[2024] JMCA Civ 15

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NOS COA2020CV00074 AND COA2020CV00083

BETWEEN	**KEY MOTORS LIMITED**	**APPELLANT**
AND	**HYUNDAI MOTOR COMPANY**	**RESPONDENT**

Mrs Symone Mayhew KC, Mrs Julianne Mais Cox and Jonathan Morgan instructed by DunnCox for the appellant

Miss Amanda Montague, Litrow Hickson and Immanuel Williams instructed by Myers, Fletcher & Gordon for the respondent

14, 15, 16 March 2023 and 15 March 2024

Arbitration – Award – Enforcement - Recognition and enforcement of foreign arbitral award - Arbitral award of costs- The Arbitration Act, sections 49, 56 and 57 - The Arbitration (Recognition and Enforcement of Foreign Awards) Act, section 4

Civil Practice and procedure – Admissibility of affidavit evidence- Execution of affidavit abroad before a notary public - Confirmation of status of notary public- Judicature (Supreme Court) Act, section 22

BROOKS P

[1] I have read in draft the judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusion and would only add, as an endorsement of her view of the

appellant's conduct in this case, that perhaps the court should consider awarding indemnity costs against the appellant.

FOSTER-PUSEY JA

[2] This is a consolidated appeal brought by the appellant, Key Motors Limited ('Key Motors'), against the respondent, Hyundai Motor Company ('Hyundai'). The appeals challenge the orders of Laing J ('the learned judge'), respectively, made on 23 September 2020 and 2 November 2020. By those orders, the learned judge recognised and enforced a foreign arbitral award ('the award') that dismissed Key Motors' claim against Hyundai for *inter alia*, breach of contract, estoppel and unjust enrichment. The award also ordered Key Motors to pay Hyundai's costs incidental to the arbitration proceedings. The learned judge also lifted a stay which he had imposed, giving effect to the said orders. Hyundai filed a counter-notice of appeal, seeking to affirm the findings of the learned judge made on 23 September 2020, in all but one respect.

Factual and procedural background

[3] Hyundai is a corporation registered under the laws of the Republic of Korea, with offices situated in the Republic of Korea. It is engaged in the manufacturing of automobiles, parts and accessories. Key Motors is a company registered under the laws of Jamaica, with its head office situated in Jamaica. By virtue of a distributorship agreement ('the agreement') dated 1 January 2013, Hyundai appointed Key Motors as an authorised distributor of its products in Jamaica.

[4] In December 2014, Hyundai ceased conducting business with Key Motors and appointed Magna Motors Dealership Limited ('Magna Motors') as its distributor in Jamaica. It was thereafter that Key Motors initiated arbitration proceedings with the Korean Commercial Arbitration Board ('the tribunal') against Hyundai pursuant to clause 18.00 of the agreement. The agreement provided that the substantive law to be applied was that of the Republic of Korea.

[5] The gravamen of Key Motors' claim in the arbitration proceedings was that Hyundai had breached the agreement by appointing Magna Motors as its distributor and had acted wrongfully in not renewing the agreement, contrary to its promises to do so. Key Motors also claimed that, alternately, an oral contract had been created that required reasonable notice to terminate. Accordingly, it sought damages for the said breaches.

[6] In its defence, Hyundai averred that the agreement had naturally ended by the effluxion of time on 31 December 2014, and that there had been no exclusive distributorship agreement between it and Key Motors. Hyundai also averred that it had no duty to renew the agreement, and neither was there any fraud, misrepresentation or unjust enrichment in its course of dealings with Key Motors.

[7] On 29 May 2019, at the conclusion of the proceedings that involved a number of hearing dates, the tribunal dismissed Key Motors' claim and awarded Hyundai its legal costs and other expenses incurred in connection with the arbitration proceedings. In the dispositive section of its award, the tribunal recites the following at para. 132:

> "For the reasons stated herein, the Tribunal hereby declares, orders and awards as follows:
>
> (i) All of [Key Motors'] claims and requests for relief in this arbitration are dismissed with prejudice;
>
> (ii) [Key Motors] shall forthwith reimburse [Hyundai] the following amounts:
>
> (a) KRW 4,230,000, representing [Hyundai's] costs of the arbitration under Article 52 of the [Korean Commercial Arbitration Board] KCAB Rules; and
>
> (b) KRW 505,904,190 plus USD 57,835.02 plus EUR 3,445.69, representing [Hyundai's] reasonable legal costs and other necessary expenses incurred by the parties in connection with the arbitration under Article 53 of the KCAB Rules.
>
> (iii) This Award is binding upon the Parties and shall be immediately enforceable; and

(iv) All other claims or requests for relief not specifically mentioned in the Dispositive section are denied."

[8] On 25 October 2019, following the handing down of the award, Hyundai initiated proceedings in the Supreme Court of Jamaica, seeking the recognition and enforcement of the award, on the basis that Key Motors had failed to pay the stipulated costs. The fixed date claim form was supported by the affidavit of Erick Gutierrez, managing director of Magna Motors, filed on 25 October 2019. Mr Gutierrez exhibited to his affidavit, a power of attorney authorising him to act on behalf of Hyundai, the agreement, and a copy of the award. In that affidavit, Mr Gutierrez averred that the arbitration procedure was just and fair and that both parties were allowed to participate in the hearing before an impartial tribunal.

[9] Accordingly, Hyundai prayed that the court makes the following orders:

"1. The Award of the Korean Commercial Arbitration Board dated May 29, 2019 in the matter of KCAB/IA No. 7112-0028 ***Key Motors Limited (Claimant) v. Hyundai Motor Company (Respondent)*** ('the Award') is recognized and enforceable in its entirety in the Supreme Court of Jamaica and the Defendant is hereby bound by the terms thereof.

2. Judgment is given in the terms of paragraph 132(ii) of the Award as follows:

'Key Motors Limited shall forthwith reimburse Hyundai Motor Company the following amounts:

a. KRW 4,230,000 representing Hyundai Motor Company's costs of the arbitration; and

b. KRW 505,904,190 plus USD 57,835.02 plus EUR 3,445.69, representing Hyundai Motor Company's reasonable legal costs and other necessary expenses incurred by the parties in connection with the arbitration.'

3. Interest on the Award from the date of this Court's judgment to the date of payment of the sums due under the Award at the rate of 3% per annum.

4. Costs to be taxed if not agreed."

[10] On 3 April 2020, in response to the filing of the claim, Key Motors filed an affidavit of Desmond Panton, challenging the application for the recognition and enforcement of the award. Mr Panton relied on section 57 of the Arbitration Act and Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the Convention') to contend that the award was unenforceable for several reasons. He stated that:

(i) The award was made in breach of the principles of natural justice;

(ii) Key Motors' counsel was not allowed a fair opportunity to oppose Hyundai's application for costs;

(iii) The tribunal failed to appreciate and consider Key Motors' case in that:

a. An oral contract existed between the parties subsequent to 2015, which required reasonable notice to terminate.

b. Hyundai entered into an agreement with Magna Motors when it was still under contract with Key Motors.

c. Hyundai made representations to Key Motors that caused Key Motors to acquire property in order to improve its facilities for vehicle sales.

d. Key Motors had created goodwill in Hyundai's brand of cars, as a result of which Hyundai had been unjustly enriched.

(iv) The award that Hyundai seeks to enforce does not represent a determination of the substance of the dispute that was before the tribunal.

[11] Additionally, on 3 April 2020, Key Motors filed a notice of application for court orders seeking to strike out the claim and its supporting affidavit. The grounds on which Key Motors relied were stated as:

> "1. Pursuant to [Civil Procedure Rules, 2002] CPR 26.3(1) and under the inherent jurisdiction of the Court
>
> 2. Hyundai Motor Company, contrary
>
> (i) to CPR 8.8(2) (as amended) failed to file an affidavit in its own name upon which [the respondent] intends to rely
>
> (ii) alternatively, the purported affidavit of Erick Gutierrez sworn to on the 10th October 2019 and filed on the 25th October 2019 contains hearsay material contrary to CPR 30.3
>
> (iii) the claim amounts to an abuse of the process of the court and is likely to obstruct the just disposal of the proceedings
>
> (iv) the Statement of Case does not disclose any reasonable ground for bringing the claim."

[12] The application to strike out the claim was supported by an affidavit of Desmond Panton filed on 3 April 2020. Mr Panton deposed that the affidavit of Mr Gutierrez, filed in support of the claim seeking to give effect to the award, should be struck out, as Mr Gutierrez had no personal knowledge of the matters stated in his affidavit. He further averred that the claim was not properly before the court.

[13] On 12 May 2020, Hyundai filed a notice pursuant to rule 31.2 of the Civil Procedure Rules ('the CPR') along with an affidavit of YoungRong Kim, senior counsel for Hyundai. By that notice, Hyundai indicated its intention to adduce evidence as to the validity of the agreement and the award under the laws of the Republic of Korea and to show that the award is final in adjudicating the dispute between the parties.

[14] Mr Kim's affidavit referred to the factual and procedural background of the claim, in similar manner as in Mr Gutierrez's affidavit. He also exhibited the award and the agreement, in addition to a copy of a translated Korean Arbitration Act. Mr Kim, however, further averred that the only recourse which was available to Key Motors, pursuant to article 36 of the Korean Arbitration Act, was not pursued, as Key Motors had not applied to the Korean court to set aside the award. Mr Kim's affidavit was also filed on its own on 19 June 2020.

