JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 35/86

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.

BETWEEN	THE INSURANCE COMPANY OF THE WEST INDIES LIMITED	APPELLANT
AND	G.G. RECORDS LIMITED	RESPONDENT

Mr. Dennis Goffe and Mr. Norman Davis for the Appellant

Mr. H. Haughton-Gayle for the Respondent

June 15, 16, 17, 18 & July 17, 1987

CAMPBELL, J.A.

By a policy of insurance, namely Commercial Comprehensive Policy No. FF-11 37425, issued by the appellant in favour of the respondent, dated 31st July, 1980, the latter insured its stock in trade against certain risks including fire.

Assets in respect of which risk coverage was available also included a class categorized as "Plant and Machinery, Trade Fixtures, Fittings and Utensils, Office Equipment, Meters and Telephone installations." This class of assets which was not insured was distinct from the class which was categorized as stock in trade. There was no definition either illustratively or exhaustively of the expression "stock in trade" nor for that matter was there any definition of inter alia "Plant and Machinery."

A fire occurred at the respondent's premises on April 19, 1982 and certain items of property described as "Master Tapes" were destroyed in the fire. A dispute arose between the appellant and the respondent as to whether the Master Tapes were destroyed in the fire, and if answered affirmatively, whether they formed

part of the respondent's stock in trade. Pursuant to the arbitration clause in the policy of insurance a sole arbitrator, in the person of Dr. L.G. Barnett, Attorney-at-law was appointed. The arbitration clause is as stated hereunder:

> "15. If any difference shall arise as to the amount to be paid under this Policy (liability being otherwise admitted) such difference shall be referred to an Arbitrator to be appointed by the parties in accordance with the statutory provisions in that behalf for the time being in force. Where any difference is by this condition to be referred to arbitration the making of an award shall be a condition precedent to any right of action against the Insurers."

By the terms of this arbitration clause it would appear that the question of the status of the assets allegedly destroyed by fire, that is to say, whether they were stock in trade thereby attracting liability, was not a matter of reference but only the quantification of admitted liability. Notwithstanding this, the parties referred their dispute in the form of certain questions to be answered by the arbitrator based on facts to be found by him, wiich encompassed both decision on liability and quantification of liability. The reference was in these terms:

> "On its facts found and on the true construction of the aforesaid Policy:
>
> (1) Whether certain Master Tapes allegedly destroyed in a fire occurring on or about the eighteenth day of April, 1982 form part of the Insured's stock in trade.
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> (2) If the answer to question 1 is in the affirmative, whether the aforesaid Master Tapes are covered under the terms of the Policy and if so whether in assessing their value for the purpose 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."

In relation to the first of the above questions the arbitrator made an award on 25th September, 1985 that:

"(ii) 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 stock in trade."

His reasons for so awarding are stated thus:

"92) Having regard to the nature of the Plaintiff's business and the terms of the Policy 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 as the subject matter of licensing or sale transactions.

(3) I accept the evidence given on behalf of the Plaintiff that Master-tapes were destroyed in the fire and that there were available markets or outlets for them.

(4) I accept the evidence given on behalf of the Plaintiff that it is usual to realise sums in excess of the production costs in dealings with Master-tapes in the Plaintiff's type of business.

(5) I hold that the production costs given in support of the Plaintiff's claim form an acceptable guide to the value of the master-tapes particularly as the evidence is that in the particular trade and experience of the Plaintiff the market price invariably exceeds the production costs."

The appellant, by Notice of Originating Motion dated 11th November, 1985, sought an order of the Supreme Court setting aside the award on the grounds inter alia:

"(a) That the award is bad on the face of it and/or that the arbitrator misconducted himself because:

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."

At the hearing of the Notice of Originating Motion, preliminary objection to the application was made by the respondent, based on four grounds namely:

"(1) The alternative ground in 1 (A) namely that 'the wording in Reason No. 2 makes the award inconsistent and/or uncertain and/or ambiguous' does not set out particulars and the motion must accordingly fail.

(2) Ground 1 (b) also must fail as it lacks particularity.

(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."

The learned judge upheld the preliminary objection, and dismissed the motion, principally on the third ground thereof. He correctly held that an error of law, if appearing on the face of the award, would be a ground for the award being set aside. He also correctly held that there was an exception to this rule namely that where a specific question of law was submitted to

an arbitrator for his decision, such decision however manifestly erroneous it may be, cannot be set aside by the court, fraud and corruption excepted. The learned judge however disagreed with the submission of Mr. Goffe which was that the only circumstance in which the court was precluded from interfering was when a specific question of law not depending on any finding of fact by the arbitrator had been submitted to him for his decision. In particular he disagreed with the submission that the court was not precluded from interfering where the question of law, on the decision of which, error is alleged, was only incidentally referred to the arbitrator albeit necessary and indispensable in making his award on a matter or matters referred to him for settlement as was the position in the instant case.

