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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M.93 of 1985

IN THE MATTER of an ARBITRATION BETWEEN THE SINURANCE COMPANY OF THE WEST INDIES LIMITED and G.G. RECORDS LIMITED

A N D

IN THE MATTER OF THE ARBITRATION ACT.

Mr. Dennis Goffe instructed by Messrs. Myers, Fletcher and Gordon, Manton and Hart for the Applicant - The Insurance Company of the West Indies Limited.

Mr. H. Haughton Gayle for the Respondent - G.G. Records Limited.

Heard : 26th, 27th & 28th May, 1986.

JUDGMENT

CLARKE, J. : (A.G.)

An application by way of Notice of Originating Motion to set aside an arbitration award was filed on behalf of the Insurance Company of the West Indies Limited (hereinafter called the Applicant) four days out of time. The Applicant applied for an extension of time. It was opposed. After hearing argument on both sides, in the exercise of my discretion I extended the time for making the application.

Undaunted, Mr. Haughton Gayle for G.G. Records Limited (hereinafter called the Respondent) promptly took four preliminary objections to the application to set aside the award. At the conclusion of argument in relation to those objections I dismissed the application to set aside the award, awarded costs to the Respondent to be agreed or taxed and promised to put my reasons in writing.

The arbitration award made and published on September 25, 1985 recited that the parties agreed in writing to refer to Dr. Lloyd Barnett as arbitrator certain differences that had arisen between them under a Policy of Insurance issued by the Applicant to the Respondent whereby the Applicant insured certain items of property against a variety of risks.

As a convenient starting point I set out what was referred or submitted to the Arbitrator and the answers he gave thereto. The

reference set out at paragraph No. 2 on page 1 of the Award reads as follows:-

"By the said agreement the said matters in dispute were specified in the form of the following questions for determination by the Arbitrator:-

On its facts found and on the true construction of the aforesaid Policy:

(1) Whether certain Master Tapes allegedly destroyed in a fire occuring on or about the eighteenth day of April 1982 form part of the Insured's stock-in-trade.

(2) If the answer to question 1 is in the affirmative whether the aforesaid Master Tapes are covered under the term of the Policy and if so whether in assessing their value for the purposes of a settlement under the Policy the value of the material taped therein should be taken into account.

(3) In any event what is the sum to which the Insured is entitled under the Policy."

The arbitrator gave reasons and then finally at pages 3 and 4 of the award he answered the three questions specified in the reference thus:

"<u>AWARDS</u>

Accordingly, I award and determine that:-

(1) The Master-tapes allegedly destroyed in the fire occurring on or about the eighteenth day of April, 1982 formed part of the Plaintiff's/Insured's stock-in-trade.

(2) The said Master-tapes are covered under the terms of the Policy of Insurance and, as was conceded by the Defendant in the course of the proceedings, it followed that in assessing their value for the purposes of a settlement or award under the Policy the value of the material taped thereon should be taken into account.

(3) Applying the average and excess clauses of the Policy

as was agreed should be done by learned counsel on both sides, and after taking into account the sum of $54,841.00 which was not in dispute, the insured is entitled to a total of $108,092.37 and I direct that the Defendant should pay the said amount of $108,092.37 to the Plaintiff which shall be accepted and taken as and for full satisfaction and discharge and as a final determination of the said differences in the matters so referred as aforesaid and all demands upon or in respect of the cause by either of the said parties against the other of them."

Now, the Applicant sought to challenge the award. Paragraph No. 1 of the Notice of Originating Motion setting out the grounds relied on for setting aside the award is as follows:

"1. That the award is bad on the face of it and/or that the Arbitrator misconducted himself because:

(a) Reason No. 2 states "... I hold that the tapes in question were intended and kept as appliances or apparatus for the production of other tapes or records, and/or the subject matter of licencing or sale transactions."

