IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. HCV 0858 OF 2008

BETWEEN	JAMAICA HYDROPONICS LIMITED	CLAIMANT
AND	ALUMINA PARTNERS OF JAMAICA	DEFENDANT

IN CHAMBERS

Lord Anthony Gifford Q.C. and Conrad George instructed by Hart Muirhead Fatta
Walter Scott and Anna Gracie instructed by Rattray Patterson Rattray

December 5 and 11 2008

ARBITRATION - POWER TO REMIT MATTER TO THE ARBITRATOR - SECTIONS 8 (b), (c) AND 11 (1) OF THE ARBITRATION ACT, 1900 (JAM) - SECTIONS 5 AND 8 OF THE COMMON LAW PROCEDURE ACT, 1854 - SECTION 10 (1) OF THE ARBITRATION ACT 1889 (UK) - SECTION 22 (1) OF THE ARBITRATION ACT 1950 (UK)

SYKES J.

1. The issue before the court on this application is whether the arbitration award made by Miss Hilary Phillips Q.C. should be remitted to her by the court acting under powers contained in section 11 (1) of the Arbitration Act of Jamaica, 1900. The application was dismissed with costs to the defendant. These are my reasons.

The Dispute

2. Not only is the parish of Manchester known for its agreeable climate and hospitable environment, it is known to be the home of Jamaica Hydroponics Limited ("JHL"), a company operated by enterprising business persons who, as the name of the company suggests, have embarked on the agricultural adventure of growing lettuce utilising the hydroponics method of cultivation. This company is one of the companies leading the way in hydroponics farming in Jamaica. Hydroponics, which comes from two Greek words, hydros meaning water, and ponos, meaning labour, is a method of growing plants

without soil. JHL has been in the business of growing and marketing lettuce since 2000.

3. As is well known to farmers in Jamaica, hurricanes can be quite destructive and they inflict heavy losses on the farming community. JHL found this out in quite a striking manner. In 2004, Hurricane Ivan rampaged through the Caribbean beginning with Grenada in the south east and making land fall in the United States of America in the northwest, taking lives as well as destroying homes and businesses. It was the most destructive hurricane of the 2004 Atlantic hurricane season. JHL found out, first hand, how destructive Hurricane Ivan was. Its farming operations were not just damaged but were a total loss. It lost all its greenhouses.

4. JHL, at the time of the passage of the hurricane, had leased land where it conducted its business from Alumina Partners of Jamaica ("Alpart"). JHL did not rebuild on the spot originally leased because it was told that Alpart intended to mine for bauxite at the site on which the greenhouses stood. It was agreed, by contract, that Alpart would (a) rough level another part of its property that would accommodate six greenhouses; (b) prepare and marl roadways to the new greenhouse site and (c) erect and install utility polls. Alpart failed to do this. The matter was referred to arbitration. Alpart, quite sensibly, accepted that it had breached the contract which meant that the arbitration became an assessment of damages. Miss Phillips Q.C. was appointed the sole arbitrator.

5. To support its claim for loss of profits, JHL relied on projected income and expenditure it had submitted in its business plan which was submitted to the Bank of Nova Scotia in January 2005 for the expansion of the farm. JHL also relied on actual income earned from the production of lettuces between November 2006 and February 2007 when production had resumed.

6. The arbitration took place between July 4 and 7, 2007 with the award being handed down on November 12, 2007. The arbitrator awarded $76,398,594.67 to JHL for loss of profit. JHL felt that this sum was inaccurate because of an alleged error made by the arbitrator. JHL

felt that the arbitrator made an error when she based her calculations on the extrapolated figure of $6,798,796 per month which was based on two green houses when in the view of JHL she should have used a figure of $9,065,064.00 per month. Had she done this, she would have arrived at a figure of $101,668,802.83 - a difference of $25,270,208.16. This application by the claimant, in practical terms, is about the recovery of the difference what it says it should have received and what the arbitrator awarded.

7. The first attempt made by JHL to retrieve the difference was to ask the arbitrator to revisit the award. It relied on section 8 (c) of the Arbitration Act which provides that an arbitrator can correct an award on the basis that she had made either a clerical mistake or error arising from an accidental slip or omission. Miss Phillips would have none of this and reaffirmed her position. In fact, she indicated that the issues raised by JHL did not fall within section 8 (c). JHL has now launched this claim asking the court to use its powers under section 11 (1) to remit the matter to arbitrator.

8. I should point out that JHL has made it abundantly clear that they are satisfied with arbitrator's work and but for the contention that she used the incorrect base figure it would not have launched this claim. JHL's sole complaint is in respect of the award for loss of profit.

9. The relevant parts of the arbitrator's reasons that are necessary for this application are found at paragraph 94 (5) and (6). They read as follows:

> *I accept that the actual revenues flowing from one (1) greenhouse in November for two (2) weeks was $968,720.00 which improved to actual revenues of $1,743,450.00 for the two (2) weeks in February of 2007 with two (2) greenhouses in operation (see paragraph 39, page 19 supra)*
>
> *That a reasonable assumption would be that actual revenues for the three month period of November*

2006 to February 2007 in respect of 2 greenhouses would provide an average which when extrapolated to the operation of six (6) greenhouses produces revenues for one (1) month of J$6,798,796.00.

10. It is obvious that the arbitrator knew that she had figures for one greenhouse in November 2006 and that by February 2007 she had figures for two greenhouses. She now had to decide how she will use this information to decide on the loss of profit. She decided to arrive at a monthly figure for two greenhouses per month and then use that figure as her base to calculate the loss for six greenhouses for one month and then go on to find the loss of profit for the relevant period, taking into account that this was an agrarian enterprise which is subject to the vagaries of the weather. Let it be clear that I am not here deciding whether Miss Phillips was wrong in her approach to the matter. What I am saying is that her thought processes as revealed do not in my view, at this stage of the analysis reveal, any error within the meaning of section 8 (c) of the Act.

