NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 1/99

BEFORE: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (AG.)

BETWEEN	HAROLD SIMPSON ASSOCIATES (ARCHITECTS) LIMITED	APPELLANT
AND	MICHAEL CARTER PARTNERSHIP	RESPONDENT

Hilary Phillips, Q.C. and Carol Davis instructed by **Davis Bennett & Beecher Brovo** for Appellant

Dennis Morrison, Q.C. instructed by **Ripton McPherson & Co** for Respondent

10th, 11th, 12th May & 30th July, 1999

RATTRAY, P.

This appeal arises out of an Arbitration Award made by Mr. Maurice Stoppi to whom the parties entrusted the determination of a dispute by a joint letter dated December 5, 1997.

The history of the matter is as follows: Consequent on an agreement made between the parties on the 7th November, 1994 the parties agreed to be joint venture partners in providing "working drawings, designs, supervisory and consultancy services" for a project designated as the Montego Bay Civic Centre in respect of which the appellant had been engaged by the Urban Development Corporation (hereinafter referred to as ("UDC"). Both parties are architectural firms. The partnership was carried on under the name of the "Simpson/Carter Joint Venture".

The agreement established inter alia:

"I. A partnership period of three years with such extension as may be required to complete the project;

II. that the capital and profits of the partnership shall belong equally to the partners and that they shall bear all losses in the same proportions;

III. that the partnership may be determined by either party giving to the other not less than three months notice expiring on the 1st of July or 2nd of January of any year;

IV. that any dispute between the parties under the agreement not resolved by conciliation "or touching or concerning the interpretation of any provision of this agreement shall be referred to one or two arbitrators to be nominated by both parties, in the case of one arbitrator by consensus and in the case of two arbitrators, one by each party and the decision of that arbitrator or panel shall be conclusive of the issue so referred to him or them."

A dispute having arisen the parties agreed to the appointment of Mr. Maurice Stoppi "to determine the issue(s) in the current dispute between us."

The claim by Harold Simpson and Associates (hereinafter referred to as "HSA") as set out in an amended Statement of Claim dated the 28th of July, 1998 amounted to $6,733,642.74 with interest at Commercial Bank rates and costs. As summarised the claim was as follows:

1. Short payment on fees $2,581,424.55

2. Architectural cost for work done between 1973 and 1974 $2,800,000.00

3. Due on new tender price $604,719.19

4. Lump sum for post contract architectural fees (as per agreement dated September 11, 1996) $747,500.00.
   The total was $6,733,642.74

5. Interest at commercial bank rates

6. Cost in and of the Arbitration.

A defence was filed which essentially denied the claim but admitted "that the claimant is entitled to be repaid any increase found by the Arbitrator to be due to him as profit on

account of the increase of tender price but says that the amount so found will form part of the overall account" and also admits that "the complainant is entitled to G.C.T. on any fees found to be due to him".

A defence was filed and a counterclaim in respect of the following items:

Civic Centre operational expenses	$5,383,080.00
Civic Centre profits (75% share)	1,419,304.39
Theatre operational expenses	349,440.00
Theatre profits (80% share)	69,888.00
Reimbursable expenses	30,335.00

making a total counterclaim of $7,252,047.39 of which $5,571,806.97 was admitted to have been received and which therefore left a balance of $1,680,240.42. This attracted a defence to the counterclaim by the claimant and a reply by the respondent.

By letter dated September 17, 1998 after the commencement of the arbitration proceedings, the parties agreed that the Arbitrator should include in his reference a lump sum to be paid to the claimant consequent on the claimant's withdrawal from the Joint Venture. The parties had been unable to agree between themselves what this lump sum should be.

The award made on the 23rd day of September, 1998 was as follows:

> "AWARD
> 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 Three Million, Seven Hundred and Forty-one Thousand, Three Hundred and Seventeen Dollars and
>
> Sixty-Five cents (J$3,741,317.65) 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:
>
> 1. Short payment on fees }
> }

3. Due on new tender price }
(both items including General Consumption Tax }
$2,680,186.65

2. Architectural cost for work done between 1973 and 1994
I make no Award in respect of this item;."

A footnote in relation to 2 reads as follows:

> "The Agreement of November 1994 is silent on this matter and the presumption is that since HSA Ltd's involvement was known, it could have been included in the Joint Venture Agreement should the parties so have wished. Also, the arbitration clause empowers me to deal with 'any disputes arising from this Agreement'. I am of the view that I have no authority to deal with pre-Agreement matters."