The hearing of the claim

[15] With the consent of both parties, the learned judge heard the fixed date claim form and the application to strike out the claim at the same time on 22 June 2020. According to the written and oral submissions made before us by counsel for Hyundai, at the oral hearing, Key Motors presented unfiled written submissions in which it alleged for the first time that: there was no certificate to verify the signature of the notary public who witnessed the signing of Mr Kim's affidavit, there was a conflict between the Arbitration (Recognition and Enforcement of Foreign Awards) Act ('the AREFA Act') and the Arbitration Act 2017, and compliance with the AREFA Act was necessary. Key Motors also submitted that the AREFA Act required a "duly authenticated copy of the Award" as well as reciprocity between the laws of Jamaica and Korea, and that the award was unenforceable as it solely related to costs. The learned judge reserved his decision at the conclusion of the hearing. On 23 September 2020, he rendered a written decision, recognising and enforcing the award. He, however, stayed his orders subject to the condition that Hyundai provide authentication of the notary's signature for Mr Kim's affidavit.

[16] Accordingly, the learned judge made the following orders:

> "1. The Award of [the] Korean Commercial Arbitration Board dated May 29, 2029 [sic] in the matter of KCAB/IA No. 7112-0028 Key Motors Limited (Claimant) v Hyundai Motor Company (respondent) ('the Award') is recognized and enforceable in its entirety in the Supreme Court of Jamaica and [the appellant] is hereby bound by the terms thereof.
>
> 2. Judgment is given in the terms of paragraph 132(ii) of the Award as follows:
>
> 'Key Motors Limited shall forthwith reimburse Hyundai Motor Company the following amounts:
>
> (a) KRW 4,230,000, representing Hyundai Motor Company's costs of the arbitration; and
>
> (b) KRW 505,904,190 plus USD 57,835.02 plus EUR 3,445.69, representing Hyundai Motor Company's reasonable legal costs and other necessary expenses incurred by the parties in connection with the arbitration.'
>
> 3. Interest on the Award from the date of this Court's judgment to the date of payment of the sums due under the Award at the rate of 3% per annum.
>
> 4. [The appellant's] Notice of Application filed on 3rd April 2020 requesting that the Court strike out the Fixed Date Claim Form is refused.
>
> 5. [The respondent] is to file within 60 days of the date of this judgment, a Certificate under the seal of the appropriate person having such power of verification in the Republic of South Korea, verifying that the Notary Park Sung Koo has been authorised by the Minister of Justice, The Republic of Korea, to act as Notary Public Since 7, Feb. 2020 to administer an oath in that state.
>
> 6. The orders at paragraphs 1-5 and 8 herein are stayed and are to have no effect before 60 days of the date of

this judgment and thereafter only upon a further order of this Court.

7. Liberty to apply within 60 days of the date of this judgment.

8. Leave to appeal is granted.

9. Costs of the Claim to include costs of [the appellant's] Notice of Application to strike out referred to herein, are awarded to [the respondent] to be taxed if not agreed."

[17] On 26 October 2020, Hyundai filed a notice of application for court orders seeking to lift the stay imposed at para. 6 of the learned judge's orders and to give full effect to the orders at paras. 1-5 and 9. The affidavit of Matthew Royal was filed in support of the application. Hyundai relied on the following grounds in support of its application:

"1. On September 23, 2020, the Hon. Mr. Justice K. Laing enforced, in the Supreme Court of Jamaica, the arbitral award dated May 29, 2019 made by the Korean Commercial Arbitration Board in the matter of KCAB/IA No. 17112-0028 and gave judgment in the terms of the Award along with interest and costs to the Claimant ('the Order').

2. The Order was stayed subject to the Claimant filing, within 60 days of September 23, 2020, '*a Certificate under the seal of the appropriate person having such power of verification in the Republic of South Korea, verifying that the Notary Park Sung Koo has been authorized by the Minister of Justice, The Republic of Korea, to act as a Notary Public since February 7, 2020 to administer an oath in that state*'.

3. The Certificate (in Korean) dated February 7, 2020 from the Minister of Justice of Korea, authorising Taechong Law & Notary Office Inc, which is Park Sung Koo's office, as a notary public until February 6, 2025 as well as a certified English translation thereof, are exhibited to the Affidavit filed in support of this application.

4. Accordingly, it is fair, just and convenient that the stay is lifted, and the Orders of Mr Justice Laing are given effect."

[18] Having heard the application, the learned judge, on 2 November 2020, ordered that:

"1. The Court declares that the Affidavit of Matthew Royale [sic] field [sic] October 26, 2020 has provided sufficient evidence verifying that the Notary, Park Sung Koo, has been authorized by the Minister of Justice, the Republic of Korea, to act as Notary Public since 7 February 2020 to administer an oath in that State, and that Order 5 of the Orders granted by Laing J on 23 September has been duly satisfied.

2. The Claimant's Notice of Application filed on October 26, 2020 is granted. The stay imposed by the Order at paragraph 6 of Laing J's judgment on 23 September 2020 is lifted and the Orders at paragraphs 1-5 and 9 are to have full effect from 2 November 2020, the date of this Order.

3. Leave to appeal is granted in respect of Order 1 herein.

4. No order as to costs.

…"

Appeal No COA2020CV00074

[19] On 6 October 2020, Key Motors filed in this court, notice and grounds of appeal challenging the learned judge's decision made on 23 September 2020. The following grounds are relied on in support of this appeal:

(1) "The learned judge failed to appreciate that the Respondent did not support the Fixed Date Claim Form with an Affidavit as prescribed by law. An affidavit that does not comply with the law is not an Affidavit."

(2) "The Affidavits of Erick Gutierrez filed on the 25th October 2019 (the Gutierrez Affidavit) and the Affidavit of YoungRong Kim filed under Notice pursuant to Rule

31.2 of the Civil Procedure Rules (the Notice was filed 12th May 2020) (YoungRong Kim Affidavit) did not comply with the law. The Learned Judge at Paragraph 4 of the Judgment clearly erred by failing to strike out the Guiterrez [sic] Affidavit which was defective in law and, at Paragraph 4 of the Judgment, further erred by relying on same and concluding that '... The Guiterrez [sic] Affidavit was filed in support of the Claim and therefore the first ground of the application does not have any merit."

(3) "The YoungRong Kim Affidavit contained hearsay material and/or evidence which contravenes Civil Procedure Rules 30.3. The learned judge ought not to have allowed the YoungRong Kim Affidavit to stand or to be admitted in evidence."

(4) "The learned judge appreciated that Counsel for the Respondent conceded that 'the Gutierrez Affidavit would be impressible' [sic] because it contained matters of information and belief and that Gutierrez Affidavit was not excepted because the application did not relate to an application for summary judgment, procedural or interlocutory application. The learned judge wrongly failed to apply same concession or principle to the YoungRong Kim Affidavit."

(5) "The learned judge was made aware in submissions that YoungRong Kim did not swear his Affidavit before the Notary Public and ought to have made an expressed finding whether the assertion was correct. The learned judge wrongly failed to adopt this course of action."

(6) "The learned judge erred in holding that the declaration as stated on the Affidavit of YoungRong Kim 'does not provide a sufficient basis for the court to find that Mr. YoungRong Kim did not swear to the Affidavit before the Notary Public in the usual correct manner of persons who have their signatures witnessed by a Notary Public' particularly having regard to:

(a) the statement on the notarial certificate to wit 'YoungRong Kim … personally appeared before

me and admitted his (her) subscription to the attached Affidavit of YoungRong Kim'

(b) the statement at paragraph (a) above on its face declared that YoungRong Kim attended (appeared) before the Notary Public and 'admitted' that he had subscribed (signed) the Affidavit.

(c) the action of YoungRong Kim is contrary to Civil Procedure Rules 30.4(1) (c) which requires that 'an affidavit must … be completed and signed by the person before whom the affidavit is sworn or affirmed'."

(7) "An affidavit sworn to outside of Jamaica may be sworn before a person in that country having the authority to administer oaths in that country. However, the signature or seal and the authority of that person to administer oath in that country' [sic] shall be verified by a certificate under the seal of the appropriate person having such power of verification in that country. The Respondent and / or YoungRong Kim failed to provide a certificate of the appropriate person in Korea capable of verifying that the Notary Public's seal and / or authority in Korea to administer oaths pursuant to Section 22(2)(4) of the Judicature Supreme Court Act and other statutes. In the premises the YoungRong Kim Affidavit is invalid and has no legal effect."

(8) "The Learned Judge erred in failing to appreciate that an Affidavit filed in support of a Fixed Date Claim Form which contravenes Rule 8.8(2) of the Civil Procedure Rules and Section 22 of the Judicature (Supreme Court) [sic] Act fails to confer jurisdiction on the Court and the Fixed Date Claim should therefore be struck out."

(9) "At paragraph 14 of the Judgment the learned judge held 'I accept that the assertion 'that this office has been authorized by the Minister of Justice, The Republic of Korea to act as a Notary Public since 7 February 2020 under law No. 60' may not be adopted at face value without further verification or proof by a certificate under the seal of a person having the power of verification of the Notary's status …'. The learned judge

having made this finding ought to have come to the inexorable conclusion that no certificate was provided in accordance to law and rule the YoungRong Kim Affidavit is inadmissible. The learned judge erred in providing the [respondent] with the opportunity to provide a certificate when it was not provided when the affidavit was first filed. This was not a procedural technicality but rather a non-compliance with law contained in a statutory provision."

(10) "In any event the purported certificate did not seek to verify the authority or seal of the Notary, but instead purport to declare that the Office of which the Notary Public was a party was authorized by the Minister of Justice. This is contrary to the Judicature (Supreme Court) Act and other law."