11. The arbitrator's error, according to JHL, was to "assume wrongly, that the figures for November to February were for two greenhouses rather than (on average) one and a half [greenhouses]" (see para. 18 of written submissions). This submission is misconceived because there is no indication of any "wrong" assumptions. The arbitrator decided to do the calculation in a particular way.

12. This error, submitted Lord Gifford Q.C., was compounded by the arbitrator when, in response to the claimant's request under section 8 (c) that she correct the error, she stated in her ruling handed down on December 19, 2007:

The figures set out in paragraph 94 (7) of the Award (sic) are based on the actual figures submitted over a particular period, by way of extrapolation, on an average, on a balance of probabilities, in the exercise of the discretion of the Arbitrator (sic) in circumstances where no

actual figures were given for any month in which all six (6) greenhouses were functioning, and having regard to the vagaries of the agricultural experiences and contingencies. Therefore no correction to paragraph 1 of the Award (sic) is required.

13. This failure to correct the error, according to Queen's Counsel, amounted to an error of law and so the court has the power to remit the matter to the arbitrator to make an award according to law. As will be seen in my analysis, this submission by learned Queen's Counsel was always going to be difficult to sustain.

Did the arbitrator commit an error of law?

14. In order to determine whether the arbitrator erred in law in refusing to make the correction, it is necessary to examine the terms of section 8 (c) to see if the arbitrator acted properly. A point that should be made quite early in order to explain why I am looking at section 8 (c) to see if the arbitrator made an error is this: because of how the law in this area has developed, the legal position is that where the arbitrator, on request, refuses to correct the alleged error under section 8 (c), the court can only remit the award to the arbitrator acting under section 11 (1) if and only if the court concludes that grounds for setting aside the entire award exists and instead of doing this, the court remits the matter to the arbitrator for reconsideration.

15. In examining section 8 (c), it is critical to understand how that provision came to be in the statute. I wish to point out that this provision was included against the backdrop of the courts' reluctance to set aside arbitration awards and this reluctance has had a deep, profound and long lasting impact on how the provision has been interpreted by the courts.

16. I shall first look at the courts' attitude to arbitration awards. The courts tend to lean in favour of upholding arbitration awards rather than to disturb them. The underlying rationale is that the parties by private treaty have decided on their own "court" and "judge". They

submit their dispute to a person to decide the matters in dispute and so it is only fair that they accept the result that comes out of that process. Of course, there are limits to this and the courts have set aside awards but only on very narrow grounds. So sacred was the arbitrator's award that even if an error was made in transcribing the result, once the award was signed, the arbitrator could not correct the award. This extreme position is captured in the headnote of ***Mordue v Palmer*** (1870 - 71) L.R. 6 Ch. App. 22, which reads, "An arbitrator having signed his award is *functus officio*, and cannot alter the slightest error in it, even though such error has arisen from the mistake of the clerk in copying the draft. The proper course in such a case is to obtain an order to refer the award back to the arbitrator."

17. This extreme position has been reversed by statute in England and also Jamaica. In England, section 7 (c) of the Arbitration Act 1889 was passed to reverse ***Mordue v Palmer***. Section 8 (c) in the Jamaican Act was modeled on section 7 (c) of the English Act of 1889. This is the legislature route to section 8 (c) in Jamaica.

18. Let me state the actual terms of section 8 (c) before examining how it has been interpreted. Section 8 (c) reads:

> *The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention have power-*
>
> *(a) ...*
>
> *(b) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court; and*
>
> *(c) to correct in an award any clerical mistake or error arising from any accidental slip or omission.*

19. Notwithstanding the apparent width of the words, the interpretation of this provision has been very technical and narrow. The best way of understanding the narrow view taken of this provision is to see it as the court's commitment to the policy of upholding awards and as such

a wide interpretation of the provision would undermine this fundamental principle.

20. The leading case on the interpretation of the provision is ***Sutherland & Co. v Hannevig Bros Ltd.*** [1921] 1 K.B. 336. The facts are succinctly stated in the headnote: by his award an arbitrator awarded certain costs to one of the parties. The successful party, being uncertain whether this award included the whole or only a part of the costs, wrote to the arbitrator. The arbitrator stated that "he certainly had made an error in writing his award, and had amended his award so that it should read as he originally intended to state it," and issued another award in which he made it clear by the addition of several words that the larger amount was included in the award. The second award was set aside on the basis that what occurred did not fall within section 7 (c).

21. In coming to its decision the court had to interpret the section. The court held that *clerical* qualifies *mistake* only and not "*or error arising from any accidental slip or omission.*" Hence there were two grounds for setting aside an award: (i) clerical mistake and (ii) error arising from accidental slip or omission. Thus section 7 (c) (UK) (8 (c) (Jamaica)) has two independent grounds on which an award can be corrected. Rowlatt J. held that a clerical mistake refers to a slip of the pen. He also held that an "accidental slip occurs when something is wrongly put in by accident, and an accidental omission occurs when something is left out by accident" (see page 341). This analysis has not been departed from and has been consistently applied.

22. A more recent formulation of the principle can be found in Lord Donaldson M.R.'s dictum in ***Mutual Shipping Corporation v. Bayshore Shipping Co Ltd, The Montan*** [1985] 1 All E.R. 520. The learned Master of the Rolls said at page 526f-g:

> *It is the distinction between having second thoughts or intentions and correcting an award or judgment to give true effect to first thoughts or intentions, which creates the problem. Neither an arbitrator nor a judge can make any claim to*

infallibility. If he assesses the evidence wrongly or misconstrues or misappreciates the law, the resulting award or judgment will be erroneous, but it cannot be corrected either under section 17 of the Act of 1950 [section 7 (c) of the 1889 Act and section 8 (c) of the Jamaican Act] or .... It cannot normally even be corrected under section 22 of the Act of 1950 [section 11 (1) of the Jamaican Act]. The remedy is to appeal, if a right of appeal exists. The skilled arbitrator or judge may be tempted to describe this as an accidental slip, but this is a natural form of self-exculpation. It is not an accidental slip. It is an intended decision which the arbitrator or judge later accepts as having been erroneous.