Since appliances or apparatus for the production of items sold in a business are properly regarded as plant, and not stock-in-trade, reason No. 2 is bad law or its wording shows that the Arbitrator misunderstood an important issue of law. Further or in the alternative the wording makes the Award inconsistent and/or uncertain and/or ambiguous.

(b) There is an apparent error of law in reasons Nos. 3,4,5 and 7 in the manner in which the Arbitrator assessed the market value of the tapes.

(c) Having said, in reason No. 8, that "in the state of the evidence before me it is difficult to tell what

was the total value of all the articles at risk but the evidence did establish values in excess of what was said in the Statement of Claim and that the insured had grosly under-insured his stock-in-trade. This must be taken into account in applying the average clause" - the Arbitrator failed to state how he applied the average clause.

(d) The Arbitrator failed to show how he arrived at the total of $108,092.37 which he held was payable to the Respondent."

Indubitably, as Mr. Haughton Gayle submitted, there are situations in which an application to set aside an award can fail in limine without there being any enquiry into the merits of the grounds of the application. That proposition is sound both in principle and on authority. For instance, in Oleificie Zucchi S.P.A. v. Northern Sales Limited (1965) 2 Lloyd's Rep. 496, there was a motion to set aside an interim award in the form of a special case on the ground of misconduct, the applicant alleging as misconduct inter alia that the award contained on its face inconsistencies, contradictions and errors of fact on material issues. McNair J. ruled that the motion failed in limine and at page 522 of the Report he said this:

> "It may well be the fact that if the operative part contains inconsistencies or the operative part of the award is muddled and unintelligible then it might be set aside on that ground. But that is very far from saying that you can set aside an award ... merely because you can find some contradictions or even inconsistencies in certain parts of the award consisting partly of findings and partly of narative."

It was against that background that the following four preliminary objections were taken by the respondent:

(1) the alternative ground in 1(a) of the Notice of Motion must fail as it set out no particulars;

(2) ground 1(b) must also fail as it lacks particulars;

(3) the entire motion fails in limine in that whereas in this case specific questions of construction and of law and fact were submitted to the arbitrator, no interference by the Court is possible;

(4) the award cannot be interfered with as the applicant should have had a case stated upon its points of law and did not.

Mr. Goffe dealt with the first two objections together, in as much as the gravamen of these was the contention that grounds 1(a) (alternative) and 1(b) lack particularity. Relying on Order 73 Rule 5(2) of the English Rules of the Supreme Court (RSC) he submitted that it is sufficient for the Notice of Motion to state in general terms the grounds of the application. Section 487 of the Judicature (Civil Procedure Code) Act so far as is relevant is in pari materia to Order 73 Rule 5(2) of the RSC and provides:

"Every Notice of Motion to set aside, remit or enforce an award ... shall state in general terms the grounds of the application..."

In my opinion, this does no more than impose a basic requirement and unless particulars can be obtained from the Notice of Motion or any affidavit accompanying it, which is not the case here, it is not sufficient to state mere heads of objections as was done by stating in the alternative ground in 1(a) of the Notice of Motion that "the wording makes the Award inconsistent and/or ambiguous." Nor is it sufficient for 1(b) of the Notice of Motion to state, as it does, that "there is an apparent error of law [in certain reasons set out in the award] in the manner in which the arbitrator assessed the market value of the tapes" without giving particulars. It was submitted for the Respondent, and I think, rightly, that the principle of the decision in Boodle v. Davis (1835) 4 N. & M. 788 though decided under the old practice requiring a motion for a rule nisi is still good law. In that case a rule nisi for setting aside an award stated, inter alia, that the award was "uncertain" and "not final." It was held by three Judges of the Court of Kings Bench (Denman, C.J., Littledale and Patteson J.J.) that the rule must be discharged and that it is not sufficient to state mere heads of objections, but that particular objections, but that particular objections must be specifically set out.