The learned judge disposed of Mr. Goffe's submission in these words:

> "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 Absalom case, the authorities distinguish two types of cases:
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> (i) where a specific question of law is submitted to the arbitrator, and
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> (ii) where a matter or matters in which a question of law becomes material are submitted.
>
> In the 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."

The learned judge proceeded to state the principle of law as he conceived it in these words:

> "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 of law 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)."

With respect to the learned judge, his statement of the principle of law involved, is inconsistent with the principle enunciated in the Absalom case. The principles stated by Mr. Goffe are correct, and are perfectly consistent with the principle enshrined in Re King v. Duveen since, in that case, apart from questions of pure fact referred to the arbitrator for a finding thereon, there was specifically and additionally referred to him, the construction of the agreement between the parties in the context of the aforesaid specific questions of fact.

The learned judge relied on Re King v. Duveen as applicable to the case before him and concluded thus:

> "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 'Reasons'. 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'.
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> In any event, as already indicated the three questions that were contained in the reference in the instant case were 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."

Against the dismissal of the motion, the appellant appeals. The submissions of Mr. Goffe before us may be stated succinctly as follows:

> "1. No specific question of law had been submitted to the arbitrator. Rather the question of law which arose for decision was merely incidental to the determination of the question whether the master tapes were ' stock in trade' or 'plant' Re King v. Duveen was thus distinguishable.
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> 2. The reference to the arbitrator was indivisible, it comprised a composite question of fact and law that is to say were the master tapes part of the assets of the respondent. If so were they part of his stock in trade or part of his 'plant'. It became necessary for the arbitrator to distinguish between stock in trade and plant which was a matter of law.
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> 3. It was error in the learned judge to bifurcate the reference into a reference as to the facts and a separate specific reference of the construction of the Policy of Insurance. In any case a construction of the Policy was unhelpful and irrelevant in determining the issue whether the master-tapes were stock in trade.

> "4. The arbitrator having found that the master-tapes were 'appliances and apparatus' erred on the face of the award and is guilty of misconduct under the Arbitration Act section 12 (2) in concluding that they were stock in trade since 'appliances and apparatus' are objects coming under the rubric of 'plant'. Appliances or apparatus for the production of other things is a classic definition of 'plant'."

Mr. Haughton-Gayle in his submission, relied on the learned judge's conclusion, that a specific question of law, namely the construction of the Policy of Insurance, had been submitted to the arbitrator. He conceded that the arbitrator undoubtedly had to find facts. However, after finding the facts, the arbitrator, on his submission, was specifically asked to find, on the assumption that he found that the master tapes were destroyed in the fire, whether as a matter of law, the master-tapes were stock in trade. This, he submits, was a specific question of law submitted to the arbitrator for his decision. This decision however erroneous it may be, could not be set aside by a court, hence, the learned judge was correct in dismissing in limine, the application.

In the course of his submission, Mr. Goffe intimated that having regard to the order sought in his Amended Notice of Appeal and the wide scope of his submission which extended beyond that which was necessary for the preliminary objection, he was requesting that our decision should extend beyond the narrow confines of the preliminary objection and cover a determination of the issue whether the award should be set aside. In this, Mr. Haughton-Gayle has concurred.

A considerable number of cases have been cited by the parties, designed to summarize the learning on the distinction between firstly, a reference of a specific question of law, the award in relation to which cannot be set aside by the court however erroneous the award is on its face, secondly, a reference of a specific question of fact, the award in relation to which is equally beyond the jurisdiction of the court to interfere, and thirdly, a reference of what may conveniently be described as an issue which is a composite of fact and law, in that it involves the finding of primary facts and the application of law to these primary facts to arrive at a decision which constitutes the award. Such a reference presumes knowledge by the arbitrator of the principles of law applicable to the issue or if he has not the knowledge, that he will obtain advice thereon. An award from a reference in this last category may be set aside if, inter alia, there is an error of law on the face of the award manifested by a patent misinterpretation or misapplication of the law in arriving at a decision on the primary facts.

