[2024] JMCC Com 04

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO.SU2023CD00396

BETWEEN	**DCL CASTLES & COTTAGES DEVELOPMENT LIMITED**	**CLAIMANT**
AND	**SKYSCRAPERS BUILDERS LIMITED**	**DEFENDANT**

Mr Lorenzo Eccleston and Mr Jahmar Clarke instructed by Temple Law for the claimant

Mr Jhade Lindsay and Miss Denise Christie instructed by 876 Legal Suites for the defendant

Heard November 21, 2023, November 30, 2023, January 15, 2024 and January 31, 2024

Arbitration Act 2017 - application to set aside arbitral awards - whether there are two final awards - whether there is a partial award and a final award – whether the cost award is an amendment to the merits award –section 55 (3) of the Arbitration Act 2017 - whether time to set aside the awards has expired section 49 of the Arbitration Act - whether time can be extended under section 55(3) of the Arbitration Act 2017- UNCITRAL Model Law- Jamaica International Arbitration Centre (JIAC) Fast Track Rules – whether a cost award can be set aside in the face of Article 14 (2) of the Jamaica International Arbitration Centre (JIAC) Fast Track Rules

CORAM: JARRETT, J

Introduction

[1] In its fixed date claim form filed on July 17, 2023, DCL Castles & Cottages Development Limited ('the claimant'), seeks to set aside two arbitral awards, both described by the arbitrator as "final". One of the awards is a decision on the merits and the other is a decision in relation to costs. Before me is an application by Skyscrapers Builders Limited ('the defendant'), to strike out the claimant's statement of case on the basis that there are no reasonable grounds for bringing the claim or that the claim is an abuse of process as it is statute barred. The defendant also asks in the alternative, that the claim be heard summarily at the first hearing, pursuant to CPR 27.2(8). I will give a brief factual background, outline the claim and the grounds of the application to strike it out, and show why I ultimately struck out the claimant's statement of case. The affidavits, both in support of the application and in response to it, also addressed the substantive claim; but I will focus in this judgment only on those aspects of the evidence relevant to the application to strike out the claim.

Factual background

[2] By virtue of a construction contract ('the contract') entered between the claimant and the defendant, the defendant agreed to construct for the claimant a four-storey apartment block with basement level parking, comprising fourteen two-bedroom units, seven penthouses of three bedrooms each, four townhouses of two bedrooms each, along with road and infrastructure works. The agreed contract sum was $567,695,534.50, after deducting $10,000,000.00 for contingencies and with a mobilization payment of $57, 600,000.00. There was a clause in the contract that required the parties to subject any dispute in relation to it to arbitration. Following a dispute between the parties (the details of which are not relevant for purposes of this judgment), the parties agreed to go to arbitration with an agreed arbitrator. They also agreed that the arbitration would be governed by the **Jamaica**

International Arbitration Centre (JIAC) Fast Track Arbitration Rules ("the Rules'). In separate proceedings,[1] the defendant sued the claimant for breach of contract ('the 1st claim'), but those proceedings were ultimately stayed on May 13, 2022, pending arbitration.

[3] On April 11, 2023, the arbitrator delivered what he described as his: **"FINAL AWARD",** dated March 16, 2023. On May 19, 2023, he delivered what was described as his: **"FINAL AWARD [DETERMINATION OF THE AMOUNT OF RECOVERABLE COST]**". On May 29, 2023, the defendant's application in the 1st claim to have the awards recognised as enforceable court orders was successful; and on August 28, 2023, it obtained a charging order, provisionally charging land owned by the claimant with the amounts payable under the awards.[2]

The claim

[4] In addition to an order setting aside the two awards of the arbitrator[3], the claimant also seeks a declaration that there are justifiable doubts as to the impartiality or independence of the arbitrator; a declaration that it was not given a reasonable opportunity to present its case during the arbitral proceedings; an order staying the enforcement proceedings in the 1st claim, an order abridging and extending the time to July 17, 2023, to file and serve the claim, and costs.