In this connection I approve the following passage at page 414 of Russell on Arbitration, 18th Edition, which was referred to me:

> "The grounds of application as stated in the Notice of Motion should be sufficient to tell the other side not only what objection is being taken to the award, but also how the objection is being taken and in respect of what particular defects the award is being sought to be set aside. If that information can be obtained from the Notice of Motion and the affidavits accompanying it, the notice will be sufficiently specific."

In my opinion, therefore, if the only challenge to the award was that the arbitrator "misconducted" himself in that having regard to the wording the award was inconsistent and/or uncertain and/or ambiguous the Notice of Motion would fail <u>in limine</u> without any further consideration by me. Nevertheless that could not be the end of the matter for the Notice of Motion also sought to invoke the inherent power of the Court to set aside the award by contending that the award is bad on its face as involving an apparent error of law. Of course, any excursion into, or discussion as to, whether an error of law is apparent on the face of the award would involve examining or determining the merits, if any, of the applicant's motion. For reasons that will appear hereafter it was not found to be necessary to trespass into those pastures.

Now, the first thing to be said at this stage is that the basis and utility of arbitration as a method of determining disputes is that the parties choose their own tribunal and agree to be bound by its decision not only on fact but also in so far as they do not take advantage of the special remedies by way of case stated, on law. <u>(See Heaven and Kesterton Ltd. v. Sven Widaeus A/B [1958] 1 W.L.R. 248 at P.254 - per Diplock J.)</u>. It is for this reason that the general common law rule is that an award is final as to both fact and law. As Lord Dunedin said in <u>Champsey Bhara & Co. v. Jwraz Balloo Spinning & Weaving Co. Ltd.</u> 39 TLR 253 (P.C.):

> "The law on the subject has never been more clearly stated than by Mr. Justice Williams in the case of <u>Hodgkinson v. Fernie (1857)</u> 3 C.B. (N.S.) 189:
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> > "The law has for many years been settled ... that where a cause or matters in difference are referred to an arbitrator whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact ... The only exceptions to that rule

> are cases where the award is the result of corruption, or fraud, and one other, which though it is to be regretted is now, I think, firmly established, viz, where the question of law necessarily arises on the face of the award ... Though the propriety of this latter may be doubted I think it may be considered as established."

Statutory recognition is given to the general rule by Section 4 of the Arbitration Act which provides inter alia that a submission, unless a contrary intention is expressed therein, shall be deemed to include the provision that the award to be made by the arbitrator "shall be final and binding on the parties."

On clear authority then, the rule that an error of law, if it appears on the face of the award, is a ground for setting it aside is an exception to the general rule that an award is final as to both fact and law.

During the course of the argument in relation to the respondent's third preliminary objection, which in my opinion is well founded for reasons that shall appear hereafter, both Mr. Haughton Gayle and Mr. Goffe rightly agreed that the rule of exception will not be applied where a specific question of law is submitted to the arbitrator for his decision and he decides it, even though the decision is erroneous. The award is not thereby made bad on its face so as to permit its being set aside.

Nevertheless, an important point of departure was Mr. Goffe's strong insistence that the rule of law in relation to the specificity of questions referred to an arbitrator is that a Court is precluded from setting aside an award as being bad on its face <u>only</u> where a specific question of law is submitted to him for his decision and he decides it, even if erroneously, and that there is no such rule as contended for by Mr. Haughton Gayle that where, as in the case before me, specific questions of construction and of law and fact were submitted to the arbitrator and he answered them, no interference by the Court is permissible.

With commendable industry Counsel cited several cases to support their respective contentions. In <u>Re King v. Duveen</u> [1913] 2 K.B. 32, relied on by Mr. Haughton Gayle, the question submitted to the arbitrator was whether upon a defined state of facts A. was liable

under a certain agreement to pay damages to B. The arbitrator decided that A. was not liable. B. moved to set aside the award on the ground that the award had found facts which showed that upon the true construction of the agreement B. was entitled to damages, and that accordingly there was error of law on the face of the award. It was held that the award could not be set aside because a specific question, whether of law or fact, had been submitted to the arbitrator's decision and he gave his decision in terms of the submission. At page 36 of the Report Channel J. said:

> "It is no doubt a well established principle of law that if a mistake of law appears on the face of the award of an arbitrator, that makes the award bad and it can be set aside ... but it is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile even to submit a question of law to an arbitrator."