23. This dictum of Lord Donaldson puts an end to Lord Gifford's contentions. What Miss Phillips did was to give effect to her first thoughts and intentions when she awarded the sum that she did. What she has done is clearly what she intended to do. So even if Miss Phillips were to say, "Good heavens, I have made an error. I should have used the figures for one greenhouse instead of two", that would not be the result of a slip of the pen or an accidental slip or omission. It would be more in the nature of having second thoughts but that cannot be corrected under section 8 (c). The real complaint of JHL is that she should have used the figure for one or one and a half greenhouses for one month and then use that as the base figure. There is nothing to suggest that she incorrectly assessed or misconstrued the evidence or miscalculated the amounts, or as in ***Mutual Shipping*** itself, incorrectly attributed evidence to the wrong party thereby making an award to the wrong person. What she decided to do, given that there was no evidence of actual expenditure when all six green houses were in operation, was to use the operation of two green houses as the basis for finding the approximate revenue for six greenhouses. This is not a slip of the pen decision. It was a deliberate choice made by her in arriving at a base figure which was then used to complete her calculation. It cannot be said that she excluded anything she intended to include or included anything she

intended to exclude. There is no indication that she intended to find the average of one or one and a half greenhouses and use that as her base figure as suggested by Lord Gifford but inadvertently used two greenhouses instead. She decided to use two greenhouses from the outset. There is no error in the expression of her conclusion. At best (and that is not being suggested) there may be an error in the thought process (see Lloyd L.J. in ***Food Corporation of India v Marastro*** [1986] 2 Lloyd's Rep. 209, 216 - 217). The best JHL can say is that she ought not to have used the evidence in that way but that is not the same thing as saying that she made slip-of-the-pen error or that there was an accidental slip or omission within the meaning of section 8 (c). What JHL was asking her to do when it asked her to revisit the matter under section 8 (c) was to have second and perhaps better thoughts on how she should use the evidence. She had no power to do this and so she was correct to refuse to amend her award. Thus even if Miss Phillips is in error it is not an error correctable under section 8 (c) of the Jamaican Arbitration Act, 1900.

24. Lord Gifford Q.C. then puts forward this subtle argument. He contended that when the arbitrator in response to JHL's request to make a correction under section 8 (c) wrote what has been set out at paragraph 12 above, the arbitrator had committed an **error of law** by altering her award by now speaking of "the exercise of the discretion of the Arbitrator (sic)." This, he submitted, was not part of her original award and by seeking to introduce this element, she is in fact changing the basis of the award and thus the argument runs, the matter should be remitted to her. In effect, in light of how I have understood the law, Lord Gifford was asking me to conclude that there is an error on the face of the record, sufficient to set aside the award and therefore the gateway to remit the matter has been opened. Let me add that Lord Gifford did not quite put the argument in this way but as I have said, if he were to have any possibility of success the submission has to be so structured to meet the existing law as I am about to state it. (my emphasis)

25. This argument runs afoul of these two points. First, even if Lord Gifford is correct, this new element has not had an impact on the award, that is to say, she has not altered her award based on second

and better thoughts as the arbitrator sought to do in ***Sutherland's*** case, and so there is nothing for me to remit to her to consider. Second, the power of the court to remit a matter to the arbitrator is circumscribed and that can only be done in circumstance where the award could be set aside. This is not the position here. This second point requires justification and the rest of this judgment is donated to that effort.

The power to remit an arbitration for reconsideration under section 11 (1) of the Arbitration Act

26. In an effort to persuade me that the legal basis for the remission under section 11 (1) exists, Lord Gifford has relied on Lord Donaldson M.R.'s judgment in ***King v Thomas McKenna Limited*** [1991] 1 All ER 653. Unfortunately, I disagree with Lord Donaldson and consequently with Lord Gifford. Lord Donaldson's basic thesis, when speaking of the equivalent English provision (i.e. section 22 of the Arbitration Act, 1950), is that the words of the statute are sufficiently broad to entertain a remission beyond the four usual grounds so long as it is necessary to prevent injustice. I must confess that I have formed the view that the development of the law does not, at this point in legal history, permit this conclusion. The way forward has to be legislative reform. The judiciary has gone as far as it can legitimately go.

27. In the case of Jamaica, as will be shown below, by the time the legislature acted, certain provisions that were included in the Jamaican Act had acquired a particular understanding for at least fifty six years prior to the passing of the Jamaican statute. It is clear, as shall be shown, that the particular understanding was brought into the Act. Therefore, while the Jamaican parliament has not been as active as the English parliament, it too, by enacting the 1900 Arbitration Act showed that it felt that judicial reform and development had come to an end. In effect, by adopting the way that law was understood, the legislature is saying to judges that they are not allowed to have second and better thoughts about how the statute should be interpreted.

28. I should add that the following discussion while focusing on section 11 (1) of the Jamaican Act will also place section 8 (b) and section 11 (1)

in their proper context and will show that are connected in that, together, they are statutory provisions which captured the techniques introduced by wily arbitrators and knowledgeable parties to circumvent the all or nothing approach to arbitration awards which were challenged, that is to say, whenever arbitration awards were challenged they were either quashed or upheld. There was no half way house. This all or nothing approach became settled law by the middle of the nineteenth century. Without these innovations, arbitration awards were either upheld in full or quashed outright. The point being made is that sections 8 (b), (c) and 11 (1) are to be seen as the only means by which a party can seek to correct an award without having the whole award being set aside.

29. As has been stated the attitude of the courts to arbitration awards was to uphold awards. This position was well settled by the nineteenth century. The firmness of this position can be gleaned from the following passage from the case of ***Hodgkinson v Fernie*** 140 ER 712, where Williams J. explained in quite robust terms at 717:

> *The law has for many years been settled, and remains so at this day, 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 of both law and fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of admission of an incompetent witness or the rejection of a competent one. The court has invariably met those applications by saying, "You have constituted your own tribunal; you are bound by its decision." 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, or upon paper accompanying and forming part of the*

award. Though the propriety of the latter may very well be doubted, I think it may be considered as established.

