[2013] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 15/2013

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**LEIGHTON CHIN-HING**	**APPELLANT**
AND	**WISYNCO GROUP LIMITED**	**RESPONDENT**

Mrs Georgia Gibson-Henlin instructed by Henlin Gibson Henlin for the appellant

Miss Maliaca Wong and Miss Shani Nembhard instructed by Myers, Fletcher & Gordon for the respondent

22 April and 22 May 2013

HARRIS JA

[1] I have read in draft the judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

[2] This is an appeal against the decision of Sinclair-Haynes J in which she ordered a stay pending arbitration of the appellant's claim against the respondent for damages, rent, interest and costs in relation to an alleged breach by the respondent of a lease agreement dated 20 April 2010 entered into between the parties to take effect on 1 April 2010.

[3] By the agreement, the appellant agreed to lease to the respondent premises located at 8 Haining Road, Kingston 5 in the parish of St Andrew for a term of five years. The "permitted use" of the premises was for "studio and offices" and the agreed rent was US$2500.00 per month subject to an annual increase of 7½%. Clause 4.8 of the lease provided that disputes or questions in relation to certain matters were to be settled by arbitration.

[4] The respondent entered into possession of the premises and proceeded to effect certain alterations to the property to convert it to the use for which it had been leased. Because of the stage at which the proceedings have reached in the court below, that is, no defence has yet been filed on account of the respondent's application for the stay, the facts giving rise to the discord between the parties are sparse. There is great disparity between the contentions of both sides in relation to certain issues of fact, for example, the basis for the issuance of a stop notice in respect of building on the premises. It does appear, however, that the parties are agreed that the respondent did not complete its work on the building, but sought to terminate the lease. It removed from the premises on 1 December 2011 and paid no rent after that date.

[5] The appellant engaged the services of attorneys-at-law, Henlin Gibson Henlin and there followed without-prejudice correspondence between Mrs Gibson-Henlin and Mr William Mahfood, managing director of the respondent. On 4 January 2012, Mrs Gibson-Henlin wrote by e-mail to Mr Mahfood, in response to a privileged communication from him, indicating that "our client does not agree that you are entitled

to terminate the lease on the basis you say or at all. It is a fixed term lease and he is not in breach". She indicated that both parties appeared not to be agreed and that there are three methods of solving the dispute: arbitration, mediation and litigation. She stated that arbitration was provided for in the lease in relation to some of the matters that were in dispute and indicated that it was her view that "it is always useful to attempt to resolve matters by the agreed methods". She recommended that the respondent "agree to proceed to mediation or arbitration within the next seven (7) days" and stated that if there could be no agreement, they would have to proceed to litigation "as our instructions are to commence those proceedings". In closing, she indicated that they would rely on the letter as proof that the appellant was "willing to proceed to arbitration and made the request of [Mr Mahfood] if necessary in relation to those aspects of the lease to which it is relevant".

[6] There appeared to be no further communication between the parties, and on 4 September 2012, the appellant filed a claim form and particulars of claim seeking damages, "the sum of US$122,693.73 plus GCT at 17.5% being rental from December 1, 2011 to March 31, 2015", interests, costs and such further relief. Although there was service of the claim form on the respondent on 5 September, there is some dispute as to whether it was also served with the particulars of claim. The respondent filed its acknowledgment of service on 19 September 2012, and on 29 October 2012, filed a notice of application for court orders seeking that further proceedings in the matter be stayed pending arbitration.

[7] The application for stay was supported by two affidavits: one deponed to by Miss Shani Nembhard, attorney-at-law of the law firm with conduct of the matter, and the other by Mr Richard Barrett, an employee of the respondent. Miss Nembhard stated in her affidavit that the respondent "was ready at the time when proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration". In his affidavit, Mr Barrett stated that the "without prejudice" correspondence between the parties had been in furtherance of an effort to resolve the issues amicably. He stated that at no point did the respondent refuse to submit the matter to arbitration, nor had it expressed an unwillingness to have the dispute resolved in that manner. He stated that the respondent had been served with two copies of the claim form, but it was not served with the particulars of claim and the particulars had been obtained from the registry at the Supreme Court by its attorneys. By an affidavit in response, Mr Marc Jones on behalf of the respondent, indicated that the respondent did not reply to the appellant's request for arbitration by e-mail. He stated that the first time that the appellant knew that the respondent had any interest in arbitration was on the last date fixed for the filing of its defence. In relation to the respondent's assertion that it had not received the particulars of claim, he relied on the affidavit of service of Rohan Whyne that the respondent had been served with same on 6 September. The application came on for hearing before Sinclair-Haynes J, who made the order mentioned in paragraph [2].