The application to strike out the claim

[5] The defendant relies on the following grounds to support its application: -

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[1] Claim No SU2021CD00434 Skyscrapers Builders Limited v DCL Castles & Cottages Development Limited

[2] I agree with both sides that the order recognising the arbitral awards does not prevent a challenge under section 55 of the Arbitration Act, given the provisions of section 57(1)(a)(v) and 57(2).

[3] The fixed date claim form refers to the cost award as being delivered on June 5, 2023, however at the hearing, counsel for the claimant indicated that that is an error and that the date of delivery is May 19, 2023.

a) Section 55(3) of the Arbitration Act ('the Act") which requires that an application to set aside an arbitral award must be made within three months of the delivery of the award, therefore the current application filed on July 17, 2023, was filed out of time.

b) The provisions of CPR 26.3(1) which provide for the striking out of a claim where there are no reasonable grounds to bring it or where it is an abuse of process.

c) CPR 27.2(8) which allows a court to hear a fixed date claim summarily at the first hearing if it considers it appropriate to do so.

d) There is no basis on which to set aside the cost award.

[6] In the affidavit of Zhentian Zhang, a director of the defendant, filed on September 15, 2023, in support of the application, he exhibits the two arbitral awards and says that the award on the merits was delivered on April 11, 2023, and the cost award delivered on May 19, 2023. According to him, he was advised by his attorney-at-law that the parties had agreed on April 11, 2023, on a separate award for costs and that the arbitrator invited the parties to email their statement of costs on or before April 21, 2023. No statement of costs, however, was submitted by the claimant.

[7] Sue-Ann Chai Chong, attorney-at-law, in an affidavit filed on October 31, 2023 , in support of the defendant's application, says that in the 1st claim, a provisional charging order was made over land owned by the claimant registered at Volume 1574 Folios 967 and 970 of the Register Book of Titles and Volume 1575 Folios 34 and 35 of the Register Book of Titles to secure the amount of $148,142,508.90 with interest under the arbitral award dated March 16, 2023 and the sum of $ 11, 192, 000.00 under the cost award dated May 19, 2023. In her affidavit filed on November 6, 2023, she says that the parties had agreed to the Rules governing the arbitration, and she points to Article 14(2) thereof, which states that the costs and expenses of the arbitration shall not be taxed or reviewed by the court. She

also exhibits email correspondence showing the delivery date of the merits award as April 11, 2023.

The defendant's response

[8] Daval Omar James Bell, in his affidavit filed on November 3, 2023, says he is the Managing Director of the claimant and that he was advised by his attorney-at-law that the issue of costs formed part of the arbitrator's final award. According to him, he was advised that he has three months from the date of the final award to challenge the decision of the arbitrator. The instant claim was filed on July 17, 2023, and is therefore well within the time prescribed by the Act. He says there is no dispute that the final award was delivered on May 19, 2023.

The submissions

The defendant

[9] The defendant's submission in relation to the striking out of the claim is simple. It is that there are two awards which are final awards and the time under section 55(3) of the Act to set aside the first award delivered on April 11, 2023, has expired. Since there is no provision in the Act to extend time to set aside an award, there is therefore either no reasonable basis for the claim in relation to the final award on the merits, or the claim is an abuse of process of the court. As to the cost award, the contention is that there is no basis to challenge this award. Besides, the claimant made no submission to the arbitrator in respect of costs, despite the arbitrator inviting the parties to do so.

[10] Mr Jhade Lindsay, counsel for the defendant submitted that the cost award is not an amendment to the merits award but is a stand-alone award. He argued that sections 49(2) and 49(3) of the Act cannot assist the claimant because those

sections apply where the arbitrator omits to make provision for costs in the award. The arbitrator is entitled under the Act to make more than one award and in the context of arbitration, the cost award is not an amendment to the merits award. Furthermore, counsel argued, the parties had agreed that there would be a separate cost award. He submitted that under the Act, party autonomy is given pre-eminence, and judicial intervention minimised. He relied on sections 4, 5 and 8 of the Act in support of the argument that the Act places importance on the agreement of the parties, it stipulates that it ought to be interpreted in accordance with its international origin, and one of its objectives is to give effect to the UNCITRAL Model Law.