In similar language Crowder J. in the same case said at 717:

I take it that the general rule of law is clear and well ascertained that the court will not interfere to set aside an award which is good on the face of it, on the ground that the arbitrator has made a mistake whether of fact or of law. Having selected their own judge, the parties are bound by his decision.

30. It can be seen that by the nineteenth century, the courts will not readily set aside arbitration awards except on very clear and well defined grounds. However, the fact that the courts did set aside arbitration awards indicated that the arbitrator was not a law unto himself who could make an award willy nilly. On the other hand, to establish that grounds existed to set aside an award was not a very easy task.

31. There were four grounds on which the courts usually acted to set aside an award in addition to that of fraud or corruption. The fraud or corruption in view here was that of the arbitrator. The other four grounds "were (1) where the award was bad on its face, (2) where there had been misconduct on the part of the arbitrator, (3) where there had been an admitted mistake and the arbitrator had asked that the matter be remitted and (4) where additional evidence had been discovered after the making of the award" (per Lord Donaldson M.R. in ***King v Thomas McKenna*** [1991] 1 All ER 653, 657e-f). His Lordship was referring to counsel's submission but he seemed to have accepted the proposition as correct.

32. Needless to say, to make out a case of fraud or corruption was no easy task. The grounds of fraud and corruption as well as the other four grounds, if established, meant that the entire award was

quashed. There was no room to segment the award to separate the wheat from the chaff. This proved to be unsatisfactory.

33. The quest for arbitrators and the litigants was to find a method to amend the award without losing the whole. Two devices were employed to circumvent this problem. One was that the parties included what eventually became known as Mr. Richards's clause, or simply, a Richards clause. This clause was the invention of one Mr. Vaughn Richards, a well known arbitrator at the time whose descendants are still involved in that occupation in London down to the present day. This clause permitted the court to remit matters back to the arbitrator after he made his award instead of setting aside the award. As will be seen, this clause became the basis for section 8 of the Common Law Procedure Act, 1854 ("the 1854 Act"). The second device was to include a state-a-special-case clause. This second device was deployed in this way: the parties, in the submission or order of reference to the arbitrator, would introduce a "clause enabling either party to call upon the arbitrator to reserve any question of law that might arise for decision of the court" (per Cockburn C.J. in ***Hodgkinson*** at page 717). This practice was placed on a statutory footing by section 5 of the 1854 Act which permitted the arbitrator, if he was not precluded by the arbitration agreement, to state his award or any part of it in the form of a special case for the opinion of the court. This section 5 of the 1854 Act is now section 8 (b) of the Jamaican Arbitration Act.

34. Before leaving this part of the matter I must make reference to the case of ***Fuller v Fenwick*** 136 ER 282 before examining how section 8 of the 1854 Act was interpreted. The reason for this reference is that this case was decided on November 24, 1846, eight years before the 1854 Act. It shows two things. First, it gives an indication of what the Richards clause looked like. Second, it shows that even with the Richards clause a remission to the arbitrator for reconsideration did not take place simply because one party was disgruntled and wished a remission to take place. The party was obliged to establish that the award could be set aside on any of the well known grounds.

35. In ***Fuller***, the judge's order, made with the consent of the parties, referred the matter to an arbitrator. The order of reference had the following Richards clause:

> *in the event of either of the said parties disputing the validity of the said so to be made and published as aforesaid, or moving the court to aside the award, the court should have power to remit the matters thereby referred, or any or either of them to the reconsideration of the said arbitrator.*

36. Before looking at the case in more detail, the form of the clause should be noted. It was designed to avoid a total quashing of the award. It said that if any of the parties dispute the award or intend to have it set aside, the court had the power to refer either all the matters in dispute "or any or either of them." This was how reconsideration of individual aspects of the award could be secured. However, even this solution had it limitations in that the remission would only take place if the party seeking the remission could establish that there were grounds on which the award could be set aside. If such grounds were established, then the court would refer the matter back to the arbitrator for reconsideration of the whole or part of the award.

37. I now return to ***Fuller***. After the arbitrator made his award, the claimant sought to set aside the award on the ground that there was a "perverse mistake of law" on the part of the arbitrator in that he treated a sum as a penalty and not as liquidated damages. It is interesting to note the claimant's counsel's submission - one Mr. Worlledge - on the clause. He stated that "[t]his being a case in which the arbitrator has clearly and palpably mistaken a firmly-settled rule of law, the court will, at the least, exercise the power reserved to it by the order, and remit the matter to him for reconsideration." Counsel was asking the court to remit the matter back to the arbitrator.

38. The court did not accept that the award should be set aside and consequently there was no basis for remitting the matter back to the arbitrator. The crucial point for our purposes is that the no one in the case thought - not even counsel for the claimant, judging by the summary of his arguments, - that the presence of the Richards clause was an opportunity for the courts to remit the matter back to the arbitrator merely because one party objected to the award.

39. The case also shows that the technique of reserving points of law for the court was well known by 1846. This is reflected in submission of counsel for the claimant who made the point that "[i]t is always competent to reserve points of law for the opinion of the court, if the parties choose so to stipulate, rather than confide in the judgment and discretion of the arbitrator." There is no hint that by 1846 this position was in doubt. It appears that in ***Fuller's*** case, the parties chose not to include such a clause and so the claimant had to try to make out that there was an error on the face of the record. Tactically, counsel had no other option since the litigants had not taken the time to utilise of one of the techniques to circumvent a complete quashing of the award. In the understood law of the day, counsel was seeking to establish a ground which would have led to the quashing of the full award in order to secure reconsideration of a part of the award under the Richards clause. The case of ***Fuller*** is therefore a reflection of the general law identified and expanded on in the cases that will be examined after I have referred further to the judgments in ***Fuller***.

