attorneys:

> "As you are aware our respective clients have arranged for Mr Stoppi's fees to be paid from funds available in the joint venture account.
>
> This is to confirm our telephone conversation to the effect that this payment is an advance from the joint venture account, to facilitate the release of the arbitration award. However as is usual the parties will of course have to abide the order for costs (if any) made by the arbitrator. As such either party will have to refund monies advanced from the joint venture account in the event that the arbitrator makes an order for costs against it."

4. The submission itself is unilluminating about the matters in dispute but these were no doubt clarified in the pleadings which the parties exchanged in July and August 1998. Mr Simpson made a claim and Mr Carter a counterclaim. Witnesses gave evidence under oath and were cross-examined. Both parties made submissions.

5. The arbitrator noted that neither party had requested a reasoned award and, after receiving payment of $422,050 in respect of his fees and charges, published his award on 23 September 1998:

> "7.1 Now I Maurice Stoppi the arbitrator appointed as aforesaid, having considered the representations of the parties, their witnesses and documents submitted by them in evidence do hereby award and direct that the joint venture in the first instance and then the respondent do forthwith pay to the claimant the total sum of [$J3,741,317.65] in full and final settlement of items shown in claimant's summary of claim of July 28, 1998 and all other issues in this reference as follows:
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> | | | | |
> |---|---|---|---|
> | 1. | Short payment on fees |) | |
> | 3. | Due on new tender price |) | 2,680,186.65 |

2.	Architectural cost for work done between 1973 and 1994	I make no award in respect of this item.
4.	Lump sum for post-contract architectural fees	See 7.3
5.	Interest	1,061,131.00
	Total	$3,741,317.65

7.2 I have further considered the representations and evidence of the respondent in respect of their counter-claim dated 18 June 1998 with which I find no merit. I therefore make no award in respect of the respondent's counter-claim.

7.3 And I further award and direct that in accordance with the notes of a meeting between the parties held on September 11 1996 and in pursuance of clause 10.01 of the Joint Venture Partnership Agreement dated November 7 1994 ... and in keeping with the wishes of the parties to mutually determine their joint venture agreement, such termination shall be effected in the following manner:

7.3.1 within 60 calendar days of the signing of the construction contract between the employer and contractor for the construction of the Montego Bay civic centre, the respondent shall pay to the claimant ... $371,652.

7.3.2 upon receipt of payment of the above amount by the claimant, the Joint Venture Partnership Agreement of November 7 1994 shall be deemed to be terminated and shall thereafter be of no effect.

7.4 And I further award and direct that the respondent bear and pay his own and the claimant's costs in and of the arbitration including my fees and charges. Such amounts for costs shall be agreed between the parties or submitted after the publication of this award to the court for taxation."

6. Section 13 of the Arbitration Act (the whole of which is substantially in the same terms as the English Arbitration Act 1889) provides that -

"an award on a submission may, by leave of the Court or a Judge, be enforced in the same manner as a judgment or order to the same effect."

7. On 9 November 1998 Mr Simpson issued an originating summons (Suit No E 538 of 1998) seeking the leave of the court. Before it could be heard, other events intervened. The construction contract for the Civic Centre was signed on 29 September 1998 and the sum mentioned in clause 7.3.1 of the award accordingly became payable on 28 November 1998, although the parties seem to have treated it as payable on 27 December. On 22 December 1998 Mr Carter issued an originating summons (Suit No E/506 of 1998) for an order setting aside paragraphs 7.1 and 7.2 of the award for an error of law on its face. On 24 December 1998 Mr Carter sent Mr Simpson a cheque for $371,652 and said that pursuant to paragraph 7.3.2 the joint venture was now terminated. Mr Simpson did not accept the cheque; he took the view that the award was one and indivisible and that paragraph 7.3.2 could not take effect until the whole award had been paid.

8. The originating summons of 22 December 1998 came before Ellis J on 7 January 1999. He set aside the award. Mr Simpson appealed and on 30 July 1999 the appeal was allowed with costs, which were subsequently taxed at $264,983. There was no further appeal against this order.

9. On 18 and 20 August 1999, after the award had been reinstated by the Court of Appeal, the originating summons pursuant to section 13 came before Harris J. She took the view that in principle leave to enforce the award should be given but that the form needed to be amended. Her order therefore said:

"1. That the plaintiff may have the leave of this Honourable Court pursuant to section 13 of the Arbitration Act for the award of the arbitrator herein to be enforced in the same manner as a judgment of the court.

2. Matter remitted to arbitrator to amend award to place it in a form in which it will be enforceable."

10. It would seem that the point which troubled the judge was the direction in paragraph 7.1 that "the joint venture in the first instance and then the respondent" pay the sum specified to the claimant. Their Lordships think that it is clear enough that the sums in

question were to come out of the joint venture funds and, so far as they were insufficient, to be paid by Mr Carter personally. But the judge thought that the award should say exactly how much should come out of identified joint venture funds and what the balance payable by Mr Carter would be.