(11) "The learned judge was wrong to hold as he did that the failure to supply the verification certificate 'is a mere procedural irregularity …' which can be cured. The verification certificate is a statutory requirement and the failure to provide same renders the affidavit invalid, of no legal effect and inadmissible evidence."

(12) "The learned judge having held that the 'requirement for an additional level of verification of the Notary's status goes to the admissibility of the Affidavit …' ought not to have admitted the Affidavit into evidence or relied on it and in doing so the learned judge committed an error of law."

(13) "The failure to provide the verification certificate of [sic] Notary Public's seal and authority is an incurable flaw for being contrary to the Judicature (Supreme Court) Act and other law and the learned judge was wrong to allow the Respondent additional time to provide 'additional proof of the Notary Public's status …'."

(14) "The learned judge failed to properly construe the Arbitration Act of Jamaica, 2017 (the Act) and the Arbitration (Recognition and Enforcement of Foreign Awards) Act and its associated convention (AREFA) and thereby failed to appreciate that in case of conflict between the two pieces of legislation, the AREFA should be applied and that the provisions of the

Arbitration Act only be applied where there is no conflict."

(15) "The Respondent having failed to place before the court

(a) a duly authenticated original award or duly certified copy thereof

(b) the original Agreement document or a duly certified copy contrary to Article IV(1) of the Convention or the Recognition and Enforcement of Foreign Awards (the Convention) [sic] the learned judge erred in admitting the Affidavit and the award into evidence or relying on these documents."

(16) "There are instances where the Arbitration Act conflicts with the AREFA. The learned judge was wrong to hold in effect that the Arbitration Act merely supplements the AREFA. This particularly so having regard to the learned judge's findings at paragraph 30 as follows:

> 'However it must be acknowledged that there exists in some respects, a real distinction between recognition and enforcement of a Convention awards pursuant to the AREFA on the one hand … and on the other hand, recognition and enforcement under Section 56 of the Arbitration Act …'."

(17) "The learned judge erred in law to hold as he did at paragraph 35 that the requirement to provide 'the duly authenticated original award or a duly certified copy thereof and the original agreement or a duly certified copy was essentially a technical requirement."

(18) "The learned judge's finding at paragraph 35 of the Judgment wrongfully placed the onus on the Appellant to establish the authenticity of the award and the agreement when this obligation is firmly placed on the Respondent as the party seeking to enforce the award."

(19) "The learned judge erred in law in his view that the reciprocity requirements of the Convention were inapplicable to the instant case and the learned judge

further erred when he came to the view that the Respondent did not have to establish before the court that the Republic of South Korea (from which country the Award emanated) had adopted the provisions of [sic] Convention as to enforcement and recognition of foreign arbitral awards in that country as Jamaica has done. In the absence of evidence of reciprocal provision in South Korea the learned judge was wrong to order that the Award be recognized and enforced."

(20) "The learned judge failed to appreciate that although the Republic of South Korea may have acceded to the Convention in 1973, it did not follow that the Convention was given the force of law in that country. It would be a matter of evidence as to whether the Convention had the force of law in the Republic of South Korea which in turn would demonstrate that there were reciprocal provisions for enforcing awards similar to Jamaica. The learned judge was wrong to make an order enforcing and recognizing the Award."

(21) "The learned judge erred in making an order granting enforcement and recognition of an award for costs only."

(22) "The learned judge was wrong to make an order granting enforcement and recognition of an award that did not represent 'a decision of the Arbitral Tribunal on the substance of the dispute' between the parties; the award based on an order for costs only."

(23) "The learned judge having held that the award of costs was 'an incidental order' ought to have dismissed the Fixed Date Claim Form."

(24) "The learned judge failed to appreciate that the Arbitral Tribunal failed to understand the Appellant's reliance on the principles of estoppel and fraud and consequently disregarded the substance and argument of the Appellant on these issues. In doing so the learned judge did not appreciate that the Arbitral Tribunal acted contrary to the principles of natural justice and contrary to the public policy of Jamaica."

(25) "The award of costs to the Respondent was manifestly unreasonable having regard to the Grounds of Appeal set out herein."

[20] In light of the aforementioned grounds of appeal, Key Motors sought the following orders:

1. "That the Judgment be set aside."
2. "That the refusal to grant the Application to Strike Out the Fixed Date Claim Form be set aside."
3. "That the application for Court Orders filed the 3rd day of April [sic] is granted."
4. "That the Fixed Date Claim Form be struck out."
5. "Alternatively, that the Fixed Date Claim Form be dismissed."
6. "Costs of this Appeal and in the Court below to the Appellant to be taxed if not agreed."

The counter-notice of appeal

[21] Hyundai, on 20 October 2020, filed a counter-notice of appeal. It contended that the decision of the learned judge made on 23 September 2020 should be affirmed "additionally or alternately" on these bases:

"1. The Affidavit of Erick Gutierrez (the 'Gutierrez Affidavit') which was filed in support of the Fixed Date Claim Form on October 25, 2019, does not contain hearsay:

(i) The learned Judge erred in finding at paragraph 7 of his Judgment that:

'Ms Montague appears to have tacitly conceded that there is merit in Mr Braham's submissions that any matters of information and belief in the Gutierrez Affidavit would be impermissible because this is not an application for summary judgment or a procedural or interlocutory application.'

(ii) The Learned Judge appears to have arrived at this finding because of his failure to have regard to paragraph 10 of the [respondent's] written submissions filed in the Court below on June 5, 2020 and relied on by the [respondent] at the hearing on June 22, 2020, in which the [respondent] submitted that the Gutierrez Affidavit is compliant with CPR Rule 30.3 as the statements made in the Affidavit are from Mr Gutierrez's knowledge and are derived from the face of the Arbitration Award and Agreement to arbitrate, which are exhibited to the Affidavit. There was no concession that the Gutierrez Affidavit contained hearsay.

2. The Affidavit of YoungRong Kim (copy filed on May 12, 2020 and the original filed on June 19, 2020) (the 'YoungRong Kim Affidavit') which was also filed in support of the Fixed Date Claim Form, does not contain hearsay:

(i) The Learned Judge failed to recognise that it was only submitted by the Claimant that even if, as an alternative to the Gutierrez Affidavit, the YoungRong Kim Affidavit is considered as the affidavit in support of the claim as it contains largely the same evidence as the Gutierrez Affidavit, it complies with CPR Rule 30.3 – see paragraph 10(iv) of the Claimant's written submissions filed June 5, 2020.

(ii) The Learned Judge restates, at paragraph 9 of his judgment, the Defendant's submission that the YoungRong Kim Affidavit contains hearsay. However, the learned Judge did not make a finding on the Claimant's oral and written submission that the YongRong Kim Affidavit also does not contain hearsay, but statements which YoungRong Kim, Senior Legal Counsel at Hyundai Motor Company, are able to prove from his own knowledge and which are apparent from the face of the documents exhibited to his Affidavit, namely, the Arbitration Agreement and Award."

Appeal No COA2020CV00083

[22] On 12 November 2020, Key Motors filed a second notice of appeal, appealing the orders of the learned judge made on 2 November 2020. The grounds of appeal were stated as follows:

> "(1) The learned judge in Chambers prior Order was appealed by the Appellant to the Court of Appeal. In the circumstances the learned judge in Chambers erred in law when he entertained the Respondent's Application for Court Orders filed on the 26th October 2020. By virtue of the said appeal the learned judge in Chambers no longer had jurisdiction since the Court of Appeal had assumed jurisdiction by virtue of the Appellant's appeal to the Court of Appeal.
>
> (2) The learned judge in Chambers erred in law when he made the challenged order having regard to the fact that the Respondent failed and/or neglected to comply with the previous order of the learned judge in Chambers made on the 23rd September 2020 (the prior Order) and in particular paragraph 5 of the said prior Order.
>
> (3) The learned judge Chambers failed to appreciate
>
> a. that paragraph 5 of the prior Order required the Respondent to –
>
> To within sixty (60) days file in court a certificate under seal of the appropriate person having such power of verification in the Republic of Korea verifying that the Notary Park Sung Koo has been authorized by the Minister of Justice, The Republic of South Korea to act as Notary Public since 7 February 2020 to administer an oath in that country
>
> b. the Respondent instead provided a purported certificate, <u>which was not affixed with a seal,</u> indicating that law firm Tae Cheong is commissioned under the jurisdiction of Seoul District Prosecutor's Office in accordance with Article 15-2 of the Notary Public Act

c. the certificate, on which no seal from the appropriate person was affixed, failed to verify that the Notary Public Park Sung Koo has been authorized by the Minister of Justice. Certifying that a law office is authorized does not comply with the prior Order which has been appealed.

d. in any event the certificate says that the law firm is commissioned as Notary Public under the jurisdiction of Seoul District Prosecutor's Office in accordance with Article 15-2 of the Notary Public Act instead of certifying that the Notary is authorized to act as Notary Public which was required by the learned judge in Chamber's prior Order

(4) In making the challenged order the learned judge in Chambers failed to appreciate and take into account the fact that the purported certificate filed by the Respondent did not comply with the provision of Section 22(2) Judicature Supreme Court Act and other law".

[23] In light of the grounds of appeal, Key Motors has prayed that the said orders of the learned judge be set aside and that it be awarded costs.