[11] The decision in **AW v PY [2022] HKCFI 1397,** from the High Court of Hong Kong, a jurisdiction which has adopted the UNCITRAL Model Law, was cited by Mr Lindsay to demonstrate that in that case, the court treated an arbitral award on the merits as separate from the arbitral award on costs. He also argued that an application to set aside the cost award was refused as it was out of time and the court found that there is no provision under the UNCITRAL Model law for an extension of time to do so. According to learned counsel, the time limit to set aside an award is not based on when the tribunal is *functus*. The critical provision is section 55(3) of the Act which establishes in clear terms that the permissible time to apply to set aside an arbitral award is within three months from receipt of the award. In relation to the cost award, he referred to Article 14(2) of the Rules which he says precludes taxation or review by the court of costs awarded by the arbitrator. Mr Lindsay submitted further that the decision in **Andrew Martin & Ors v Michael Harris [2019] EWHC 2735** cited by the claimant's attorneys-at-law to support their submission that the cost award is an amendment to the merits award, is unhelpful, as that decision was based on the Arbitration Act 1996 of England which is not an UNCITRAL Model Law jurisdiction. According to counsel, each of the awards in the case at Bar has all the hallmarks of an award under section 46 of the Act and is a final award.

The claimant

[12] Counsel Mr Jahmar Clarke relied on sections 47(1) and 47 (3) of the Act to argue that arbitral proceedings are terminated by a final award and that subject to exceptions that do not apply in this case, the mandate of the arbitrator comes to an end upon the termination of arbitral proceedings. He said that it therefore cannot be argued that the arbitrator's mandate came to an end when he delivered the merits award on April 11, 2023, since the issue of costs remained unresolved. It was only after the cost award on May 19, 2023, that the arbitrator's mandate was discharged. The merits award delivered on April 11, 2023, was not a final award and the arbitrator was wrong to so declare it, argued learned counsel. The cost award, he submitted, is an amendment to the merits award. He cited section 49 of the Act and submitted that this section expressly states that a cost award is an amendment to the award of the arbitral tribunal and forms a part of it. The time to apply to set aside the award therefore ran from the date of the delivery of the cost award. That date was May 19, 2023, and consequently, the claimant's claim was filed in time. Mr Clarke further argued that once the final award is made, the arbitrator is *functus* and so the only true final award was the award made on May 19, 2023. Reliance was placed on para 10.34 of the book **Arbitration of Commercial Disputes by Andrew and Karen Tweeddale**, in which the authors state the following: -

> "The term final award is often used by English and Commonwealth commentators for an award that completes the functions of the arbitral tribunal. When the final award is issued then the arbitral tribunal is *functus officio*. Subject to certain exceptions, the jurisdiction of the arbitral tribunal ceases at that point. Therefore, if an award leaves unresolved any issue, such as interest or costs, it should not be referred to as a final award. In **Charles M Willie and (Shipping) Ltd v Ocean Laser Shipping Ltd.,** Mr Justice Rix held

that a final award is made when the arbitral tribunal makes a ruling that finally disposes of the claim and all the issues. In this respect a final award is distinguishable from a partial, interlocutory, preliminary or interim award."

[13] The decision in **Andrew Martin & Ors v Michael Harris** (supra) was cited by Mr Clarke to support his argument that the issue of costs in the cost award cannot be separated from the earlier merits award. He invited the court to take a "liberal approach" to interpreting both awards as one award. As to Article 14 of the Rules, Mr Clarke submitted that the restriction referred to in that article is in relation to reviewing and taxing the costs quantified by the arbitrator and has nothing to do with a challenge to a cost award under section 55 of the Act.