By a Notice of Motion dated 7th October 1998 the respondent (MCP) applied to the Supreme Court to set aside the award on several grounds including:

> That there was error on the face of the award.

The Motion came before Ellis, J who on the 7th of January 1999 allowed the Motion on the ground that there was error on the face of the award. He found inter alia as follows:

> "There is in the award a plethora of references to the joint venture agreement. The question is: are those references indicia of incorporation. I so find that they are and that there has been an incorporation of agreement into award. Having found that, it is trite to say I am entitled to look at the agreement. When I look at the agreement I have a strong suspicion that Arbitrator erred in not dealing with matter as it relates specifically to clause 4.01, which dealt with profits. The award was in relation to fees. I agree with Mr. Morrison (counsel for the respondents) that there was an error on the face. That error vitiates the award and leads to the conclusion that the award has to be set aside."

On appeal before us Miss Hilary Phillips, Q.C. submitted that there is no error disclosed on the face of the award which must be examined and interpreted without reference to any other document since none is incorporated into the award.

Specifically, this does apply to the pleadings and the Joint Venture Partnership Agreement.

How is the Court to determine whether there is an error on the face of the award? It is only if a relevant document is included in the award that a construction of such document is permissible in order to determine whether there is an error on the face of the award. The Arbitration Clause in the contract clearly states that "the decision of the Arbitrator or panel is conclusive of the issue so referred to him or them." The letter of appointment requires the Arbitrator Mr. Stoppi "to determine the issue(s) in the current dispute between us." The award does not contain the Arbitrator's reasons since neither party requested a reasoned award. The Court is required to determine whether the contract or any other document is incorporated in the award since it is well established that only in such circumstances can the Court examine any document other than the award itself to determine what appears on its face.

As was stated by Somervell, L.J. in ***D.S. Blaiber & Co Ltd v Leopold Newborne (London) Ltd*** [1952] 2 Lloyd's List Law Reports 427 at page 428 "The circumstances on which an award can be set aside are narrow." The learned Lord Justice relied upon the opinions of Lord Dunedin in ***Champsey Bhara & Co., v. Jivraj Balloo Spinning and Weaving Company , Ltd.,*** [1923] A.C. 480 and Mr. Justice Williams in ***Hodgkinson v. Fernie*** [1857] 3 C.B. (N.S.) 189 to state at page 429:

> "I am clear myself that in this case we are not entitled to look at the contract. It is referred to generally in the recital and I do not think it would make any difference if it had been referred to generally in the award or in matters introductory to the finding which was not in form a recital. I do not find here that the learned arbitrators have on the face of their award based their decision on the construction of any particular term in the contract. The terms may have been different from the normal. There may have been special conditions. All sort of things may have occurred between the parties which would justify an award in this form, notwithstanding the matters to which I referred at the beginning of my judgment. I am clear that on the face

> of this award no such error appears as entitles the sellers to have it set aside."

Lord Justice Denning at page 429 stated -

> "I have a strong suspicion that the arbitrators went wrong in law, but we are not able to say so without looking at the contract, because the terms of the contract may vary the ordinary legal rights and implications. The difficulty is that we are not at liberty to see this contract. It is not expressly incorporated into the award, nor can I see that it is impliedly incorporated. The question whether a contract, or a clause in a contract, is incorporated into an award is a very difficult one. As I read the cases, if the arbitrator says: 'On the wording of this clause I hold' so-and-so, then that clause is impliedly incorporated into the award because he invites the reading of it; but if an arbitrator simply says: ' I hold that there was a breach of contract,' then there is no incorporation.
> In this case there is simply a recital of a contract which is not incorporated into the award and therefore we cannot look at it."

And further:

> "If people want to raise points of law then they ought to ask at the time for a case to be stated on a point of law."

Lord Justice Romer concurred and stated at page 430:

> "
> ...that where you merely have in a recital to an award, as here, a reference in general terms to a document, then the Court is not entitled to look at the document itself upon an application to set aside the award as being bad in law on the face of it."

What did Ellis J find in the note of his judgment which is before us? He stated:

> "There is in the award a plethora of references to the joint venture agreement."

and went on, without identifying those references, to find that those are indicia of incorporation.

The preamble to the Award which sets out the narrative stating the Appointment, Representation, Orders for Direction, Preliminary Meetings, Pleadings and Hearings are not part of the Award. We can glean no assistance from an

examination of this preamble. The Award carries its own heading and is therefore clearly identified. It also does not incorporate the agreement.