40. I will accept the charge that I am repeating myself but the point I am about to remake needs reinforcing. The judgment of Maule J. in ***Fuller*** reflects the ultimate core reasoning why arbitration awards are not lightly set aside. He said at page 285:

> *If the case had been left to follow the ordinary course, it would have been decided, as to the facts, by a jury, and, as to the law, by the judge, with an ultimate appeal to a court of error. The parties, for some reason, thought fit to withdraw the case from that mode of trial, and to refer the*

whole to an arbitrator, thinking, probably, that the facts would be more conveniently ascertained, and the law more conveniently determined by one from whose judgment there was no appeal, and that an arbitrator would, in the particular case, be a better judge of the facts than a jury, and of the law that the court. It is quite true that it is sometimes advantageous to have a matter decided by a person possessing the smallest possible knowledge of law. These considerations have, in modern times, induced the courts to deal much more liberally with awards than was formerly their practice, and, generally speaking to hold them to be final, unless some substantial objection appears upon the face of them.

41. In other words, the parties knew that they were submitting to a tribunal from which there was no appeal. The also knew that the arbitrator may not know much or any law at all. They decided to take that risk. Having gone along with the procedure with full knowledge of the consequences, setting aside the award merely because of a disagreement with the outcome or that the person misapplied the law or did not interpret the evidence correctly was not an appropriate ground to overturn the award since the parties knew that there was no appeal and obviously intended the decision to be final.

42. So impressed were the legislature with Mr. Richards's clause that they incorporated its effect, if not the actual text of the clause, into section 8 of the 1854 Act. The terms of the section are as follows:

In any case where the reference shall be made to arbitration as aforesaid, the Court or a Judge shall have power at any time and from time to time, to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said Court or Judge shall seem proper.

43. As can be seen, while section 8 of the 1854 Act was not reproduced ipsissima verba in section 8 (c) of the Jamaican Act, there can be no doubt that the substance is identical with the only difference being that section 8 of 1854 Act is more wordy. The *aforesaid* in section 8 of the 1854 Act refers to the power of the court to refer matters to arbitration. This power was found in earlier provisions of the Common Law Procedure Act (see sections 3 and 7).

44. It is now important to see how section 8 of the 1854 Act was interpreted by the courts. Within three years of this legislation, counsel sought to argue that section 8 conferred greater powers on the Court than was hitherto the case. Cockburn C.J. firmly rejected this submission by stating in ***Hodgkinson*** at page 716 that:

> *It is true that section [8] gives the court authority, in any case where reference shall be made to arbitration, at any time, and from time to time, "to remit matters referred, or any or either of them, to the reconsideration and re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said court or judge may seem proper." I am, however, clearly of the opinion that it was not intended by that enactment to alter the general law as to the principles upon which the courts had been in the habit of acting in determining whether they would or would not set aside awards;*

Williams J. in ***Hodgkinson*** stated at page 717:

> *But it is said that the law upon this subject has been varied by the 8th section of the Common Law Procedure Act, 1854, and that we ought under the authority of that section to send the matter back to the arbitrator, with an intimation that he was wrong and a direction to decide otherwise. I think it is impossible to say that this clause has varied*

the law as to alter the power and character of the arbitrator, and to enable us to say that his decision shall no longer be final either as to the law or the facts. This provision of the statute was intended merely to introduce into every order of reference the clause familiarly known as "Mr. Richards's clause." Nobody ever dreamt that the introduction of that clause into the order had the effect of altering the law as to the decision of the arbitrator being conclusive

Crowder J. at pages 717 and 718 also weighed in on the matter:

I take it that the general rule of law is clear and well ascertained that the court will not interfere to set aside an award which is good upon the face of it, on the ground that the arbitrator had made a mistake whether of fact or of law. Having selected their own judge, the parties are bound by his decision. That this is the general rule, indeed, is admitted; but it is said that this case forms an exception to that general rule; for that the parties are not to be supposed to have made the arbitrator the judge to decide the particular matter now in question.

...

It was insisted, that, at all events we ought to interfere by virtue of the power given to the court by the 8th section of the Common Law Procedure Act, 1854. ... The intention of the 8th section evidently was, to give the court the same power in all cases to send back an award for re-consideration, as they before had only in those cases where the submission or order contained a special provision to that effect. If, as is suggested, that the statute altered the law in this respect, the consequence would be that the court would in almost every case be called upon to

interfere, - a consequence which would very materially impair the utility of arbitrations.

Willes J. added, after agreeing with the other judges, at page 718;

[Speaking of the submission that the court can remit matter under section 8] It is obvious that this would open a door to much inconvenience, uncertainty, and fraud ...

45. In the case of ***Hogge v Burgess*** 157 ER 482 the issue was raised again. I am afraid I must cite a rather long passage from Martin B. The Baron said at page 484:

That was clearly the old rule, [referring to dicta from Alderson B. and Parke B. in Phillips v Evans which was that the courts will adhere to the principle to uphold awards rather than set them aside for mistakes] and we have now to deal with an act of Parliament operating on these proceedings by compulsory reference. It is well known that up to a certain period there was no power to send back an award to the arbitrator. The clause for that purpose was first introduced by Mr. Vaughn Richards and it enabled the Court to remit the matters referred to the arbitrator instead of setting aside the award. The legislature, acting on that state of things, by the 3rd section of the Common Law Procedure Act, 1854, enabled the Court or Judge to refer matters of mere account in country causes, to the judges of the County Courts, who are proper persons to decide both the law and facts. Then comes the 7th section, which refers to an arbitration in pursuance of an order of the Court or a Judge under the 3rd section, and which says that the proceedings upon any such arbitration "shall be conducted in like manner, and subject to the same rules and

> *enactments, as to the power of the arbitrator and of the Courts," &c, "enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of Court or a Judge's order." **So that there is an express enactment that the power of the arbitrator and of the Courts as to setting aside the award shall be the same as upon a reference by consent. I cannot conceive a stronger legislative enactment that the Court shall have no further power to set aside an award under that Act than on a reference by consent.** Mr. Cooke says that is altered by the 8th section; but we must look at the intention of the legislature, and we find a distinct enactment that the power of the Court shall be the same as on a reference by consent, and applying that to this case, it means that the Court shall not have any power to set aside an award for mistake of law or fact. [After citing section 8 continues:] It seems to me, that is nothing more than enacting that the clause introduced by Mr. Richards shall apply to all orders of reference made under the 3rd section, and that it does not alter the distinct enactment of the 7th section.* (my emphasis)

46. This passage, then, indicates that the legislature was merely taking the law as it stood and putting it in the statute so that it would apply to judicial referrals to arbitration thereby equating judicial referral with arbitrations by private treaty.