[8] The appellant filed four grounds of appeal as follows:

" a. The learned judge erred as a matter of fact and/or law and/or wrongly exercised her discretion in finding that the Respondent was at the time when the proceedings were commenced ready and willing to do all things necessary to the proper conduct of the arbitration.

b. The learned judge erred as a matter of fact and/or law in finding that the claim is within the scope of the arbitration agreement in clause 4.8 in circumstances where the claim for rent is not one of the matters agreed to be referred to arbitration therein and where the clause expressly excludes disputes concerning rent.

c. The learned judge erred as a matter of fact and/or law and/or wrongly exercised her discretion in refusing to accept submissions based on the **House of Blues** case that on the material before her the grant of a stay would lead to an 'undesirable state of affairs'.

d. The learned judge erred as a matter of law and/or wrongly exercised her discretion in granting the application because:

    (i) Staying the matter in its entirety is disproportionate having regard to the fact that the claim for rent cannot be the subject of arbitration."

[9] It is necessary to set out two provisions which are critical to a determination of these grounds: section 5 of the Arbitration Act and clause 4.8 of the lease agreement. Section 5 of the Arbitration Act states:

"5. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the

> proceedings, apply to the Court to stay the proceedings, and the Court or a Judge thereof, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

"Submission" is defined in section 2 as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not".

Clause 4.8 states:

> "In case of any dispute or question whatsoever arising between the parties hereto with respect to the cesser or abatement of rent as aforesaid or to the construction or effect of this Lease or any clause or thing herein contained or the rights duties or liabilities or [sic] either party under this Lease or otherwise in connection with the foregoing the matter in dispute shall be settled by reference to a single arbitrator in case the parties agree upon one otherwise by two arbitrators one to be appointed by each party in the manner provided by the Arbitration Act provided that this clause shall not apply or be deemed to apply to any dispute or matter touching or with respect to the rent hereby reserved save with regard to such cesser or abatement of rent as aforesaid."

Submissions

Ground (a)

[10] Mrs Gibson-Henlin submitted that section 5 of the Arbitration Act requires that it be shown that the applicant for a stay was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary for the proper

conduct of the arbitration. She submitted that the section is clear that the court must be satisfied that this requirement is met before it exercises its discretion to stay the proceedings. The respondent, she contended, must not only show that it was ready and willing at the time of the application but also at the time the claim was commenced. Relying on **Douglas Wright T/A Douglas Wright Associates v The Bank of Nova Scotia Jamaica Ltd** (1994) 31 JLR 351, she submitted that the court should assess the 'readiness' and 'willingness' by examining the evidence as to the conduct of the respondent leading up to the commencement of the claim.

[11] She further submitted that the respondent did not respond to the e-mail of 4 January 2012 and even though in the e-mail the appellant made it clear that he would be relying on his request in the event of any application for a stay, he still made an effort after that warning. She submitted that the respondent did not seek to rely on the arbitration clause; it did not take steps to indicate its willingness to proceed to arbitration. She submitted that a mere assertion of willingness, as expressed by the respondent's affidavit was insufficient since there were tangible steps that could have been taken as was done in the case of **Douglas Wright Associates v BNS**. Even after the claim was filed, she contended, the respondent waited until the last day of the period fixed for filing the defence to file its application. The application, she contended, was a strategy employed to delay the just disposal of the proceedings having regard to all the circumstances.

[12] Miss Wong submitted that there was no finding by the judge that is so unreasonable as to be unsupported by the evidence. She argued that the judge had before her two affidavits filed on behalf of the respondent and in both there were statements about the respondent's willingness to arbitrate. That simple assertion in the affidavit, she submitted, was approved by the court in **Douglas Wright Associates v BNS** and the claim in the case was consequently stayed. She further submitted that the e-mail did not indicate any attitude in relation to the respondent's willingness and the judge's conclusion in that regard could not be altered by anything contained therein.