In the final paragraph on the same page the learned judge added:

> "I have some doubt whether the intention of the arbitrator in the case now before us was not really to decide the question as one of fact rather than of law. But however that may be it cannot affect our decision on this motion for the arbitrator has undoubtedly given his decision in the terms of the submission, and if his decision involves an erroneous construction of the agreement, the same words were used in the submission, and therefore that question of law was referred to him. He has either given an erroneous decision on a specific question of law which was referred to him, or he has decided a question of fact. In either case no grounds exist for setting aside the award."

I think that the headnote to the Report of the case that "if a specific question is submitted to an arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face so as to permit its being set aside" accurately states the principle of that decision. It has been approved and applied in a number of cases including the case of Government of Kelantan v. Duff Development Co. Ltd. [1923] A.C. 395 (H. of L.) and in the Canadian case of Re The Bay Co. (B.C.) Ltd. and Local 170 of the Pipefitting Industry (1960) Vol. 24 D.L.R. 582 where it was laid down by Wilson J. in the British Columbia Supreme Court that where a specific question of law, e.g. the construction of a provision of a collective

agreement, is submitted to arbitration (as opposed to the submission of a dispute in which a question of law becomes material) the Court cannot interfere with the arbitrator's decision on the point of law, however erroneous it be. The learned judge cited with implicit approval the the passage from the final paragraph on page 36 of the Report of the judgment of Channell J. in Re King Duveen quoted above.

In my view, Mr. Goffe's proposition precluding the Court's competence to set aside an award as being bad on its face where and only where a specific question of law is submitted to an arbitrator for his decision and he decides it, even if erroneously, is too narrowly stated in the light of the authorities and betrays a misreading of the reasoning by which their Lordships arrived at their decision in the case of F.R. Absalom Ltd. v. Great Western (London) Garden Village Society Ltd. [1933] A.C. 592 (H. of L.) on which he so heavily relied. Put another way, neither that case nor any other case cited to me is authority for Mr. Goffe's contention.

That is so even though he correctly submitted that, as was pointed out by Lord Russell of Killowen in the the Absalom case, the authorities distinguish two types of cases:

(1) where a specific question of law is submitted to the arbitrator; and

(2) where a matter or matters in which a question of law becomes material are submitted.

In former the Court cannot, but in the latter it can and will interfere, if an error of law appears on the face of the award.

It is, I think, pertinent to set out the salient facts of the Absalom case not the least reason being that the observavasations of their Lordships must be considered in the light of what was before their Lordships' House. There, a building contract contained a clause numbered 30 which provided that the contractor would be entitled under certificates to be issued by the architect to the contractor to payment by the employer under certain conditions. A dispute arose, the contractors stopped working and the architect served a notice on them to proceed with the work. By virtue of an arbitration clause in the contract the parties then

submitted to an arbitrator "the dispute in regard to (1) the issue of the certificates and (2) the validity of the notice served by the architect." The arbitrator in making his award construed clause 30. In reversing the Court of Appeal the House of Lords held that the arbitrator had erred in his construction of Clause 30, that the construction of that clause had not been expressly or specifically left to the arbitrator and that his award should be set aside for error in law appearing upon the face of it.

It is to be observed that the Absalom case itself falls within the second category of cases where a matter or matters in which a question of law becomes material are submitted. Be it further noted that in that case no specific question, whether of law or fact, was submitted to the arbitrator. What was submitted to him by the parties were "the disputes" in regard to (a) the issue of certain certificates and (b) the validity of a notice under a certain clause of the contract between the parties. He was therefore, charged in general terms to hear and determine disputes which had arisen in regard to the issue of certificates and the validity of a notice although questions of construction of clauses of the contract became material to the determination of the disputes.