Stay of proceedings in the Court of Appeal

[24] The appellant sought an order for the stay of execution of the judgments of the learned judge handed down on 23 September 2020 and 2 November 2020, respectively. On 19 January 2021, Brooks P made the following orders at para. [18] of his written judgment:

"1. Further execution of the judgments of Laing J handed down on 23 September 2020 and 2 November 2020 is stayed pending the outcome of the appeal, on condition that Key Motors Limited pays, on or before 1 February 2021, the sum of $20,000,000.00 into an interest bearing account in the joint names of the attorneys-at-law for both parties and failing such a deposit, pay the sum into court, by that date.

2. The Bailiff of the Supreme Court is nonetheless empowered to complete the sale of the goods that she has marked as part

of the execution against Key Motors Limited of the order for seizure and sale in her possession.

3. The net proceeds of sale shall be paid to the respondent's attorneys-at-law, who shall promptly place it on an interest bearing account in the joint names of the attorneys-at-law for both parties and failing such a deposit, promptly pay the sum into court.

4. Liberty to apply.

5. Costs of this application to be costs in the appeal."

No factual disputes

[25] It is important to note that at no time did any of the counsel for the appellant take issue with the contents of the award exhibited to Messrs Gutierrrez's and Kim's affidavits. Counsel for the appellant, when asked by the court, also stated that there were no factual disputes in respect of the contents of both affidavits. Nevertheless, counsel insisted that there was non-compliance with the Judicature (Supreme) Court Act. Counsel submitted that even if the matters in the documents and the affidavits were not in dispute it was still important to take the point that Messrs Gutierrez and Kim did not refer to matters within their own knowledge, and the affidavit of Mr Kim did not comply with the requirements of the Judicature (Supreme Court) Act.

Highlights of the final award (see pages 282-314 of the record of appeal)

[26] The highlights of the award are critical to an understanding of a number of the issues raised in the appeal. As indicated earlier, Key Motors brought a claim against Hyundai pursuant to an arbitration clause contained in the agreement between the parties. The agreement was governed by the laws of the Republic of Korea "without reference to its conflicts of law principles" (see page 285 of the record of appeal). All disputes were to be resolved by arbitration under the auspices of the Korean Commercial Arbitration Board ('KCAB') in accordance with the KCAB International Arbitration Rules.

[27] At para. 12 of the award, the tribunal wrote:

"Accordingly, it is not disputed between the Parties that:

(i) The arbitration is conducted pursuant to the KCAB Rules;

(ii) The seat of the arbitration is Seoul, Republic of Korea;

(iii) The Tribunal is constituted of three arbitrators;

(iv) The language of the arbitration is English; and

(v) The substantive law to be applied by the Tribunal to the merits of the disputes in this arbitration is the law of the Republic of Korea."

[28] The award was, therefore, made pursuant to the KCAB International Arbitration Rules (effective as of 1 June 2016) and the Arbitration Act of the Republic of Korea. Both parties were represented by attorneys at the hearings. Hyundai provided its contact information for the purpose of the arbitration and indicated that notices were to be sent to the attention of Mr Kim, senior counsel for Hyundai.

[29] The tribunal outlined a long procedural history in the course of which the appellant filed various applications. It noted that among the grounds on which the appellant relied for relief, was an assertion that the respondent "breached the principle of estoppel by terminating or refusing to renew the Agreement after 31 December 2014" (see page 291 of the record). It also noted that the appellant alleged that the respondent intentionally and maliciously made false and fraudulent statements that induced it "to make significant investments including purchasing new land and buildings in reliance upon" the respondent's false assurances (see page 291 of the record).

[30] Importantly, the tribunal outlined that the appellant sought from it, as a part of the award in the arbitration, an order for the respondent to reimburse it for "all of its costs and expenses incurred in connection with this arbitration, including the fees and expenses of the arbitrators, the KCAB administrative expenses and legal fees and disbursements" (see page 292 of the record).

[31] After outlining the respondent's general arguments refuting the appellant's claim in the arbitration, the tribunal (at para. 48) wrote that the respondent sought:

> "…an award in this arbitration:
>
> (i) Dismissing [the appellant's] claims in their entirety and denying all relief requested by [appellant];
>
> (ii) Ordering [the appellant] to reimburse [the] Respondent for all of its costs and expenses incurred in connection with this arbitration, including its legal fees, in accordance with Articles 52 and 53 of the KCAB Rules."

[32] At paras. 81-89 of the award, the tribunal examined the issue as to whether the respondent breached the principles of good faith and/or estoppel by refusing to renew the agreement after its expiration. At para. 89 (pages 301-302 of the record) the tribunal ruled:

> "The Tribunal concludes that [the] Respondent was entitled to decline to renew the Agreement, that just cause or reasonable cause was not required for its decision, and that there are no special circumstances in the present case which would cause [the] Respondent's decision to be in breach of the principles of good faith or estoppel. The Tribunal therefore concludes that [the appellant's] claims on the basis that Respondent terminated or refused to renew the Agreement in violation of the principles of good faith and/or estoppel are without merit."

[33] Upon examining the appellant's allegations that the respondent made false and fraudulent statements and concealed important information from the appellant, which induced the appellant to make significant investments in its business based on assurances that the business relationship would continue (para. 104 of the award, page 305 of the record), the tribunal concluded that this was "another iteration of the [appellant's] allegation that the respondent violated its obligations under Korean law by terminating or refusing to renew the Agreement" (para. 105). At para. 106, page 306 of the record, the tribunal reiterated that the agreement expired, the respondent was not required to

renew it, and the appellant failed to prove that the respondent requested or demanded that it make the investments it made in 2013 and 2014.

[34] At paras. 122-131 of the award, the tribunal addressed the subject of costs. In particular, at paras. 122 and 123, it wrote:

> "122. **Both sides requested an award of their costs in this arbitration**, including the fees and expenses of the arbitrators, the KCAB administrative fees and legal costs.
>
> 123. The KCAB Rules address the arbitration costs (including the KCAB's administrative fees) and the other costs incurred by a party in connection with the arbitration (including legal fees and other necessary costs) in Articles 52 and 53, which provide as follows:
>
> Article 52. Apportionment of Arbitration Cost.
>
> 1. The Arbitration Costs, including the administrative fees, shall in principle be borne by the unsuccessful party. However, the Arbitral Tribunal may, taking into account the circumstances of the case, apportion the Arbitration Costs between the parties in any manner it deems appropriate.
>
> 2. **The Arbitral Tribunal shall apportion responsibility for the Arbitration Costs in each Award**, provided that the Arbitral Tribunal may in its discretion postpone apportionment of any Arbitration Costs in case of an interim, interlocutory or partial Awards until the final Award.
>
> Article 53. Costs incurred by a Party.
>
> **Legal costs and necessary expenses incurred by the parties in connection with the proceedings**, including legal fees and costs for experts, interpreters and witnesses, **shall be allocated by the Arbitral Tribunal in the final Award.** Unless otherwise agreed by the parties, the Arbitral Tribunal shall have the power to allocate the necessary expenses incurred during the proceedings in any manner it deems appropriate taking into account the circumstances of the case." (Emphasis supplied)

[35] The tribunal then, at para. 132 of the decision (pages 312-313 of the record) made the award previously outlined at para. [7] of this judgment.

Issues on appeal

[36] Kings Counsel Mrs Mayhew and counsel, Johnathan Morgan, made the oral submissions on behalf of Key Motors. Counsel helpfully condensed the grounds of appeal across both appeals into eight issues, which I have adopted, save for my reference to the points raised by the respondent in its counter-notice of appeal. Those issues, which for ease of reference have been grouped under headings, are as follows:

Validity and admissibility of Hyundai's affidavit evidence

> "I. Whether the affidavits of Erick Gutierrez and YoungRong Kim filed in support of the Fixed Date Claim Form contained hearsay evidence that was inadmissible in the proceedings. **[Appeal 00074 – Grounds 2, 3 and 4] [The counter-notice of appeal]**
>
> II. Whether the affidavits of YoungRong Kim were properly admissible in support of the Fixed Date Claim Form in the absence of being sworn before the Notary Public at the material time without verification of signature or seal and authority of Notary Park Sung Koo and whether it constituted evidence which the learned Judge could receive to enter final judgment for the Respondent. **[Appeal 00074 – Grounds 1, 2, 5, 6, 7, 8, 9, 10, 11, and 12]**
>
> III. Whether the learned Judge was correct to allow the Respondent the opportunity to cure the defects in the YoungRong Kim Affidavit post-judgment. **[Appeal 00074 – Ground 13] [Appeal 00083 – Ground 1]**."

Setting aside the stay of the orders

> "IV. Whether the evidence presented by Matthew Royal was sufficient for the Judge to lift the stay so that the orders for final judgment would become effective, and whether the qualification of the Notary Public who purportedly witnessed the YoungRong Kim Affidavit was proved or

verified in accordance with the Judicature (Supreme Court) Act. **[Appeal 00083 – Grounds 2, 3 and 4]**."

Recognition and enforceability of the award for costs

"V. Whether the Respondent (Claimant below) was mandated to provide the original or a certified copy of the Arbitration Agreement and Award. **[Appeal 00074 – Grounds 15, 17 and 18]**

VI. Whether the arbitration award for costs only was enforceable in Jamaica under the Arbitration (Recognition and Enforcement of Foreign Awards) Act. **[Appeal 00074 – Grounds 21, 22, 23, and 25]**

VII. Whether there was a breach of natural justice in the arbitration proceedings so as to render the award unenforceable in Jamaica. **[Appeal 00074 – Ground 24]**."