[13] In written submissions, it was submitted that although arbitration is usually a private process, there are well-established formalities for starting arbitration proceedings. Relying on Redfern and Hunter's Law and Practice of International Commercial Arbitration 2nd edn, it was submitted that typically, the complainant in an arbitration initiates formal proceedings by serving the other party with a notice of dispute or a claim. At no point, it was argued, did the appellant serve the respondent with a notice of dispute or any other statement formally commencing arbitration proceedings. It was also submitted that unwillingness on the part of the respondent could not be inferred from the fact that the respondent waited until 42 days before filing its application as this position was not supported by the authorities. It was pointed out that in **Douglas Wright Associates v BNS**, the court found that the application for a stay was timely although it had been made two years after the writ had been filed.

Grounds 3(b), (c) and (d)

[14] In written submissions, it was submitted on behalf of the appellant, that an alternative reason for not granting the stay is that the claims were not covered by the arbitration clause. The appellant was claiming arrears of rent owed, damages for breach in respect of the remaining term of the lease and damages for destruction of the leased property. The arbitration clause covers disputes relating to cesser and abatement of rent, the former being a situation where the premises are destroyed by an insured risk so as to be unfit for occupation and use, and the latter referring to circumstances where a tenant may be entitled to a reduction in the rent if he loses the enjoyment of the property through the fault of the landlord or some unforseen calamity which was not insured against. It is clear, it was submitted, that on the face of the claim it is not about cesser or abatement of rent properly understood. It was argued that there was no merit in the respondent's submission in the court below that the claim for rent was really a claim for damages because the appellant had refused to accept the respondent's breach and went on to affirm the lease.

[15] Mrs Gibson-Henlin submitted that in paragraph 10 of the particulars of claim, the issue was raised that it was never in the contemplation of the parties that the respondent would have allowed the permitted use of the premises without obtaining the requisite permission. She argued that the respondent had failed to obtain the necessary planning permission for the intended use of the premises. However, it was the unauthorized building on the premises and not the lease itself which had caused a stop notice to be ordered by the planning authorities. Having affirmed the lease, the claim

for rent subsisted during the term of the lease which had not expired. Mrs Gibson-Henlin submitted that the claim was therefore for rent in respect of the unexpired portion of the lease.

[16] It was also submitted in writing that the claim for damages in so far as it affected the general liability of the respondent could arguably fall within the arbitration clause. This, it was submitted, gives rise to the situation where a part of the dispute can be referred to arbitration, but the portion that is not within the clause, namely the claim for outstanding rent, must be litigated. It was also the appellant's submission that he had advised the respondent at the outset that there were aspects of the agreement that were not subject to the arbitration clause. It was further submitted that if the clause is enforced in light of this divergence, then the result may be multiple proceedings as there would be arbitration and litigation between the same parties arising out of the same circumstances. Relying on **House of Blues Ltd and Evan Williams v Secret Paradise Resort Limited** SCCA No 43/2005, delivered 25 September 2005, it was submitted that the potential for multiple proceedings concerning the same subject matter with the attendant risks of duplication in costs and inconsistent rulings is a sufficient reason for refusing a stay. The result would be that either all of the proceedings would be stayed or that a portion of these proceedings would be stayed while the remaining portion continues. Staying the entire matter, as the learned judge had done, it was submitted, is disproportionate because the claim for rent cannot be the subject of arbitration and accordingly the appellant ought to be allowed in the interests of justice to continue with that aspect of his claim to which he

has a right of access to the courts. In oral submissions, counsel submitted that there was sufficient reason why the matter should not proceed to arbitration at all.

[17] In written submissions, it was submitted on behalf of the respondent that the respondent had given up possession of the premises effectively on 30 November 2011. Reference was made to the definition of rent in Hill and Redman's Law of Landlord and Tenant, 18 edn, at paragraph 1457 as being "the recompense paid by the lessee to the lessor for the exclusive possession of corporeal hereditaments" and a similar definition by Owusu in Commonwealth Caribbean Land Law as payment which a tenant is bound to pay to his landlord for the use of the land of his landlord. The respondent, it was submitted, has asserted that it has no liability under the lease because the lease is void. Therefore, it was submitted, the issue of whether or not the lease is valid is crucial to the issue of whether or not the respondent is liable for rent from 30 November 2011 to the present day. This is an issue that falls squarely within the arbitration clause, it was submitted. Reference was made to the judge's statement that the allegation that the premises was unfit was inextricably bound up with the issue of fitness for the purpose for which it was leased and this could have an impact on the appellant's entitlement to damages. The respondent submitted that on that basis, there may be an alternate claim for the abatement of rent, the determination of which, likewise, is squarely within the arbitration clause. It was also submitted that the relief sought was in the nature of damages, which was within the scope of the arbitration and any amount claimed for rental that would accrue in the future could only be construed as a claim for damages.