Analysis and discussion

The Arbitration Act 2017

[14] The Act is transformative. It has completely modernised Jamaica's arbitration law, which, prior to its passage in 2017, was governed by the very archaic Arbitration Act 1900. Retired Judge of the Supreme Court, Justice Roy K Anderson CD, FCIArb, writing the Forward to the Rules, describes the Act's advent, the role of **Jamaica International Arbitration Centre** and the Rules in this way: -

> "In Jamaica after more than a century of living with an old, out-dated and inadequate statute, the legislature finally passed into law a new Arbitration Act 2017. This has provided a fillip to the growing efforts to avoid costly and dilatory litigation in a system which is over-burdened by backlogs and inertia. The introduction of the new Arbitration Act based on the UNCITRAL Model Law is a welcome addition to the national economy and there are already signs that the commercial sector is awakening to the possibilities which it provides.

> Nevertheless, the passage into law of this Act itself would not facilitate the opportunities that are inherent in a viable alternative dispute resolution mechanism. The law must be given life through rules which provide practical guidance as to how it is to be implemented in practice. It is for this reason that we must commend the Jamaica International Arbitration Centre…for putting together these rules to facilitate fast-track arbitration. The rules provide a veritable road map for negotiating one's way through the Act and its processes".

[15] The Act applies to both domestic and international arbitration and is modelled off the United Nations Commission on International Trade Law (UNCITRAL) Model Law. Section 5 (e) expressly provides that one of the Act's objectives is to give effect to the UNCITRAL Model Law. Section 3 in defining the UNCITRAL Model Law, states that it was adopted by the United Nations Commission on International Trade Law in 1985 and subsequently amended in 2006. A review of the Act undoubtedly shows that importance is placed on party autonomy and the arbitral process, while there are limits on judicial intervention save for those instances where it is needed to support arbitration agreements and arbitral awards. Section 3(5) (a) of the Act expressly states for example, that parties are free to agree on how a dispute should be resolved, subject to any safeguards that are necessary in the public interest. Section 4(1) provides that in the interpretation of the Act, regard is to be had to its international origin, the need to promote uniformity in its application and the observance of good faith. Section 8, meanwhile, states that in matters governed by the Act no court shall intervene except where so provided in the Act. Helpful assistance in the interpretation and application of the UNCITRAL Model Law from other UNCITRAL Model Law jurisdictions is in my view not only appropriate, but is desirable to promote uniformity and consistency in its application.

[16] Section 55(1) of the Act provides for the setting aside of an arbitral award in accordance with subsections (2) and (3). Given the importance of these provisions to the application before me, I will set them out in full: -

"55.-(I) Recourse to the Court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3).

(2) An arbitral award may be set aside by the Court only if

(a) the party making the application furnishes proof that-

(i) a party to the arbitration agreement referred to in section 10 was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of Jamaica;

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties

cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Jamaica; or

(ii) the award is in conflict with the public policy of Jamaica.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under section 48, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."

The issues

[17] The primary issue I must decide is whether the claimant is out of time to apply to set aside the arbitral awards. In the process, I must determine the nature and effect of each of the two awards.

The nature of the two awards

[18] The arbitrator describes both the merits award and the award on costs as final awards. The authors of **Redfern and Hunter on International Arbitration 6th**

Edition, say that there is no internationally accepted definition of the term 'award'. There is in fact none in the UNCITRAL Model Law. Our legislators have however defined 'award' in section 3 of the Act as meaning:

> "A decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award".

[19] In my view, the Act contemplates that during the arbitral proceedings, several awards may be made. Section 19(3) speaks to an award on the merits. Section 20(2) suggests that an interim measure made prior to the award which finally determines the dispute may be in the form of an award. There can also be an award on agreed terms as provided for in section 45. These awards are said to have the same status and effect as an award on the merits. Under section 48(4), the arbitrator may make additional awards in relation to claims presented but not included in the award. In a sense, subject to a challenge, all awards are 'final', as they finally determine the substantive issues with which they deal and are binding on the parties. However, I accept as sound and adopt, the view expressed by the authors of **Redfern and Hunter on International Arbitration** (supra), that the award that disposes finally of all outstanding issues is the "final award". That was also the position held by Rix J in **Charles M Willie (Shipping) Ltd, v Ocean Laser Shipping**, referred to in the book **Arbitration of Commercial Disputes** (supra) cited by counsel Mr Clarke in his submissions.