Therefore, bearing in mind the generality of the reference in the Absalom case it is not in my view correct, as Mr. Goffe contended, that the effect of that case is that if a specific question of fact is submitted to the arbitrator and its determination requires him to decide a question of law and he wrongly decides that question then the award can be set aside if that error of law is apparent on its face. In any case, that proposition flies in the face of Re King v. Duveen (Supra) which in my opinion is still good law. Indeed, both Lord Russell of Killowen and Lord Wright approved that case in their speeches in the Absalom case. Lord Wright recognised (see page 616 of the Report) that in Re King v. Duveen a "separate and distinct" matter was referred on facts to be separately found or assumed unlike the Kelantan case where the only questions to be determined were the questions of law as to the construction of the contract, there being no disputed facts.

In the instant case it is clear that the reference to the arbitrator contained three specific questions. "On its facts found",

that is to say after the facts had been found, the Policy of Insurance fell to be construed, and the three specific questions (supra) answered in the light of that construction. The facts were found. They are listed in the Award under the heading "RESONS". Therefore once the facts were found the reference was a reference as to the construction of the Policy in order to determine the answers to the specific questions posed. The construction of the terms of the Policy for the purposes aforesaid was the very thing referred to arbitration. As Viscount Cave L.C. said in the Kelantan case (supra) at page 409, "where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator cannot be set aside by the Court only because the Court would itself have come to a different conclusion." Viscount Cave went on to say this:

> "If it appears by the award that the arbitrator has proceeded illegally, for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance then there is error in law which may be ground for setting aside the award ..."

With great respect I disagree with this dictum for its effect is to place an unwarranted distinction, in my view, in a court's competence to interfere according to whether the question is a question of construction specifically referred or a specific question of law simpliciter both of which are ex hypothesi questions of law. I therefore prefer the position taken by the Supreme Court of Canada in Faubert & Watts v. Temagami Mining Co. (1960) 22 D.L.R. 220 and followed by Wilson J. in British Columbia Supreme Court in the Bay Company case (supra) that where a question of construction is specifically referred to arbitration the Court cannot interfere with the arbitrator's decision on the point of law, however erroneous it be.

In any event, as already indicated, the three questions that contained in the reference in the instant case were specific and as Mr. Haughton Gayle put it, they could not have been more specific. The arbitrator gave exact answers to each question and has "undoubtedly given his decision in the terms of the submission" (as did the arbitrator in Re King v. Duveen already discussed) and even if in so doing error of law appears on the face of the award, his award cannot be set aside on the grounds set out in the

first part of 1(a) and in 1(b) of the Notice of Motion.

As the complaint about the failure of the arbitrator to state how he applied the average clause and as to how he arrived at the total sum awarded (see 1(c) and (d) of the Notice of Motion) the short answer is that, as Diplock J. (as he then was) observed in Heaven and Kesterton Ltd. v. Sven Widaeus A/B [1958] 1 W.L.R. 248 at p.252, there is no reason why an arbitrator who has not been asked to state an award in the form of a special case should on the face of his award give any reasons for any part thereof, whether the substantive part or the costs part. That was Mr. Haughton Gayle's submission and he is clearly right.

In the end then, the Notice of Motion must fail in limine as the respondent's first, second and third preliminary objections are well founded and are accordingly upheld.

In the result it is unnecessary for me to consider the fourth preliminary objection. In any case, during the argument Mr. Haughton Gayle did not pursue that objection conceding, and I think rightly so, that at the in limine stage the Court could not dismiss the application merely because a special case had not been stated for enabling questions of law to be determined by the court as there is no peremptory requirement for a party to ask for a special case to be stated for the Court.

Nevile St. E. Clarke
Judge (Ag.)