[18] Miss Wong submitted that the appellant's present position is inconsistent with its previous posture as it was at some point willing to proceed to arbitration. She submitted further that the arbitration clause makes mandatory, disputes as to obligations and rights and makes optional disputes as to rent. It does not mean that the arbitrator would be precluded from considering the latter. The arbitrator's power or jurisdiction would include rights, duties or obligations that a party might have including rent. Regardless of what the relief is coined as, it was argued, this does not alter the remedy that the appellant is seeking which is damages. The arbitrator, she argued, has jurisdiction to compensate the appellant for any loss or damage arising from the breach as he sees fit. As so awarded, there could be no further award as it would be double compensation. She sought to distinguish the **House of Blues** case on the basis that in that case, not all the parties were signatories to the agreement with the consequence that the arbitrator could not bind them. In the present case, both parties had signed the agreement to arbitrate.

[19] In my view, two issues arise for determination:

1. Is there sufficient evidence that the respondent was ready and willing to go to arbitration when the claim was filed and later when the application was made?
2. Does the matter in relation to rent fall within the arbitration clause?

Analysis

Is there sufficient evidence that the respondent was ready and willing to go to arbitration?

[20] There is no dispute between the parties as to the legal requirement imposed by section 5 that the court must be satisfied that the applicant for the stay was at the time when the proceedings were commenced ready and willing to do all things necessary for the proper conduct of the arbitration. In **Douglas Wright Associates v BNS**, the court stated that this also has to be the stance of the applicant at the time when the application is brought. The real dispute between the parties is as to whether the evidence or facts support the judge's conclusion that the respondent was willing and ready at the time when the appellant brought the claim. In the court below, reliance was placed on a letter written by Mr Mahfood in response to a letter from Mrs Gibson-Henlin, but it is my view that this reliance was misplaced as both letters were privileged and the parties had not waived their right to such privilege. The only evidence that existed and ought properly to have been considered was Miss Nembhard's statement as to the willingness of the respondent and Mr Barrett's assertions that the parties had communicated at first with a view to resolving the matter amicably and that at no point did the respondent refuse to submit the matter to arbitration; nor had it expressed an unwillingness to have the dispute resolved in that manner. This is to be considered against the assertions of Mr Jones that the respondent had failed to reply to the appellant's request for arbitration and that the appellant had only known of the respondent's interest in arbitration on the last date fixed for filing the defence.

[21] It is my view that the assertion of an applicant who seeks to have proceedings stayed that it is willing and ready to arbitrate is sufficient evidence upon which a court may find that it is indeed willing and ready unless there is evidence to the contrary. There need not be any further facts in support of that assertion although such facts would strengthen its position. There is no evidence that the respondent refused to or stated that it was unwilling to arbitrate. It is true that there is no evidence of a response to the e-mail from Mrs Gibson-Henlin in which arbitration was suggested. But, in my view, silence or inaction on the part of the respondent to a suggestion to arbitrate is insufficient to ground a finding of unwillingness. According to the text Law and Practice of International Arbitration, a party initiating recourse to arbitration must give to the other party a notice of arbitration. The notice of arbitration, it states, shall include, among other things: a demand that the dispute be referred to arbitration and a reference to the contract out of which the dispute arises; the general nature of the claim, and an indication of the amount involved, if any; the relief and remedy sought; and a proposal relating to the number of arbitrators, if not already agreed. This is a step which could have been taken by the appellant to put in motion arbitration proceedings. This would have served as formal notice to the respondent of his intention to have the matter arbitrated. The appellant failed to take this step and to that extent, may also be viewed as being inactive in having the matter resolved by arbitration. The respondent's lack of response or its failure to give a positive indication or statement to the effect that it objected to the notice of arbitration would have been a

clear indication that it was not interested in arbitration. It would have provided cogent evidence of the respondent's unwillingness.

[22] The learned judge, in speaking to the question of the filing of the application on the last date fixed for the filing of the defence, had this to say, with which I entirely agree:

> "The fact that the defendant's application was filed shortly before the expiration of the time he was allowed to file his defence and acknowledgment of service should not disqualify his application on the basis of lack of readiness and willingness. The application, although made at the nth hour was nevertheless duly filed within the allotted period."

I would add that it is not insignificant that there is some dispute as to whether the respondent actually received the particulars of claim, which may have had some bearing on the filing of the defence or the application. It is my view therefore that the finding of the learned judge that the respondent was willing and ready at the time of the commencement of the claim and the hearing of the application to stay the action and proceed to arbitration is not unreasonable and consequently should not be disturbed.