47. Watson B., in ***Hogg***, expressed his agreement with this position. He explains that certain provisions of the 1854 Act made allowed for compulsory reference to arbitration and he saw the issue as "whether there is any difference with respect to awards under the compulsory clauses of the Common Law Procedure Act, 1854" (see page 485). He concluded that "the legislature had not left the matter in doubt, but has clearly expressed its intention that these compulsory references should be governed by the rules of law applicable to ordinary

references" (see page 485). Channell B. expressed himself in similar terms.

48. The case of ***Mills v The Master and Wardens and Society of the Mystery of Bowyers in the City of London*** 69 ER 1024 was to the same effect.

49. From these cases, the path of the development of the law is no longer in doubt. The arbitrations that occurred because of referrals under the provisions of the 1854 Act were subject to the same law, rules and procedure as those done outside of the statute. This position cannot be stated too strongly because in ***Hogge*** counsel submitted that a doubt had arisen about the status of ***Fuller's*** case because in that case there was a clause permitting remission to the arbitrator whereas arbitrations under the 1854 Act would not necessarily have such a clause. The court's response quieted that line of reasoning and hence was no difference between arbitrations under the Act and those outside the Act.

50. To be fair to counsel in ***Hogge***, his submission was not groundless because in a text entitled ***The Common Law Procedure Act*** (1854) by Messieurs Holland and Chandless, before the position just stated was decided by the courts, the learned authors in a note to section 8 of the 1854 Act questioned whether ***Fuller's*** case would still be authoritative because it was the view of some members of the legal profession, apparently, that the words of the section were indeed wider that Richards's clause. However, that this additional bit of information has done is to reinforce the point that the courts were not going to permit the actual terms of section to confer any greater power than was available under the clause.

51. Since parliament was intruding in a body of law that had (1) well developed principles on setting aside awards and (2) an accepted the solutions of the Richards's and state-special-cases clauses to escape the all or nothing approach, the legislature had to address directly whether the referrals under the should have its own law or whether the existing practice would apply to compulsory arbitrations. The issue was settled by the terms of section 7 of the 1854 Act which said that

statutory arbitrations and ordinary arbitration abided by the same law. The cases show that the judges of the time understood that sections 7 and 8 of the 1854 Act were designed to maintain existing law and practice and not to alter the law and practice. There was no intention to give the courts power greater than that which existed under a Richards clause. There is no case that I am aware of that has challenged this understanding of the law as it was understood in the middle years and beyond of the nineteenth century. Certainly, I did not understand Lord Donaldson, in ***King***, to be taking issue with how I have stated the development of the law.

52. It is against this background that the English Arbitration Act, 1889, was passed. Section 8 of the 1854 Act has been carried forward, in substance, in the various English statutes on arbitration. Section 8 was reproduced in section 10 (1) of the English Arbitration Act of 1889. The same provision later became section 22 (1) of the 1950 Arbitration Act.

53. The Jamaican Arbitration Act of 1900 follows closely the English 1889 legislation. Section 11 (1) of the Jamaican Act is the Jamaican equivalent of section 8 of the 1854 Act. That is to say, the Jamaican Parliament approved the Richards clause solution and expressly incorporated it effect and understanding. If it is that section 11 (1) of the Jamaican Act is merely a reproduction, in substance, of section 8 of the 1854 Act, is it legitimate for a court, at this point in our legal history, to ignore all this history and go its own way? I say, "No."

54. At the risk of repetition, after the 1854 Act it was the law that remission by the court to the arbitrator under section 8 of the 1854 Act would only be done on grounds which would have induced the courts to set aside the award. This reasoning applies to section 11 (1) of the Jamaican Act. Jamaica was not purporting to make new law or to break with the past. We were copying existing law that had, by 1900, developed a particular understanding and application.

55. English Court of Appeal authority from the nineteenth century suggests that despite the passage of the 1899 Act, which repealed the arbitration provisions of the 1854 Act, section 10 (1) of the 1899

Act was not understood as conferring a wider power than previously existed. This was made abundantly clear in ***In re Keighley, Maxsted & Co. and Durant & Co.*** [1893] 1 Q.B. 405. In that case Lord Esher M.R. had this to say at pages 408 - 410:

> *Prima facie, no doubt, this determination was final and conclusive, and was not subject to remission to the umpire by a court of law; but one of the parties made an application to the Queen's Bench Division to remit the award to the appeal committee under s. 10 of the Arbitration Act, 1889 . Now, that there has been an arbitration, and ... the arbitration therefore comes within the provisions of that Act. We must see, therefore, whether the circumstances of the case are such as to justify the Court in remitting the award to the umpire for re-consideration.*
>
> *The Arbitration Act, 1889, in great measure follows the provisions of the Common Law Procedure Act, 1854; if, therefore, any part of it is enacted in the same terms as those used in the Common Law Procedure Act, then, according to the rules which govern the decisions of the Courts, if decided cases have determined the construction to be placed on the Common Law Procedure Act, we must adhere to those decisions when we are called upon to place a construction upon that part of the Arbitration Act in which the same language is used with regard to the same subject-matter. Now, the provisions of both these Acts as to referring back the decision of an arbitrator for reconsideration had their origin in the following reason, as has been frequently pointed out: previously to 1854 there had been in many cases submissions to arbitration containing a clause authorizing a reference back to the arbitrators; while in other cases there had been no such clause in the*

submission; and it had been decided that, in the absence of such a clause in the submission, the Court could not refer back the award, but where there was such a clause the award could be referred back, although only on certain specified grounds. The effect of both these Acts is to treat all submissions to arbitration (whether made by consent or compulsorily) as though they contained a clause giving the Court power to refer back the award to the arbitrator or umpire, and we must therefore consider the present arbitration as though it had been an old arbitration - that is to say, prior to 1854 - and the submission had contained such a clause.