[20] It is therefore after the final award that the arbitral tribunal becomes *functus officio* and it is this award that is referred to in section 47(1) of the Act as the award by which the arbitral proceedings are terminated. Section 47(3) on the other hand provides that on the termination of the arbitral proceedings, the mandate of the arbitral tribunal terminates, subject to the provisions of section 48 and 55(4), both of which are not relevant on the facts in this case.

[21] The Act in its definition of 'award', allows an arbitrator to make a partial award. A partial award is not the 'last award' in the arbitral proceedings. A tribunal may also

decide to resolve issues of liability first before delivering a decision on damages and costs. According to **LLias Bantekas in An Introduction to International Arbitration** at paragraph 7.3.2:

> " It is also common for tribunals to offer partial awards in order to address complex issue of liability first, before using the award on liability as a platform for assessing quantum, i.e. the range, scale and quality of applicable damages …In practice tribunals routinely grant partial awards, their authority stemming from the *lex arbitri*, which is generally permissive, as well as institutional rules, subject to any contrary agreement by the parties".

[22] **Refern and Hunter on International Arbitration** (supra), at para.9.95, gives an example of a partial award in its treatment of the different approaches to dealing with the costs of an arbitration under the UNCITRAL Rules, the Stockholm Chamber of Commerce (SCC) Rules and the International Chamber of Commerce (ICC) Rules:-

> "Arbitration rules, such as those of UNCITRAL and the SCC provide for the costs of the arbitration to be fixed in the award. The ICC Rules provide differently, permitting the tribunal to fix costs at any time during the arbitration. The arbitral tribunal then has a choice: it can either ask each of the parties for details of their costs and expenses before making its award, so as to deal with them in that award; or it can deal with costs in a separate final award, which will then reduce what was intended to be a 'final' award on the merits of the case to the status of a partial award"

[23] There is no dispute that the merits award, the first award made by the arbitrator, dated March 16, 2023, was delivered to, and received by the parties on April 11, 2023, and it dealt with the substantive issues in dispute between them. There is also no dispute that in addition to determining the question of liability, that award decided that the claimant is to pay the defendant's recoverable costs of the

arbitration. There is also no dispute that the second award in relation to the costs of the arbitration, is dated May 19, 2023, and was delivered to and received by the parties on that same day. The first award is undoubtedly final in the sense that it finally determined the issue of liability, it is the award on the merits, and it is binding on the parties. It was, however, not the last award in the arbitral proceedings. Despite the nomenclature given to it by the arbitrator, it is not the award that finally determined the arbitral proceedings. I find therefore, that it is a partial award. The second award which assessed recoverable costs, is in my view, and I accordingly find, the final award as it plainly completed the mission of the arbitrator, and it is the award that terminated the arbitral proceedings and brought the arbitrator's mandate to an end. In his oral submissions, Mr Clarke argued that the arbitrator was wrong to state in the merits award that the parties had agreed that there would be a separate award as to costs, as there was no such agreement. Besides the fact that there is no evidence to support such a submission, even if there was no such agreement, the fact remains that two awards were made by the arbitrator and the cost award was the last of the two and it ended the proceedings.

[24] In **Andrew Martin & Ors v Michael Harris** (supra), the issue the court had to decide was whether it had the jurisdiction to make an order in relation to costs of arbitral proceedings when the merits award had been successfully appealed but the cost award had not. The court gave short shrift to the argument that since the cost award was not appealed it remained unchallenged, notwithstanding the fact that the merits award had been overturned on appeal. The judge in that case was of the view that the arbitrator and the parties had contemplated that if the merits award was overturned, the cost award would follow suit, since the general rule in keeping with the provisions of section 61 of the Arbitration Act 1996 of England is that costs should follow the event. Since, therefore, the cost award followed the event, the cost of the arbitration would follow the successful appeal of the merits award and be reversed without the need for a separate challenge.

[25] In the course of the judgment in **Andrew Martin & Ors v Michael Harris** (supra), the judge quoted the following extract from **Merkin's Arbitration Law** at para

18.75 which was referred to him in arguments and which he found to be a correct statement of the law: -

> "The award of costs must be in the form of an award, and for this purpose may be included in the substantive award, or may be dealt with separately in a supplementary award, but whether costs are dealt with in the main award or in a separate award, any award as to costs stands or falls with the substantive award, so that, if the substantive award is overturned by the court, the award as to costs ceases to have effect".