11. A discretionary power to remit an award is contained in section 11 of the Act, reproducing the terms of section 10 of the 1889 Act. Authority for the use of this power so that the award may be amended to be put into a form which is enforceable is to be found in the decision of Diplock J in *Margulies Brothers Ltd v Dafnis Thomaides & Co (UK) Ltd* [1958] 1 WLR 398.

12. Before the arbitrator could amend the award, Mr Simpson issued a writ against Mr Carter on 23 August 1999 (Suit CLH 103 of 1999) claiming payment of the sums awarded and interest. This was belt and braces: the summary procedure under section 13 is intended for clear cases but the alternative mode of enforcement is by an action upon the award: see *Re Boks & Co and Peters, Rushton & Co Ltd* [1919] 1 KB 491. The writ claimed payment of the sums awarded together with interest and costs.

13. For the purpose of enabling the arbitrator to amend his award, Miss Davis (on behalf of Mr Simpson) supplied him with information about the state of the joint venture bank accounts. There was $976,737.35 in one account and $247,903.58 in another. Mr Carter, on the other hand, asked the arbitrator to state a case for the court, asking whether on the true construction of the partnership agreement it created a partnership and whether, if it did, Mr Carter could be required to pay Mr Carter anything until the partnership accounts had been taken after a dissolution. It also asked whether he could be required to pay interest and whether, having regard to the submission agreement of 5 December 1997, he could be made to bear the whole of the fees and charges of the arbitrator.

14. The arbitrator amended the award on 4 November 1999 to provide that the sums in the two partnership bank accounts should be paid to Mr Simpson and the remaining sum of $2,516,676.72 should be paid by Mr Carter. He rejected the request to state a case, saying (in a letter to the parties dated 4 November 1999) that the remission had been only for the purpose of putting it into an enforceable form and that he was otherwise *functus officio.* The sums of $976,737.35 and $247,903.58 (making $1,224,640.93 in

all) were paid out of the joint accounts to Mr Simpson on 9 November 1999.

15. On 12 November 1999 Mr Carter issued new proceedings (E. 474 of 1999) to set aside the award on various grounds, including misconduct in refusing to state a case. He followed this up on 6 April 2000 with an originating summons (2000 EC 137) seeking declarations and orders concerning the winding up of the partnership. Both summonses were eventually dismissed: the first by Wesley James J on 26 June 2001 and the second by Beswick J (Ag) on 28 June 2000.

16. On 26 June 2000 Beswick J (Ag) gave leave for the statement of claim in the writ action to be amended to give credit for the $1,224,641 paid on 9 November 1999. On 18 January 2001 Marsh J gave summary judgment for the remainder of the claim.

17. Mr Carter appealed to the Court of Appeal against (1) the order of Beswick J (Ag) giving leave to amend the statement of claim in the writ action (2) the order of Marsh J giving summary judgment in the writ action (3) the dismissal by Wesley James J of the summons to set aside the award for misconduct and (4) the dismissal by Beswick J (Ag) of the summons for orders winding up the partnership. The Court of Appeal dismissed all four appeals and Mr Carter now appeals to Her Majesty in Council.

18. The main submission of Mr Codlin for the appellant concerned the effect of the order for remittal made by Harris J. He says that the effect was altogether to nullify the award. It follows that Beswick J (Ag) should not have granted leave to amend the statement of claim in the writ action, because the cause of action in those proceedings, namely the award, had disappeared. Likewise, no summary judgment should have been given. If Mr Simpson wanted to proceed by writ, he should have issued new proceedings after the amended award, which was in point of law a new award, had been published. The nullity of the first award also meant that Mr Carter was not restricted in the points which he could raise when the arbitrator was considering the matter again and he should have stated a case as requested. The partnership summons was another way of seeking answers to the questions on which the arbitrator should have sought the opinion of the court.

19. The Court of Appeal, in a judgment delivered by Forte P., said that the amended award was not a new award. It was amended to

put it into enforceable form, that is to say, it was the same award in a better form. Their Lordships agree. There is no rule that a remittal under section 11 necessarily means that the award ceases to have any effect and that the parties start with a clean sheet. The general principle is that the powers and duties of the arbitrator cannot exceed what is necessary to give effect to the order for remittal. If the award is remitted for one specific purpose, such as to amend a name, the arbitrator has no power to amend the award in any other way: see *Howett v Clements* (1845) 1 CB 128.