Issue two

Does the issue in relation to rent fall within the arbitration clause?

[23] The arbitration clause makes it clear that a dispute in relation to rent is excluded from arbitration unless it concerns abatement or cesser of rent. In dealing with this issue, the learned judge referred to the definition of cesser of rent as advanced by the

appellant and contained in Ross: Commercial Leases/Division G Rent Review at chapter four. She found, quite correctly, that the dispute was not in respect of cesser of rent. She relied on the definition of abatement of rent as contained in Stair Memorial Encyclopaedia/Landlord and Tenant (Reissue)/General Law at paragraph 191 as referring to circumstances where the tenant loses the enjoyment of all or any part of the subjects let to him either through the fault of the landlord or through some unforeseen calamity. She also rightly found that the dispute does not relate to abatement of rent.

[24] Save and except for the evidence that the premises were to be used as "studio and offices" and that the respondent had discontinued its construction of the studio, there is no evidence as to the reason for the respondent seeking to terminate the lease. However, it is not unreasonable to conclude that the respondent's termination was on account of the discontinuance of the construction of the studio. For whatever reason, whether it was due to the failure to obtain planning permission or the issuance of the stop notice arising from the failure to comply with the building regulations and whether the termination of the lease was lawful and damages payable as a result thereof, these are all issues within the purview of clause 4.8. Although the appellant pleaded in its particulars of claim that the respondent had commenced construction without obtaining the requisite planning permission and as a result, a stop notice had been ordered, there is no evidence of this. Although counsel for the appellant also contended that the termination of the lease was due to the stop notice issued to the respondent as the construction of the building was contrary to building regulations, equally, there was no

evidence of this. However, it is clear that the respondent was not able to use the premises according to part of the stated purpose in the lease.

[25] The respondent has sought to rely on **Rom Securities Ltd v Rogers (Holdings) Ltd** 205 EG 427 asserting that the lease was void and therefore it is not liable. It seems to me that the underlying premise of this argument is that it must have been in the contemplation of the parties that the lease would only be valid if the purpose for which it had been given could be carried out. Indeed, this had been one of the arguments in **Rom Securities Ltd** that it was an implied term of the lease that if the requisite building permission had not been granted, the lease could not subsist. I agree with counsel for the respondent that the true status of the lease is integral to a resolution of the issue, as, if there were no valid lease at the time the respondent sought to terminate it and vacate the premises, then there would be no liability. It is my view that the question of the validity of the lease is for the determination of the arbitrator to be made based on the construction of the lease agreement and evidence as to the factual circumstances surrounding the respondent's discontinuance of the construction and vacation of the premises.

[26] I also agree with the respondent that regardless of the name given to the relief sought, if the lease is valid, damages would be the appropriate remedy to be awarded to the appellant. It is true that if there is a breach of a contract a party may elect to continue the contract and may recover damages for the breach. But, in my view, where the breach is of a fixed term lease and involves giving up possession of the property before the expiration of the term, there is no further occupation and rent, properly

speaking, would no longer apply. The lessor may, however, be entitled to the amount that would be payable under the lease, save and except for the existence of any circumstance rendering the lease void, but the lease having been brought to an end and there is no longer possession of the premises, any amount payable would be in the form of damages for breach, to be calculated by reference to the amount payable for rent.

[27] The appellant has sought to rely on the **House of Blues** case contending that there would be multiplicity in proceedings and the possibility of inconsistent findings of fact. However, as I have found that all the reliefs claimed are matters which are properly within the remit of the arbitrator(s), as Miss Wong has submitted, there could be no further claim as this would result in a duplication of proceedings and remedies. It is therefore my view that the learned judge was quite correct in finding that reliance on the case was misplaced. Allowing the matter to proceed to arbitration would, far from preventing the just disposal of proceedings, be promoting adherence of the parties to what they have contracted for. In any event, the learned judge was required to exercise her discretion as to whether there was sufficient reason for the stay of proceedings pending arbitration to be granted, and it has not been shown that she is plainly wrong (see **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042).

[28] For these reasons I would affirm the decision of the judge and dismiss the appeal with costs to the respondent.

BROOKS JA

[29] I too have read the draft judgment of Phillips JA and agree with her reasoning and conclusion.

HARRIS JA

ORDER

Appeal dismissed. Costs to the respondent to be taxed if not agreed.