In the opinion of the learned judge, in principle, once a cost award is consequential on the substantive award, it falls with it. He was also of the opinion that since the claim form challenging the award referred only to the substantive award; the Arbitration Act 1996 does not define "award"; and the cost award was issued after the filing of the claim form, it was reasonable to treat the two awards as "one overall award" for the purposes of the legislation.

[26] Counsel Mr Lindsay is correct in saying that the Arbitration Act 1996 of England is not modelled off the UNCITRAL Model Law. However, the general principle articulated by the court in **Andrew Martin & Ors v Michael Harris** (supra), concerning the effect of a successful challenge of a substantive award on a cost award which is consequential on it, I find sound and applicable whether the jurisdiction is based on the UNCITRAL Model Law or not. The merits award before me however has not been set aside. Both awards are currently extant. But should the merits award be set aside, the cost award, which is plainly consequential on it, will fall with it. Given the provisions of the Act and its UNCITRAL Model Law origin, it is my opinion that the two awards should not be treated as "one overall award. Each of the two awards, can be the subject of an application under section 55 of the Act. There is nothing in the section that restricts a challenge to only awards that terminate the arbitral proceedings.

[27] Section 49 of the Act provides that where an arbitrator fails to make provision for costs in an award, a party may, within fourteen days of the delivery of the award, apply to the arbitrator for directions. The section goes on to provide that after giving the parties an opportunity to be heard, the arbitrator shall amend the award by giving directions as to the payment of the costs of the arbitration as he thinks fit. I cannot agree with counsel for the claimant, that the section supports his submission that the second award in relation to costs was an amendment to the award on the merits, within the meaning of the section. The arbitrator made provision for costs in the first award on the merits. He expressly stated that the claimant is to pay the defendant's recoverable costs together with interest from the date of the award, until payment. He then went on to say that at a hearing held on April 11, 2023, it was agreed that a statement of costs would be submitted by April 21, 2023, which would be the subject of a separate award on the recoverable costs. In my opinion therefore, section 49 cannot apply to the facts of this case.

Whether the claimant is out of time to challenge the awards

[28] Pursuant to section 55(3) of the Act, no application to set aside an award may be made after three months of it being received. The undisputed fact is that the parties were emailed the merits award on April 11, 2023, and the cost award on May 19, 2023. The fixed date claim form seeking to set aside both awards was filed on July 17, 2023. Clearly three months have passed since the merits award was received by the claimant. It therefore cannot be seriously contended that the time to challenge that award has not expired. I find that it has.

[29] Although the claimant in its fixed date claim form seeks an order that the time for filing and serving the claim be abridged and extended to the date of filing, no application is before me by the claimant for an extension of time to bring the claim and no submissions were made in rebuttal of the submissions made on behalf of the defendant, that there can be no extension of time granted by the court under

section 55 (3) of the Act. It is therefore unnecessary for me to make any determination on whether time can be extended under the section. I will however say *en passant*, that the decision from the High Court of Hong Kong **AW v PY** (supra) is instructive on the issue whether there can be an extension of time to set aside an arbitral award. In that case the court recognised that in UNCITRAL Model Law jurisdictions there has been general acceptance that courts have no power to extend time to set aside arbitral awards beyond the permissible three-month period. Section 12 of the UNCITRAL Model Law which provides that no court shall intervene except where so provided in the UNCITRAL Model Law itself, which is reflected in section 8 of the Act, was referred to by the court in **AW v PY** (supra), as an "important consideration" on this issue. As observed earlier, section 8 of the Act stipulates that in matters governed by the Act no court shall intervene except where so provided in the Act. There is no provision in the Act that permits the court to extend the time under section 55.