Interaction between the Arbitration Act and the AREFA Act

"VIII. Whether the Arbitration Act, 2017 and Arbitration (Recognition and Enforcement of Foreign Awards) Act, 2001 ('AREFA') properly construed required that the learned Judge find on admissible evidence that the Respondent (Claimant below) had satisfied the requirements of AREFA including the provisions of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards done in New York on 10th June 1958 ('the New York Convention'). **[Appeal 00074 – Grounds 14, 16, 19, 20]**."

The standard of review of this court

[37] The issues before the learned judge did not require him to make factual findings from the testimony of witnesses on disputed issues. Instead, in my view, the learned judge was required to interpret the relevant law and procedural rules, and exercise his discretion in respect of procedural matters that arose in the course of the hearing of the claim and the applications that came before him.

[38] The respondent, therefore, correctly referred to the principles set out by this court in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, where

Morrison JA (as he was then), examined the principles surrounding an appeal from the exercise of a judge's discretion. It is emphasised that this court must defer to the judge's exercise of discretion on an interlocutory application, and should only set it aside if it was based on a misunderstanding by the judge of the law or the evidence before him, or on an inference that particular facts existed or did not exist, which can be shown to demonstrably wrong, or where the judge's decision is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it (see para. [20] of that judgement).

Validity and admissibility of the affidavits

The rulings of the learned judge

[39] In his disposal of the claim and application, the learned judge considered several issues. In relation to whether the affidavit, filed in support of the claim, breached rule 8.8(2) of the CPR, the learned judge rejected Key Motors' submission that no proper affidavit was filed in support of the claim. The learned judge, however, also found that there was a "tacit" concession by Hyundai that Mr Gutierrez's affidavit contained hearsay.

[40] With regard to the effect of section 22(2)(b) of the Judicature (Supreme Court) Act, on the absence of the verification of the notary's status in respect of Mr Kim's affidavit, the learned judge found that the validity of the affidavit was not affected. He concluded that the affidavit appeared to have been made in accordance with the laws of the Republic of Korea and that the procedural irregularity, which went to admissibility of the affidavit for the purposes of Jamaican law, could be subsequently cured. As such, he ordered Mr Kim's affidavit to be admitted *de bene esse*, subject to the required additional proof of the notary's status.

Submissions for Key Motors

[41] The gravamen of Key Motors' submission in relation to this issue is that the affidavits of Mr Gutierrez and Mr Kim were inadmissible to support the claim, as they contained hearsay. Counsel argued that both affidavits were not based on the personal

knowledge of the affiants, as they had not participated in the arbitration proceedings. Accordingly, there was a breach of rule 30.3(1) and (2) of the CPR, in which circumstance the learned judge ought not to have recognised and enforced the award.

[42] Counsel further submitted that the learned judge had recognised that Mr Gutierrez's affidavit contained hearsay, but that he failed to make any express order as to the effect of the hearsay or to strike out the said affidavit. Additionally, counsel noted that the learned judge had rested his determination of the matter primarily on Mr Kim's affidavit when it suffered from other defects as well as similar defects impacting Mr Gutierrez's affidavit. Counsel stated that the hearing was not interlocutory in nature and, as such, hearsay was not admissible, not even where the source of the information or the grounds of belief are identified. Counsel relied on **Sally Ann Fulton v Chas E Ramson Limited** [2022] JMCA Civ 21.

[43] Further, in relation to Mr Kim's affidavit, counsel argued that the learned judge was wrong to have admitted it into evidence because the seal and authority of the notary public were not verified as required by section 22 of the Judicature (Supreme Court) Act. Accordingly, the absence of the notary public's verification affected the validity of the proceedings.

Submissions for Hyundai

[44] Miss Montague made the oral submissions on behalf of the respondent. Counsel submitted that Mr Gutierrrez's affidavit complies with rules 8.8(2) and 30.3 of the CPR, in that the award and the agreement were exhibited to the affidavit, from which the facts in support of the claim could be ascertained. Additionally, in the circumstances, it was submitted that the accuracy of the statements contained in the affidavit and the documents exhibited to it have not been disputed.

[45] Moreover, counsel submitted, Mr Gutierrez's affidavit was sworn in the capacity of agent, having obtained a power of attorney to "sign all documents, give evidence, provide all witnesses and do all things which may be necessary in any proceedings relating to the

enforcement of the Award". Thus, the award and the agreement were not subject to the hearsay rule. In relation to the affidavit sworn by Mr Kim, counsel submitted that it did not contain hearsay as Mr Kim was able to prove the information contained therein from his own knowledge and from the documents exhibited to his affidavit.

[46] Counsel also submitted that the learned judge was correct to have refused to accept Key Motors' submission that the omission of the notary's declaration indicated that the affidavit was not sworn before the notary public.

[47] Counsel also deemed to be correct, the position taken by the learned judge that section 22(2) of the Judicature (Supreme Court) Act does not affect the validity of the affidavit, which was made in accordance with the laws of the Republic of Korea. Accordingly, the procedural irregularity of the absence of the verifying certificate could be cured by subsequent verification. Moreover, counsel averred, the learned judge had acted in accordance with the principle of dealing with cases justly rather than to strike out the claim on the basis of procedural irregularities. Reliance was placed on **Hannigan v Hannigan & Ors** [2000] EWCA Civ 159 and **Woodward v Woodward and Curd** [1959] 1 All ER 641.

[48] In relation to the alleged incomplete jurat, counsel also urged on the court that Key Motors had not rebutted the presumption of rule 30.4(5)(b) that the affidavit, which was made outside the jurisdiction, complied with the laws of the place where the affidavit was made. Counsel also relied on **STX Pan Ocean Co Ltd v Bowen Basin Coal Group Pty Ltd and Others** [2010] FCA 1002.

[49] In relation to its counter notice of appeal, counsel for Hyundai argued that contrary to its written submissions filed in the court below, the learned judge had found that there was a "tacit" concession by counsel below that the affidavit contained hearsay. This finding, counsel submitted, was an erroneous one on the part of the learned judge as counsel for Hyundai had submitted that the affidavits did not contain hearsay material.

A review of the affidavit evidence for the respondent

Mr Gutierrez's affidavit

[50] It is important to examine the contents of the affidavits in considering the appellant's complaints surrounding them. Mr Gutierrez deposed that he was the managing director of Magna, and that Magna was the authorised representative of Hyundai for the purpose of the proceedings. He exhibited a power of attorney that Hyundai granted to him to empower him to bring the proceedings on its behalf. He then stated at para. 3 of the affidavit:

> "The facts stated herein are, so far as they are within my knowledge, true and so far as they are not within my knowledge, I state the source of the information and say that they are true to the best of my information and belief."

[51] Mr Gutierrez stated that the appellant and the respondent were parties to the agreement dated 1 January 2013, which he exhibited, also referring to the governing law and arbitration clause.

[52] At para. 5, he stated "I have been advised and do verily believe that the Agreement is valid under the laws of the Republic of Korea". He stated that a dispute arose between the parties because the respondent ceased to do business with Key Motors from 1 January 2015 and appointed Magna Motors as its distributor in Jamaica.

[53] He referred to the arbitration claim that the appellant commenced against Hyundai before the KCAB, the nature and elements of the claim, as well as the fact that these disputes fell within the arbitration clause. Mr Gutierrez stated that the parties agreed that the law of the Republic of Korea would apply and the parties did not dispute that the arbitration was conducted pursuant to the KCAB rules. He deposed that the parties also agreed that: the seat of the arbitration was Seoul, Republic of Korea, the tribunal was constituted of three arbitrators, the language of the arbitration was English, and the substantive law to be applied by the tribunal to the merits of the disputes in the arbitration was the law of the Republic of Korea.

[54] Mr Gutierrez stated that the appellant was given proper notice of the arbitral proceedings, was able to present its case, and actively participated in the arbitration proceedings in a number of ways. He stated that on 29 May 2019 after the hearing, the KCAB issued its award, which he exhibited and quoted the dispositive section of the award. He stated that the award provides that it is binding upon the parties and is immediately enforceable.

[55] At para. 14 of the affidavit, Mr Gutierrez stated that the appellant had failed or refused to make the payments due to the respondent under the award. The paragraphs that immediately follow include statements suggesting that Mr Gutierrez received information and advice:

> "15. I am advised by Magna's attorneys-at-law, Messrs Myers, Fletcher & Gordon and verily believe that Key Motors is bound by the Award and the Award is enforceable in Jamaica.
>
> 16. I am also advised by Myers, Fletcher & Gordon that the subject matter of the dispute; termination and/or refusal to renew the Agreement, is capable of settlement by arbitration in Jamaica and further that the allegations of breach of the principle [sic] of good faith, estoppel, breach of contractual obligations, unjust enrichment and tort are all valid causes of action in Jamaica and similar legal tests to those used by the KCAB are applied in Jamaica.
>
> 17. I am also advised by Myers, Fletcher and Gordon that the procedure of the arbitration also does not offend any principles of justice or the right to a fair hearing in Jamaica, in that both parties were permitted to submit their case and respond, to call and examine witnesses and to have a hearing before a fair and impartial tribunal which was selected in an objective way.
>
> 18. I am advised by HMC [Hyundai] and verily do believe that the Award is final and conclusive of the dispute between the parties and that the Award is not capable of being appealed or set aside by Key Motors."

[56] Mr Gutierrez deposed that the award allowed for payment orders as sought in the claim to be enforced personally against Key Motors, and that Key Motors is registered,

resident, conducts business, and has assets in Jamaica against which a judgment of the court pursuant to the award may be enforced. The affidavit was signed before a Justice of the Peace in Jamaica.