In my view, the reference in this case was not one of construing the policy of Insurance in so far as determining whether the master-tapes were stock in trade. No assistance in determining this issue can be derived from the policy. The issue had to be determined aliunde. If the determination is that the master tapes are stock in trade, then the policy speaks unambiguously that they are insured, and compensation for their loss is then determined as prescribed equally unambiguously in the policy. The reference was equally not one of pure fact

because the concept of stock in trade, albeit popularly considered as one of fact in any particular circumstance, is dependent on the application of principles of law distinguishing between fixed assets and circulating assets dependent on the purpose for which they were respectively acquired or manufactured and/or the role played by them in any particular business enterprise.

Thus, a refrigerator would be stock in trade or circulating asset for an enterprise, manufacturing refrigerators, while the same refrigerator would be fixed asset, namely plant and equipment in the business of a restaurateur. The law thus decrees what an asset should be categorized as, having regard to the facts existing in any given situation. The issue as to whether the master-tapes were stock in trade, in the context of the respondent's business was thus unquestionably, a question of mixed fact and law and an award made dependent on the determination of this issue, may be set aside if premised on an erroneous view of the applicable law or if it represents a misapplication of the law as correctly found by the arbitrator. Attractive as the learned judge's view may be relative to the court assuming jurisdiction over a reference to an arbitrator of a specific question of fact in the determination of which a question of law is required to be determined, I cannot endorse that view. In fact, there would appear to be a contradiction in terms in saying a reference is of a specific question of fact when its determination involves the decision of a question of law.

In the instant case, the finding of the arbitrator as already mentioned is that:

> "Having regard to the nature of the Plaintiff's business and the terms of the Policy 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 as the subject matter of licensing or sale transaction."

Mr. Goffe relies heavily on the use by the arbitrator of the words "appliances or apparatus" as a classic definition of "plant" when used in juxtaposition with words like - "for production of other things," as was used by the arbitrator when he juxtaposed them with the words "intended and kept for the production of other tapes and/or records". Thus he submitted that the arbitrator, having found that the master-tapes were appliances and apparatus intended and kept for the purpose as stated by him, erred in law in not concluding that they represented 'plant' which, unlike stock in trade, was not insured.

Had the arbitrator stated no other intended user for which the master tapes were kept, there would be merit in Mr. Goffe's submission but the arbitrator went on to say that the master-tapes were intended and kept "as the subject matter of licensing or sale transaction". The arbitrator made further findings in relation to the master-tapes as hereunder:

> "(a) There were available markets or outlets for them;
>
> (b) It was usual to realise sums in excess of the production costs in dealings with master tapes in the Plaintiff's type of business;
>
> (c) In the particular trade and experience of the Plaintiff the market price invariably exceeds the production costs."

The policy described the respondent as "Record Distributor and Producer." The evidence derived from the "Reasons" stated by the arbitrator as the basis of his award discloses that the respondent produces master-tapes. He thereafter deals with them for purposes of making profit. He achieves his purpose

by (a) using the master-tapes, or some of them, for the production of other tapes or records, (b) by licensing their use by other persons or (c) by selling them, for which there is an available market.

In so far as the master-tapes are produced by him for sale, they are, albeit described as "appliances or apparatus" in fact stock in trade in manner, similar to the manufacture of refrigerators for sale. The master-tapes are dealt with in the respondent's business as dual purpose products, and in the absence of evidence that they are produced predominantly for the purpose of achieving the objective of "producing other tapes or records" and not for the purpose of sale, it is impossible to say that the arbitrator erred on the face of his award in holding that, though described as appliances or apparatus, the master tapes were stock in trade.

As a matter of fact, it could properly be inferred from paragraphs 6 and 7 of the arbitrator's reasons that the predominant purpose of producing the tapes was for sale, because he found that of the seven groups of master-tapes which by agreement were in issue, four groups containing 113 master-tapes were "marketable master-tapes."

In conclusion, though the motion ought not to have been dismissed on the basis of the preliminary objection raised, it would merit dismissal and is accordingly dismissed on the merits, in that no error of law appears on the face of the award which would entitle the court to interfere with it.

The appeal is accordingly dismissed. However, inasmuch as the appellant would have succeeded, had the appeal been limited to the dismissal of the motion solely on the basis

of the preliminary objection, but has failed, because by agreement, the appeal was argued on the basis of a dismissal of the motion simpliciter, it would seem just that no order as to costs ought to be made relative to the proceedings on appeal.

ROWE - PRESIDENT

I agree.

CAREY, J.A.

I entirely agree.