There have been many decisions upon the provisions relating to arbitration in the Common Law Procedure Act, 1854, and especially as to the right construction of s. 8, which gave power to the Court to remit the matters referred to the reconsideration of the arbitrator. It has been held that one effect of the Act was that it continued the ordinary law as to decisions by arbitrators, that is to say, that they are final and conclusive both of the law and of the facts, and that whether there has been a mistake either of law or fact the parties cannot by themselves set it up. Where, however, the submission contains a power to refer back to the arbitrator, if the party alleges that there has been a mistake on the arbitrator's part either of law or fact, the Court gives this effect to the power: that upon such a state of facts alone the decision cannot be questioned either on the law or the facts, the parties having chosen their arbitrator for better or worse; but that if the arbitrator himself informs the Court that he thinks he has made a mistake either of law or fact, and both he and the party approach the Court, the

Court would send the matter back to him for reconsideration, although such a course will not be taken on the mere allegation of one of the parties. That was the law under the Act of 1854, and that is the view adopted in Dinn v. Blake, in which case it is said in terms that an award cannot be sent back to the arbitrator on the mere ground of mistake, the exceptions being where there has been corruption or fraud, where there is a mistake of law or fact apparent on the face of the award, and where the arbitrator himself admits that he has made a mistake. That law or rule of the Court, therefore, applies only where there is an allegation by the arbitrator that he has made a mistake of law or fact; and the case of Dinn v. Blake is no authority for anything beyond.

56. Lopes L.J., in the same case, was of the same opinion when he stated at pages 411 - 412:

I am of the same opinion. The language of s. 10 of the Arbitration Act is very general and comprehensive, though I am not prepared to say that it is more comprehensive or of larger import than that of s. 8 of the Common Law Procedure Act, 1854. It appears to me that all the cases decided under the latter Act are applicable to cases arising under s. 10 of the Arbitration Act, and it is therefore material to consider both the law under the Common Law Procedure Act and the law that was in existence before that Act was passed.

The case of Burnard v. Wainwright, which was decided in 1850, is an important one, and, in my opinion, governs the present case, for the same point arose in it which arises here. There was a clause in a submission empowering the Court to

remit the matter to the arbitrator for reconsideration, together with a statement by the arbitrator that his judgment would have been affected by the evidence subsequently discovered. Those facts are very similar to those in the present case, for the Common Law Procedure Act, 1854, having done away with the necessity for having a clause in the submission authorizing the remission of the award to the arbitrator, the absence of such a clause in the present case makes no difference; and we have also in the present case a statement by one of the arbitrators that his judgment would have been affected by the evidence. In Burnard v. Wainwright Wightman, J., does not seem to attach importance to the arbitrator's statement that the evidence would have affected his judgment; and it is material to observe that there was no affidavit of the arbitrator asking for the assistance of the Court or intimating an intention to ask for their assistance. The case of Mills v. Master &c., of the Society of Bowyers is a very valuable one, for that decision placed a construction on s. 8 of the Common Law Procedure Act, 1854, to the effect that it was no longer necessary to introduce into a submission a provision for remitting the award back to the arbitrator for reconsideration.

57. The third member of the court Kay L.J. although he was minded had the matter been free from authority to give section 10 (1) of the 1899 Act a wider ambit, nonetheless concluded, at page 415, that:

At present I am not inclined to go a step beyond those cases, or to say that there is a right of appeal; there is a limit to the jurisdiction, which must be looked for in those cases. It is not too much to say of Mills v. Master, &c., of Society of Bowyers, that it decides that one of the objects

> *of the Common Law Procedure Act, 1854, was to prevent the necessity of putting into the submission a clause giving the Court power to remit. Before that Act there was no power, without such a clause, to remit an award; all that the Court could do was to set it aside, and there was a limit to the cases in which that could be done. And I think that the power now given by statute to remit an award cannot be exercised on grounds wider than those on which the Court could, before 1854, have remitted an award where the submission contained such a power.*

58. From the passages from the three judges there can be no doubt that they thought that the interpretation of section 10 of the 1899 was governed by the law as it stood before and after the 1854 Act. The Jamaican Act was passed after this case, thus, the case for saying that the Jamaican legislature opted for the well settled and thoroughly understood legal position is even stronger.

59. The only appellate authority that I have found which may cast doubt on the position of the courts on section 10 (1) of the Arbitration Act of 1889 is the case of ***In re Montgomery, Jones and Co. and Liebenthal and Co.***, 78 L.T. 406. This case is, regrettably, extremely weak authority to detain one for too long. The judgments, on this point were pointing in different directions. A.L. Smith L.J. took the view that the grounds for remission to the arbitrator were limited. Chitty L.J. felt otherwise while Collins L.J. agreed with both judgments. This is not the most promising material to ground the proposition that the grounds for remission are wider that what was already established.

60. Before leaving ***In re Montgomery*** I must make an observation about the arbitration clause in that case. The clause provided for an arbitration and a committee of appeal, that is to say, the parties contracted to have their court of first instance and court of appeal. Until there is legislative reform those doing engaged in arbitration in Jamaica may well consider these options.

61. As noted earlier, Lord Donaldson in ***King*** has given the then equivalent English provision (section 22 (1) of the 1950 Arbitration Act) a wide interpretation. I should point out that such is the dearth of appellate authority supporting Lord Donaldson's position that his Lordship had to refer to first instance judgments that appear to support his position.

62. Nonetheless, it is important to understand how his Lordship arrived at this position. His Lordship stated at page 659b-c:

> *In ascertaining the limits of the court's jurisdiction, properly so called, I see no reason why section 22 and the other sections should not be construed as meaning what they say. Certainly so far as section 22 is concerned, there is no element of doubt or ambiguity. The jurisdiction is wholly unlimited. It may well be the case that section 8 of the Common Law Procedure Act 1854 was enacted with a view to providing a statutory alternative to "Mr. Richards's clause," the terms of which I have not been able to discover, but this objective cannot limit the effect of the words used in the section in the absence of ambiguity. How that jurisdiction should be exercised is a quite different matter and to that I now turn.*

63. This passage from the learned Master of the Rolls is very difficult to reconcile with over one hundred years of case law. In effect, the Master of the Rolls stated that over one hundred years of understanding should be ignored because he was of the view that the words of the statute should not be limited by their purpose.