Mr Kim's affidavit

[57] Mr Kim deposed that he was senior counsel for Hyundai and a practising lawyer in the Republic of Korea. He, too, stated at para. 2 of his affidavit that:

> "The facts stated herein are, so far as they are within my knowledge, true, so far as they are not within my knowledge, I state the source of the information and say that they are true to the best of my information and belief."

[58] Paras. 3-14 of Mr Kim's affidavit repeated information included in Mr Gutierrez's affidavit.

[59] Importantly, at para. 15, Mr Kim deposed that the only further recourse that Key Motors could have had in respect of the award was an action to set it aside pursuant to the Arbitration Act of Korea. He referred to an English translation of the relevant provision in which he highlighted that any such action would have had to be made within three months from the date on which the party applying received the authentic copy of the award and that he is not aware of any such application having been made. He opined that this meant that Key Motors had no further recourse in Korea against the award. In concluding his affidavit, he stated that the award allows for the payment orders to be enforced personally against Key Motors, and that Magna Motors was authorised by Hyundai to enforce the award in Jamaica. He also exhibited the agreement, the award and the Arbitration Act of Korea in English and Korean.

[60] Again, as indicated earlier in this judgment, the attorneys for the appellant did not challenge the contents of either Messrs Gutierrez's or Kim's affidavits. Instead the appellant has identified various alleged procedural 'defects' in both affidavits. In so far as Mr Gutierrez's affidavit (which was signed in Jamaica) is concerned, the appellant complains that it did not comply with the law as it contained hearsay.

[61] A similar complaint was made in respect of Mr Kim's affidavit but, in addition, the appellant asserted that:

a. Mr Kim did not swear his affidavit before a Notary Public;
b. His affidavit did not comply with rule 30.4(1)(c) of the CPR or the requirements of section 22(2)(4) of the Judicature (Supreme Court) Act in respect of affidavits sworn outside of Jamaica; and
c. The failure to supply a verification certificate meant that the affidavit could not have been admitted into evidence.

Discussion

[62] The appellant's submissions that the affidavits contained hearsay will now be examined. Rule 30.3 of the CPR provides that:

> "(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
>
> (2) However an affidavit may contain statements of information and belief-
>
> a) where any of these Rules so allows; and
>
> b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates-
>
> (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information and belief; and
>
> (ii) the source for any matters of information and belief.
>
> (3).....
>
> (4)....."

[63] I have noted that the appellant, in its written submissions, submitted that the claim before the learned judge was not interlocutory proceedings, but was a final proceeding so that no hearsay was admissible even where the source of the information or grounds of belief are identified. In **Sally Fulton v Chas E Ramson Limited** (relied on by the appellant) that appellant was seeking the court's permission to institute a claim on behalf of the company for losses allegedly suffered by the company as a consequence of "directors funnelling payments and benefits to the wife of the Chairman…when she was not working for the Company or providing any service or value". The appellant deposed as follows:

> "In or around April 2017, I learned that Mrs. Mary Ramson had been on the payroll of the Company for many years, although she did not work for or provide any services or value to the Company. This information was shared with me by someone with intimate knowledge of the financial affairs of the Company (who has requested that his/her identity be kept confidential)."

[64] The appellant did not provide any information substantiating her allegation that unlawful payments had been made, and she did not disclose the source of her information. This court ruled, agreeing with the judge at first instance, that evidence was required to support the application, and that there needed to be "a substratum of facts to establish that the appellant has a legitimate claim to be pursued" (para. [69] of the judgment). The court indicated that the question as to whether the appellant could commence a derivative action in the name of the company, for which she was seeking permission, was a matter of substantive law and not procedural law and as a result, it would be impermissible to rely on hearsay information.

[65] In my view, the case at bar is clearly distinguishable from the circumstances in the **Sally Fulton** case. The appellant, in the case at bar, did not dispute the accuracy of the facts outlined in both affidavits. As counsel for the respondent submitted orally, if the matter required a trial, the documents attached to both Messrs Gutierrez's and Kim's affidavit would, in all likelihood, have been included in an agreed bundle of documents.

Furthermore, as counsel for the respondent submitted, for the main part, the information contained in both affidavits can be plainly seen in the provisions of the award and the agreement, both of which are legal documents. Hyundai is a company, and so an individual would have to swear to the affidavits in support of the claim in the same manner that Mr Panton swore an affidavit in support of Key Motors' notice of application. Mr Gutierrez did so as an agent of Hyundai. His reference to information and belief would, be understandable, as the company must have a person swearing to the affidavit and that person will not always be able to speak from personal knowledge. In light of the nature of the matter, it would be unreasonable to require that only persons who actually appeared at the tribunal can swear to an affidavit so as to exhibit the award. Between receiving his instructions as agent for Hyundai and reviewing the content of the award and the agreement, Mr Gutierrez was able to speak to the contents in his affidavit.

[66] In any event, as the respondent submitted, as senior counsel for Hyundai, and the person to whom notices were to be sent in the course of the arbitration proceedings, Mr Kim was intimately associated with the arbitration hearing, and so could prove from his own knowledge the majority of the facts relating to the proceedings before the tribunal, as well as the facts apparent on the face of the award and the agreement. Furthermore, Mr Kim was able to give evidence on foreign law and was able to opine that the award is final and conclusive of the dispute between the parties. He was able to speak from personal knowledge that Key Motors had not challenged the award in Korea. Again, the appellant did not dispute the facts outlined in the affidavit.

[67] The learned judge stated that counsel for the respondent appeared to have tacitly conceded that "any matters of information and belief in Mr Gutierrez's affidavit would be impermissible because this is not an application for summary judgment or a procedural or interlocutory application". The respondent provided an excerpt from its written submissions in the court below in which it denied that the statements in Mr Gutierrez's affidavit constituted hearsay (see para. 33 of the respondent's submissions before this court). We are unable to resolve this issue as much would depend on the oral submissions made before the learned judge.

[68] Although the affidavits included paragraphs reminiscent of references to hearsay, in my view, the evidence did not constitute hearsay. In the final analysis, all the information provided in the affidavits arose from either the personal knowledge of the affiants or was verifiable from the documentation attached to the affidavits. In addition, some of the references to information and belief in Mr Gutierrez's affidavit touched on legal advice given by Hyundai's attorneys. The learned judge cannot be faulted when at para. 4 of his judgment, he refused to strike out Mr Gutierrez's affidavit, concluded that it was filed in support of the claim and contained the evidence on which the respondent intended to rely.

[69] Furthermore, even if the information could have been seen as hearsay, this would not have been fatal to the claim in these particular circumstances as it was not a hearing on the merits of a matter. None of the matters to which both affiants referred was in contest so as to make it imperative that a first-hand witness account be required. No doubt there is the possibility that similar claims or applications in the future may involve factual disputes. The case at bar, however, was not such a matter. The merits of the matter were determined before the tribunal, and the claim was solely pursued for the recognition/enforcement of the award.

Issues surrounding the notary public

[70] The appellant has complained that the learned judge ought to have found that Mr Kim had not sworn his affidavit before a notary public. This complaint is without merit. On the face of the notarial certificate, it states that Mr Kim personally appeared and admitted his subscription to the affidavit. The learned judge did not err in refusing to accept the appellant's argument and cannot be faulted in his conclusion that there was no sufficient basis for him to find that Mr Kim "did not swear to the affidavit before the Notary Public in the usual correct manner of persons who have their signatures witnessed by a Notary" (see para. [12] of the judgment).

[71] The points made by the appellant in respect of section 22 of the Judicature (Supreme Court) Act will now be considered.

[72] Section 22 of the Judicature (Supreme Court) Act provides:

> "(1) Every Justice may administer oaths and take affidavits, declarations and affirmations concerning any matter or proceeding in any Court in this Island and where the matter or proceeding shall be in the Supreme Court such Justice shall for such purpose be deemed to be an officer of the Court.
>
> (2) **Affidavits, declarations and affirmations concerning matters or proceedings in any Court in this Island may be sworn or taken-**
>
> a) in any place which is part of the Commonwealth…
>
> b) in any foreign state or country before any Jamaican or British Ambassador, Envoy, Minister, Charge d'Affaires or Secretary of Embassy or Legation or any Jamaican or British Consul-General or Consul or Vice-Consul or Acting Consul or Consular Agent exercising his functions in such foreign state or country; or
>
> **c) in any foreign state or country before any person having authority by the law of such state or country to administer an oath in such state or country.**
>
> (3) Any affidavit, declaration or affirmation purporting to have affixed, impressed or subscribed thereon or thereto the seal or signature of any person authorized by paragraph (a) or paragraph (b) of subsection (2) shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person or of the qualification or official character of that person.
>
> (4) **Where any affidavit, declaration or affirmation is sworn or taken in any foreign state or country before any person authorized by paragraph (c) of subsection (2) the signature or seal of such person and his authority to administer an oath in such state or country shall be verified** by a certificate of one of the officers set out in paragraph (b) of subsection (2) **or by a certificate under the seal of the appropriate person having such power of verification in such state or country**." (Emphasis supplied)

[73] Rule 30.4 of the CPR also addresses the making of affidavits outside the jurisdiction. It states in part:

> "(5) A person may make an affidavit outside the jurisdiction in accordance with-
>
> This Part; or
>
> The law of the place where the affidavit was made.
>
> (6**) Subject to section 22(4) of the Judicature (Supreme Court) Act,** any affidavit which purports to have been sworn or affirmed in accordance with the law and procedure of any place outside the jurisdiction is presumed to have been so sworn." (Emphasis supplied)

[74] In summary, affidavits may be sworn in a foreign state before any person who, by law, has the authority to administer an oath in that country. Where this occurs, the signature or seal of that person and his authority to administer an oath in that country shall be verified. One of the ways in which this may be done is by a certificate under a seal of the person with the power to make the verification in the country.