In ***Marley and Plant Ltd v. Mutual Housing Services Limited*** [1988] 25 J.L.R. 38 at page 39 Downer, J.A. (Ag.) (as he then was) stated:

> "The jurisdiction of the Supreme Court to set aside the award of an arbitrator is circumscribed because the parties have chosen their own tribunal and the findings of an arbitrator expressed or necessarily implied are not to be disturbed save in certain well defined circumstances."

And later:

> "Moreover, in interpreting an award, Courts are mindful that many arbitrators are not learned in the law so that there is a reluctance to set aside awards when there is a reasonable interpretation which will uphold it."

Mr. Dennis Morrison, Q.C. for the respondent has submitted quite frankly that if the Court finds that the contract is not incorporated in the award the application before Ellis J to set aside that award should not have succeeded. The question is whether in this case the contract is so incorporated.

He maintains that there is a "plethora of references" to the contract in the award.

The first reference to the Joint Venture Agreement is in the footnote to the item "Architectural cost for work done between 1973 and 1994" on which no award was made (I have already recorded that footnote).

The other reference is item 7.3 of the award which reads:

> "And I further award and direct that in accordance with the notes of a meeting between the parties held on September 11th, 1996 and in pursuance of Clause 10.01 of the Joint Venture Partnership Agreement dated November 7th, 1994 and not having received the submission referred to in 6.2.2. above and in keeping with the wishes of the parties to mutually determine their Joint Venture Partnership Agreement, such termination shall be effected in the following manner.

> 7.3.2. Upon receipt of payment of the above amount by the Claimant, the Joint Venture Partnership Agreement of November 7th, 1994 shall be deemed to be terminated and shall thereafter be of no effect. "

Do these references incorporate the Joint Venture Agreement into the award? In ***Giacomo Costa Fu Andrea v. British Italian Trading Co., Ltd*** [1962] 2 All E.R. 53 Diplock L.J. at page 59 after citing ***Hodgkinson v. Fernie*** [1837] 3 C.B.N.S. at page 200 "which sets out the basis of the court's jurisdiction to set aside awards for error on their face" retravelled with approval the roadway of precedent covered by Somervell L.J. in **Blaiber** (supra) adding to that throng ***F.R. Absalom Ltd. v. Great Western (London) Garden Village Society, Ltd*** [1933] All E.R. Rep. 616. At pages 62-63 of the Report he stated -

> "It may be that in particular cases a specific reference to a particular clause of a contract may incorporate the contract, or that clause of it, in the award. I think that we are driven back to first principles in this matter, namely, that an award can only be set aside for error which is on its face. It is true that an award can incorporate another document so as to entitle one to read that document as part of the award and, by reading them together, find an error on the face of the award. But the question whether a contract, or a clause in a contract, is incorporated in the award is a question of construction of the award. It seems to me that the test is put as conveniently as it can be in the words of Denning, L.J. which I have already cited from ***Blaiber & Co., Ltd v. Leopold Newborne (London) Ltd.*** ...
>
> 'As I read the cases, if the arbitrator says 'On the wording of this clause I hold' so and so, then that clause is impliedly incorporated into the award because he invites the reading of it."

The only references in the award to the Joint Venture Agreement are to the footnote to which I have already referred and clause 7.3 of the award which reads:

> "And I further award and direct that in accordance with the notes of a meeting between the parties held on September 11th, 1996 and in pursuance of Clause 10.01 of the Joint Venture Partnership Agreement dated November 7th, 1994 and not having received the submission referred to in 6.2.2. above and in

> keeping with the wishes of the parties to mutually determine their Joint Venture Partnership Agreement, such termination shall be effected in the following manner."

Does the reference to 10.01 of the Joint Venture Agreement incorporate the agreement in the award? I would think not. It certainly does not incorporate the whole agreement. Even if it does incorporate clause 10.01 and I do not think it does - that clause reads:

> "Determination by notice: The partnership may be determined by either partner giving to the other not less than three months notice in writing expiring on the 1st day of July or the 2nd day of January in any year."

This has nothing to do with the dispute between the parties.

The Joint Venture Agreement therefore is not incorporated in the award and the trial judge was not permitted to roam through its contents in search of a place to anchor his findings that there was an error on the face of the award. His judgment therefore which reads inter alia - "there is in the award a plethora of references to the joint venture agreement" cannot be supported; firstly because it is incorrect in fact and secondly because his conclusion is not supportable in law.

Consequently, I would allow the appeal, set aside the judgment of Ellis, J and reinstate the award of the arbitrator. The costs of the appeal and the trial are awarded to the appellant.

BINGHAM, J.A.:

I agree.

PANTON, J.A. (Ag.):

I also agree.