[30] Unlike the merits award, time to apply to set aside the cost award made on May 19, 2024, and delivered on that same day, would not have expired when the fixed date claim form was filed on July 17, 2023. The defendant contends however that there are no reasonable grounds in the fixed date claim to set aside the cost award, furthermore, article 14(2) of the Rules, which the parties agreed would guide the arbitration, prevents any challenge in a court of a cost award.

[31] There is no parallel rule in the UNCITRAL Model Rules, to Article 14(2) of the Rules which reads: -

> "Costs shall be awarded on a summary and commercial basis and in such manner and amount as the arbitral tribunal shall in its absolute discretion consider fair, reasonable and proportional to the matters in dispute. The arbitral tribunal shall specify the amount of such costs. There shall be no taxation or review by the Supreme Court or any other court of such costs, fees and expenses."

I am inclined to agree with Mr Clarke that on a proper construction of this article, the prohibition is against any challenge to the amount of the costs awarded in the way costs are taxed in a court, but it does not prevent a challenge to the cost award based on the grounds outlined in section 55 of the Act. If I am wrong on that, then it simply means that the claimant would be prevented from applying to set aside the cost award , and to seek to do so in the face of article 14(2) of the Rules, would be an abuse of process.

[32] If I am correct in the interpretation of article 14(2) of the Rules, I now turn to consider the following grounds to set aside the awards, which are outlined in the fixed date claim form: -

1. The Court has inherent jurisdiction to set aside an arbitral award where there is an error of law on the face of the award.
2. The arbitrator fell into error in law in his construction and interpretation of section 25(1) of the Standard Form Agreement that permitted the Claimant to determine the contract.
3. The arbitrator erred when he failed to apply the law relative to privity of contract.
4. The arbitrator erred when he refused to grant the claimant an extension of time to file and/or uploaded (sic) its Further Amended Respondent's Statement of Defence and Counter Claim dated December 20, 2022.
5. The claimant was denied on an unreasonable basis, the opportunity to present its case following the arbitrator's decision to refuse the Claimant's application for an extension of time to file and/or uploaded (sic) its Further Amended Respondent's Statement of Defence and Counter Claim dated December 20, 2022.

6. The arbitrator erred when he failed to consider the Claimant's Counter Claim and to rule on same.

7. The arbitrator erred when he failed to consider and/or ignore the uncontroverted evidence given by the claimant's witnesses including in particular the Quantity Surveyor, George Henry.

8. The arbitrator's failure to act with independence and/or impartiality throughout the proceedings created a real danger of bias towards the Claimant.

9. It is in the interest of justice that the orders sought herein be granted.

10. Such further grounds as are set out in the Affidavit of Daval Omar James Bell filed herein in support of the Fixed Date Claim Form."

[33] None of these grounds make any specific reference to the cost award. Neither is there any allegation in the affidavit of Daval Omar James Bell filed in support of the fixed date claim form which refers to the cost award or the proceedings in relation to it. Save for grounds 8 and 9, all the above-mentioned grounds are clearly directed towards the merits award. It is not disputed that the claimant did not make any submission to the arbitrator on costs, despite being invited to do so. It therefore cannot be said that there is doubt as to the arbitrator's impartiality and independence during the proceedings in relation to his assessment of costs. Having chosen not to participate in the proceedings whereby costs were assessed, it is difficult to see how the claimant could contend that it was not given an opportunity to present its case. I cannot therefore see any reasonable grounds in the fixed date claim form or in the affidavit in support on which the claimant seeks to set aside the cost award.

Conclusion

[34] In summary, I find that the merits award made on March 16, 2023, and the cost award made on May 19, 2023, are two separate awards liable to be set aside under

section 55 of the Act. I also find that the time to set aside the merits award has expired. If, on a true construction of article 14(2) of the Rules, a cost award cannot be set aside by the court under section 55 of the Act, I find that to bring the claim in relation to the cost award is an abuse of process of the court. However, if there is no such proscription, I find that there are no reasonable grounds to bring the claim in relation to the cost award.

[35] In the result, I make the following orders: -

a) The claimant's statement of case is struck out.

b) Costs to the defendant to be agreed or taxed.

c) Leave to appeal granted to the claimant.

A. Jarrett
Puisne Judge