[75] At para. [14] of his judgment, the learned judge addressed the issue concerning the verification of the notary public that witnessed Mr Kim's signing of his affidavit. The learned judge erroneously referred to section 22(2)(b) of the Judicature (Supreme Court) Act instead of section 22(2)(c). However, his conclusion that section 22(2)(c) does not affect the validity of the affidavit, "which on its face appears to have been duly made in accordance with the laws of Korea" (para. 14 of the judgment), cannot be faulted. I also agree with the learned judge when he went on to state:

> "The requirement for an additional level of verification of the Notary's status goes to the admissibility of the affidavit for purposes of Jamaican Law, however its omission is a mere procedural irregularity which can be cured by the [respondent] providing this further authentication of the authority of the Notary."

[76] The approach that the learned judge took, in the exercise of his discretion, to admit the affidavit "de bene esse", subject to the required proof of the notary public's status, cannot be faulted. The learned judge stayed the orders so as to prevent any injustice in the event that the verifying certificate was not filed. It was open to the judge, and in the interests of justice, to have allowed the appellant the time to secure the verifying certificate. This is so particularly in light of the fact that the appellant took the point concerning the absence of the verifying certificate on the very day of the hearing, with no notice to the respondent that the issue would have been raised.

[77] The learned judge's decision in the exercise of his discretion, accorded with the approach recommended by the English Court of Appeal in **Hannigan v Hannigan**. In that appeal, their Lordships opined that the judge of the county court erred when he dismissed the appellant's appeal against the order of a district court judge who had struck out her claim. Their Lordships opined, at para. 33 of their judgment, that the district judge exercised his discretion in a seriously flawed manner when he concentrated on a number of technical mistakes and "lost sight of the wood for the trees". This led to his imposing a sanction that was "a quite disproportionate response to the procedural irregularities he was considering". In the case at bar, it cannot be said that the learned judge misunderstood the law or the evidence before him or made a decision that no judge regardful of his duty to act judicially could have made. The cases on which the appellant relied concerning the introduction of fresh evidence are not applicable.

[78] The grounds of appeal concerning the validity, admissibility and verification of the affidavits are without merit. It bears repeating that, in any event, the appellant did not challenge anything in the affidavit as untrue or inaccurate. The point taken is clearly a wholly technical point, as the appellant is not suffering any unfairness or prejudice emanating from the complaint that it has made.

Setting aside the stay of the orders

Submissions for Key Motors

[79] It was submitted that by allowing the defect of the absence of the notary's certificate to be cured post-judgment, the learned judge had erred. Counsel further opined that the learned judge had failed to consider the principles espoused in **Ladd v Marshall** [1954] 1 WLR 1489 in determining whether the irregularity could be subsequently cured. Additionally, counsel submitted that the post-judgment correction did not comply with order 5 made by the learned judge. In that regard, counsel submitted that the affidavit of Mr Royal indicated that "Teachon Law & Notary Office Inc" was duly commissioned, as distinct from the notary himself, Mr Park Sung Koo. Accordingly, the affidavit remained inadmissible, counsel argued.

[80] Counsel also submitted that the learned judge lacked the jurisdiction to make the orders made on 2 November 2020, as the matter was already on appeal before this court. Reliance was also placed on **Lilieth Douglas v Errol Francis** [2017] JMCA App 8.

Submissions for Hyundai

[81] Counsel for Hyundai submitted that the order of the learned judge was not to cure a defect after judgment nor to admit fresh evidence. Therefore, he continued, the considerations of **Ladd v Marshall** are inapplicable to the instant case. Furthermore, pursuant to rule 26.1(2)(e) of the CPR, the court has the power to stay part or whole of any proceeding, pending a specified date or event. As such, it was within the court's discretion to stay portions of the order until the condition imposed was satisfied.

[82] Counsel also submitted that no evidence had been adduced by Key Motors to disprove that Mr Park Sung Koo was an authorised notary public. Thus, the learned judge was entitled to lift the stay on the basis of the minister's certificate, which was exhibited to Mr Royal's affidavit.

Analysis

[83] In light of the point that the appellant took for the first time at the hearing before him in its unfiled submissions, the learned judge ordered the respondent to, within 60 days of the judgment, file a certificate under the seal of the appropriate person:

> "having such power of verification in the Republic of South Korea, verifying that Notary [sic] Park Sung Koo has been authorised by the Minister of Justice, The Republic of Korea, to act as Notary Public Since 7 Feb. 2020 to administer an oath in that state."

[84] The learned judge stayed orders 1-5 and 8 of his order for 60 days and further ordered that they would have effect only upon a further order of the court. I addressed earlier in this judgment the question as to whether the judge exercised his discretion properly in making this order. The question now arises as to whether the learned judge was correct in ruling that the respondent had satisfied the order that he made.

[85] The respondent, in the affidavit of Matthew Royal, filed 26 October 2020, provided a certificate in the following terms:

> "Registered No. 2020-9654
>
> NOTARIAL CERTIFICATE
>
> (Seal) HANSUBOK
> NOTARY PUBLIC OFFICE
> 38, Jong-ro-3-gil, Jongno-gu, Seoul, Korea
> TEL : +82 2 756 3300
> FAX : +82 2 756 4300"

[86] On the second page it read:

> "Ministry of Justice
>
> No. 60

Notary Commission Certificate

Name: TAECHEONG LAW & NOTARY OFFICE INC.

Address: 4th Fl, Darim Building, 246, Hangnam-daero, Gangnam-gu, Seoul, Korea

The above-mentioned law firm Tae Cheong is commissioned as a notary public under the jurisdiction of Seoul District Prosecutor's Office in accordance with Article15-2 of the Notary Public Act (Law No. 15150).

(commission period: until February 06, 2025)

February 07, 2020

Minister of Justice."

[87] Attached to that document was the said notary certificate written in Korean.

[88] The learned judge did not err in accepting the document as having complied with the order that he made. The certificate from the Ministry of Justice verified that the law office of Tae Cheong, of which Park Sung Koo was a member, was authorised to act as a notary public. That is what was ordered and that is what the respondent complied with. It is also noteworthy that Mr Koo's notarial certificate referred to the fact that Taecheong Law and Notary Office Inc was authorised by the Minister of Justice, the Republic of Korea, "to act as Notary Public since 7 February 2020 Under Law No. 60". The learned judge cannot be faulted when he regarded the certificate that the respondent received as complying with the requirements of section 22 of the Judicature (Supreme Court) Act, as this is what the certifying authority in the Republic of Korea provided on request. It was clearly open to the learned judge to accept the certificate as verifying the signature and seal of the notary public as well as his authority to administer the oath in the Republic of Korea.

[89] The evidence placed before the learned judge was, therefore, sufficient to allow for him to lift the stay that he had imposed in the interests of justice. Furthermore, contrary to the appellant's submissions, the learned judge retained the power to complete the order that he had expressly stayed. He also had the power to abridge the time that he had previously set. The grounds of appeal challenging the decision of the learned judge to set aside the stay, therefore, fail.

Recognition and enforceability of the award

The ruling of the learned judge

[90] The learned judge addressed the issue as to whether there is a requirement for the submission of the original or duly authenticated award and agreement, having regard to his finding that there were two applicable pieces of legislation with separate regimes in the Arbitration Act and the AREFA Act, the latter of which gives effect to the Convention. Thus, he held that article IV(1) of the Convention did not apply to the claim in relation to the production of a "duly authenticated original award or a duly certified copy" or "the original agreement… or a duly certified copy" but that that provision was aimed at safeguarding the integrity of the enforcement process. Moreover, he observed that the authenticity of the award was not in issue before the court, and neither could the absence of a duly authenticated award, in the circumstances of the case, present a sufficient ground on which to ignore the claim.

[91] On the issue of costs, the learned judge rejected Key Motors' submission that the issue was not a matter of substance before the tribunal and, therefore, could not be recognised or enforced in Jamaica. In assessing this issue, the learned judge considered that the order for costs was incidental to the substantive claim, which was properly before the tribunal, in circumstances where both parties had requested costs. The learned judge further noted that articles 49, 52 and 53 in the KCAB make allowance for an unsuccessful party to bear the arbitration costs and endow the tribunal with the discretion to award costs in the absence of a contrary agreement. The learned judge held that in the absence

of binding legal authority to the contrary, the order for costs would be recognised and enforced as it was closely connected to the arbitration proceedings itself.

[92] In addition, the learned judge rejected Key Motors' contention that the award should not be given effect for the reason that the tribunal had failed to consider the issues of estoppel and fraud. The learned judge observed that an award could not be invalidated merely on the view that the tribunal wrongly decided a point of law or fact. Further, he found that the tribunal had understood the issues raised by Key Motors and had decided that the agreement was conclusive of those issues. In that regard, the learned judge rejected the defences as raised by Key Motors.

Submissions for Key Motors

[93] Counsel submitted that the learned judge was wrong to have ordered recognition and enforcement of the award for the reason that no duly authenticated original or duly certified award was placed before the court.