20. Mr Codlin relied upon *Johnson v Latham* (1851) 20 LJ QB 236 but it seems to their Lordships that the interlocutory comments of Erle J are against his submission and the judgment does not decide the point in his favour. There was an arbitration concerning the right to maintain a weir and one of the issues was the depth of water which the defendant was entitled to maintain behind the weir. The award directed that, to define the height, marks should be placed as a third party should direct. The arbitrator made an award of costs in favour of the defendant which was taxed by the Master at £172. The award was then successfully challenged on the ground that the arbitrator had wrongly delegated to the third party a question which he should himself have decided. The court remitted the award to the arbitrator, who added a plan indicating what the height of water should be. The defendant claimed costs under the allocatur of the Master after the original award and the plaintiff objected that the costs should have been taxed again after the second award.

21. In support of the plaintiff's argument, Mr Watson said, at p 238 "At the time the Master taxed the costs he had no jurisdiction, for the award was bad". Erle J interrupted: "It was not adjudged bad. It was only sent back to the arbitrator on one point". Mr Watson modified his submission slightly: "After it was so sent back there was no existing award until the new award was made". Erle J commented: "What became of the award as to the residue of the matters which were not sent back, pending the second reference? It seems to be in a manner suspended". Later, Erle J put a question to Mr Watson:

> "Suppose an award good as to three points, and bad as to the fourth, and sent back as to that alone, as at present advised I am of opinion that the arbitrator is *functus officio* as to the three and cannot alter his judgment as to them."

22. Mr Watson did not dissent from the substance of this opinion. He said:

> "The arbitrator must re-award his previous award as to them, or the old award may stand as to them after the new award is made."

23. The conclusion their Lordships draw from these exchanges is that on any view, the remittal of the award does not deprive it of legal effect. It continues to operate so as to make the arbitrator *functus officio*, unable to alter his award, on those matters which were not remitted. In the judgment, at p 240, Erle J allowed the objection to the allocatur because "the discretion of the arbitrator over the costs of the reference and award is to be exercised at the close of the reference". This only finally happened when the new award was made. But that does not mean that the old award had ceased to have any effect. On the contrary, "the arbitrator might not alter his first award upon any matter not referred back". In *Russell on Arbitration* (18th ed) p. 409 the effect of *Johnson v Latham* was said to be that "the part not remitted will continue valid". Their Lordships agree.

24. In this case the remittal was expressly concerned with the form of the award and it follows that the substance of the award remained valid and could properly form the subject-matter of the action to enforce it. It also follows that the arbitrator had no jurisdiction to reconsider the merits and was right to refuse to state a case on the questions of law which it was said that he should have taken into account. Likewise, Mr Carter is not entitled to pursue his partnership remedies by action when the partnership has been properly dissolved and the final rights of the parties determined.

25. Mr Codlin next submitted that the award was bad in law because it is a well-established rule of partnership law that one partner cannot sue another for money received on behalf of the firm except in a partnership action claiming a dissolution and partnership accounts. The short answer is that it is not open to Mr Carter to complain that the award was bad in law. He had attempted unsuccessfully to set it aside for error of law on its face. No application had been made before the original award for a stated case and, as their Lordships have indicated, no such application could be made afterwards. The parties submitted the whole of their partnership dispute to the arbitrator and, as the Court of Appeal observed, there is no reason to suppose that he did not consider the

full state of accounts between the parties as part of the award which he made with a view to a dissolution.

26. Finally, Mr Codlin submitted that the arbitrator had no power to order Mr Carter to pay the whole of the arbitrator's costs and charges because the submission letter of 5 December 1997 said that they should be borne equally. Section 4(i) of the Act gives an arbitrator a general power to award costs but that power, like all the others listed in section 4, is subject to a contrary intention expressed in the submission.

27. Their Lordships do not think that the submission letter is concerned with the allocation of costs between the parties. It is intended to create contractual relations with the arbitrator and to make the parties each liable to him for an equal share of his costs and charges. Indeed, it would have been better for the arbitrator if he had insisted that each party accept liability for the whole of his costs and charges. As Lord Hope of Craighead said in his chapter on *Arbitration* in the Laws of Scotland (Stair Memorial Encyclopaedia (Reissue 1999)) at paragraph 96:

> "The arbitrator would be wise ... in his own interests to make it clear in his award that the liability of the parties to him remains a joint and several liability, because, unless he does so, he may deprive himself of the protection of being entitled to have recourse against either party for the payment of the whole of his fee if the other refuses to pay his share."

28. In the present case, this precaution was unnecessary because the arbitrator was paid out of the partnership account. But the liability in equal shares to the arbitrator is not inconsistent with his having the statutory power to order that, as between the parties, the costs should be borne differently. That was the basis upon which the parties agreed to payment out of the joint venture account and their Lordships consider that they understood the position correctly.

29. Their Lordships will therefore humbly advise Her Majesty that the appeals should be dismissed with costs.