64. I must confess that I am unable to see my way as clearly as Lord Donaldson in circumstances where the 1950 Act was a consolidating statute designed to consolidate the Arbitration Acts of 1889 and 1934. There is no indication that the 1950 Act was an amending statute.

65. To say that section 8 of the 1854 Act was simply a statutory Mr. Richards's clause is not the entire picture. The history of the matter has been recounted and need not be repeated. Thus, I cannot agree that the sole objective of section 8 was to provide a statutory Richards clause. The provision was part of a legislative scheme designed to give power to the judge to refer some matters to arbitration and at the same time make it plain that referrals under the statute were subject to the same law and practice as private ones.

66. Lord Donaldson concluded at page 660h-j:

> *In my judgment the remission jurisdiction extends beyond the four traditional grounds to any cases where, notwithstanding that the arbitrators have acted with complete propriety, due to mishap or misunderstanding, some aspects of the dispute which has been the subject of the reference has not been considered and adjudicated upon as fully or in a manner which the parties were entitled to expect and it would be inequitable to allow any award to take effect without some further consideration by the arbitrator.*

67. Lord Donaldson has therefore expanded the grounds on which a court may order that an arbitration award may be remitted. Such innovation would need to come from the legislature. I have the highest regard for Lord Donaldson and I have not often disagreed with him but in this case I respectfully decline to follow his lead. Nowhere in his judgment did the learned Master of the Rolls meet head on the passages from the nineteenth century cases cited earlier which indicated how the court understood section 8 of the 1854 Act. Neither did he demonstrate that that understanding was changed by subsequent enactments. In other words, the provision before the Master of the Rolls was not free from authority and regrettably, his Lordship did not undermine the reasoning of those cases on the point and so in my view has not demonstrated why that interpretation no longer held good. To say, as he did that the starting point has to be

the words of the statute, which, admittedly, is not an alarming proposition in and of itself, but where the substance and essence of the provision has been the subject of judicial pronouncement of high authority and the provision of the statute have been retained by successive statutes that have re-enacted the section in statutes governing the same subject matter as the original statute, I would have thought the consistent re-enactment would have been the clearest indication that the legislature was quite happy with the judicial construction of the statute. At the very least one would have expected the Master of the Rolls to show that the context of section 22 (1) in the 1950 Arbitration Act showed a different legislative intent, thereby demonstrating that section 22 (1) cannot be construed as it was in previous Arbitration Acts - proposition made more difficult by the fact that the 1950 Act was a consolidating statute. In any event, even if Lord Donaldson had done this, that view could not apply to Jamaica, because we have retained the nineteenth century understanding and practice and so our legislative context could not support Lord Donaldson's reasoning and conclusion. I conclude that there is no legitimate legal basis to give the words a new meaning.

68. It would seem to me, also, that there is too much imprecision in the learned Master of the Rolls' formulation. This imprecision can be too easily exploited by disgruntled participants in the arbitration process who may happen to find a sympathetic judge. What does his Lordship mean when he says that there can be a remission if it can be said that the adjudication was not "in manner which the parties were entitled to expect and it would be inequitable to allow any award to take effect without some further consideration by the arbitrator"? What would be the test to be applied in this situation? Lord Donaldson's formulation is posed at too high a lever of abstraction and generality to be amenable to easy discernment and consistent application.

69. It is not hard to envision the equivalent of the Chancellor's foot creating unnecessary complication in hitherto sell settled law. It would seem to me that Lord Donaldson's approach has the potential to undermine the strong first principle of finality of arbitration awards, without sufficient safe guards that would prevent his expanded grounds from being used to disturb awards at the behest of a

disgruntled party. As Mr. Scott pointed, other countries have introduced appeals in the arbitration process but the Jamaican legislature is not convinced that it needs to do this. Judges cannot remedy this perceived defect.

70. In coming to his position, the Master of the Rolls was building on his earlier efforts in ***Mutual Shipping***. However, as Lord Donaldson admitted, ***Mutual Shipping*** would have fallen within the third category of the four usual grounds on which an award could be disturbed. In ***Mutual Shipping*** the arbitrator awarded the sum of money to the wrong party. He admitted his error but felt that he did not have any power to correct it under section 17 of the 1950 Arbitration Act (section 8 (c) of the Jamaican Act).

71. These arguments apply to Jamaica. The Jamaican Parliament must have known about section 8 of the 1854 Act and the subsequent case law. Yet, Jamaica enacted section 11 (1) of the Arbitration Act which is a direct descendant of section 10 (1) of the 1889 Arbitration Act (UK) which itself has section 8 of the 1854 Act as its ancestor.

Conclusion

72. Let me say that I am not aware of any authority of the Court of Appeal of Jamaica that compels a conclusion different from what I am about to state. I conclude, therefore, that the law I am to apply is this: a court has no power under section 11 (1) of the Jamaican Arbitration Act remit the matter to the arbitrator unless it can be shown that there exists any of the grounds upon which an award would be set aside before the passing of section 8 of the 1854 Act. Those grounds are fraud, corruption as well as (1) where the award was bad on its face, (2) where there had been misconduct on the part of the arbitrator, (3) where there had been an admitted mistake and the arbitrator had asked that the matter be remitted and (4) where additional evidence had been discovered after the making of the award. None of those grounds has been made out.

73. It would seem that as far as Jamaica is concerned, until the legislature provides otherwise, parties would do well to revisit the practice of nineteenth century to how the various clauses were

drafted to allow the parties to mitigate the rigours of the all or nothing approach to arbitration awards. They are even at liberty, it appears to create, their own court of appeal.