[94] Counsel also argued that the Arbitration Act permits the enforcement of a decision of the arbitral tribunal, which is on the substance of the dispute. Accordingly, the learned judge erred in that the arbitration award is one for costs which is not capable of recognition or enforcement. Further there was nothing in the agreement to authorise the grant of costs, counsel averred. Counsel relied on, among other cases, **Czarina, LLC v WF Poe Syndicate** (2004) 358 F3d 1286, **Martin Grossman v Laurence Handprints NJ Inc et al** (1982) 90 AD 2d 95, CBA **Industries Inc v Circulation Management Inc** 179 AD 2D 615 (1992), **Porter and Benson v Buckfield Branch Railroad** (1851) WL 1744, the United States District Court decision of **Sammi Line Co Ltd v Altamar Navegacion SA** 605 F Supp 72 (SDNY 1985), **Telestat Canada v Juch Tech Inc** (2012) ONSC 2785 and **Hanson v Webber** (1855) WL 2008.

[95] Counsel further argued that the arbitration award ought not to have been recognised or enforced because the tribunal failed to give due consideration to the issues of estoppel and fraud, which resulted in a breach of natural justice. In that regard, counsel

submitted that Key Motors had renovated its facilities at the request of Hyundai on the understanding that the agreement would have continued after December 2014. Thus, the learned judge, in finding that the tribunal had properly considered those issues, erred, as those issues fell outside the scope of the contractual provisions to which the tribunal had limited its consideration. Reliance was placed on **Cukurova Holding AS v Sonera Holding BV** [2014] UKPC 15, **Front Row Investment Holdings (Singapore) pte v Daimler South East Asia pte Ltd** [2010] SGAC 80, among other cases.

Submissions for Hyundai

[96] Counsel characterised as inapplicable to the instant matter, the cases cited by the appellant in respect of the New York Convention, and submitted that under the Arbitration Act, the submission of a copy of the award is sufficient for its enforcement. Further, counsel averred that there was no dispute as to the accuracy of the award placed before the court. Thus, ultimately, Hyundai should not be denied the enforcement of its award on technical points.

[97] Counsel also submitted that by virtue of section 49 of the Arbitration Act, an award of costs is within the purview of the arbitration tribunal. Therefore, it is not inconsistent with the Arbitration Act for an award to include an order for the payment of costs. Additionally, an award of costs was not excluded by the terms of the agreement. Reliance was placed on a number of cases including a judgment from the United States District Court for the Southern District of New York, **Shaw Group, Inc v Triplefine Int'l Corp** (2003) WL 22077332 (judgment delivered on 5 September 2003), **Bank Mellat v Helleniki Techniki SA** [1983] 1 QB 291 and **Adamas Management & Services Inc v Aurado Energy Inc** [2004] NBQB 342 (judgment delivered on 14 July 2004).

[98] Counsel further submitted that there was no breach of the principles of natural justice and, accordingly, no breach of public policy. Also, it was argued that while there is no duty for an arbitral tribunal to address every point in a case (per **Cukurova Holding AS v Sonera Holding BVI**), the tribunal had held that the provisions of the agreement were determinative of the claim for estoppel. Counsel submitted that the tribunal having

further held that Hyundai had not requested Key Motors to make investments in 2013 and 2014, it was evident that the tribunal had dealt with the issues raised.

[99] It was also submitted that the tribunal's award is not invalid where, on an application for enforcement, the court is of the opinion that the tribunal wrongly decided an issue of fact or law (per **Corporation Transnacional de Inversiones v Stet International SPA** (1999) 45 OR (3d) 183 (SCJ), a decision from the Supreme Court of Justice of Ontario). Counsel also posited that the defences of natural justice and due process are restricted to the form of a foreign procedure and not the merits of the case, as sought to be advanced by Key Motors. Counsel also referred to **Beals v Sadanha** [2003] 3 SCR 416 and **Errol Panton v Donald Panton & Desmond Panton** [2018] JMCC Comm 46.

Discussion

[100] The learned judge's approach to this issue was correct. The arbitrators dismissed all of the appellant's claims, which constituted the substantive grounds put forward for relief, having given reasons for doing so. The issue of costs was considered in the body of the award, and a determination made in light of the applicable rules and the facts of the arbitration. The costs order is a part of the award and not merely incidental to it. The appellant itself had asked for its costs of the arbitration. The learned judge was, therefore, correct when he did not dismiss the fixed date claim form on the basis that the respondent was only seeking to recover the costs awarded by the arbitrators.

[101] The case of **CBA Industries Inc v Circulation Management Inc**, on which the appellant has relied, is distinguishable. In that matter, the Supreme Court, appellate division, New York, confirmed an arbitrator's award of damages but vacated that portion of the arbitration award directing payment of the purchaser's attorney fees. The Supreme Court held that the arbitration clause of the asset purchase agreement explicitly barred either party from recovering attorney fees incurred in arbitration. This constituted an express limitation on the arbitrator's power. There is no such limitation in the case at bar.

[102] Clause 18 of the agreement addresses the governing law of the agreement as well as the arbitration. It provides:

> "1. This Agreement shall be governed by and construed, in accordance with laws of the Republic of Korea without reference to its conflicts of law principles and as if fully performed therein, and will bind the successors and assigns of each party. The United Nations Convention on Contracts for the International Sale of Goods shall be inapplicable to this Agreement.
>
> 2. Except as provided in Section 18.00-3 below, **All disputes**, controversies or differences, out of, or in relation to, or **in connection with this Agreement** and all amendments thereto, including any question regarding its existence, validity or termination, **shall be finally resolved by arbitration under the auspices of the Korean Commercial Arbitration Board in accordance with the International Arbitration Rules of the Korean Commercial Arbitration Board**…The arbitration proceedings and resulting decision shall be made in English, and its decision shall be final and binding on both Parties." (Emphasis supplied)

[103] As was demonstrated in the award, the rules governing the arbitration made provision for the costs that were awarded. The arbitration agreement expressly incorporated the arbitration rules and so the tribunal had authority to make the costs orders.

[104] In the circumstances, there is no basis for any argument that the award of costs exceeded the jurisdiction of the arbitral tribunal, and the cases to which the appellant referred touching and concerning limitations of the powers of tribunals as to the matter of costs are inapplicable. These cases included **Grossman v Laurence Handprints N J Inc**, **Porter and Benson v Buckfield Branch Railroad**, **Hanson v Webber** and **Telestat Canada v Juch-Tech Inc**.

[105] The tribunal considered the appellant's claims and reliance on estoppel and fraud and dismissed them on the basis that they were not proved. This does not mean that the

tribunal acted contrary to natural justice or the public policy of Jamaica. It is not competent for the courts in Jamaica to re-examine the issues argued before the tribunal. While it is clear that the appellant disagrees with the conclusion to which the tribunal arrived, the appellant has not shown any breach of natural justice in the course of the proceedings in which it fully participated. In addition, nothing has been put before the court to show that the decision that the respondent seeks to enforce is contrary to the public policy of Jamaica. The learned judge was correct to arrive at the conclusion that there was no basis on which he could refuse to enforce the award. The tribunal addressed the merits in the matter. The learned judge was correct that the application for enforcement was not an appeal of the award, and there was nothing before him to support a finding of breach of natural justice. The grounds of appeal concerning enforcing the award for costs and the alleged breach of natural justice also fail.

Interaction between the Arbitration Act and the AREFA Act?

The ruling of the learned judge

[106] The learned judge found that there was no requirement for reciprocity of laws in the claim. He observed that there were two applicable pieces of legislation; the Arbitration Act and the AREFA Act, which gives effect to the Convention. In that context, he found that the amendment to section 4 of the AREFA by the Arbitration Act creates a uniformed approach to recognition and enforcement procedures, as, in so far as recognition and enforcement are concerned, the AREFA Act is governed by section 56 of the Arbitration Act. He held that since the claim was filed under section 56 of the Arbitration Act, there was no requirement for "an element of reciprocity of laws", which related to the AREFA Act.

Submissions for Key Motors

[107] On this issue, counsel submitted that there can be no recognition and enforcement of an award under the convention from countries that do not have reciprocal enforcement and recognition provisions to the Convention. Therefore, the learned judge was wrong to have ordered that the award be recognised and enforced, as Korea has no reciprocal

provisions. It was also argued that article 4(1) of the convention that includes provision for the production of specific documents (that is, a duly authenticated original award or a duly certified copy, the original agreement or a duly certified copy of the agreement) was applicable to the instant case. This requirement, it was argued, would have been necessary even if the recognition and enforcement proceedings are grounded under section 56 of the Arbitration Act. Accordingly, counsel submitted that the learned judge erred in finding that the burden was on Key Motors to prove that the copy of the award provided was inaccurate or not a true copy. Reliance was also placed on **the Independent Commission of Investigations v Digicel (Jamaica) Limited** [2015] JMCA Civ 32.

Submissions for Hyundai

[108] It was submitted that there is no conflict between the Arbitration Act and the AREFA Act. Instead, the AREFA Act is supplemented by the Arbitration Act, as made evident by the fact that section 66 of the Arbitration Act amended section 4 of the AREFA Act by deleting the words "section 13" and substituting therefor "section 56". Therefore, a foreign arbitration award can be enforced by either an action under the convention or under the provisions of the Arbitration Act. In this case, the claim was brought pursuant to section 4 of the AREFA Act and sections 56 and 57 of the Arbitration Act.

[109] Furthermore, counsel argued, the Arbitration Act does not stipulate reciprocity as a condition to recognise and enforce a foreign award. However, in the event that reciprocity was indeed required, as correctly stated by the learned trial judge, both Jamaica and the Republic of Korea have acceded to the Convention, which is incorporated into Jamaican law by the AREFA Act.

[110] Counsel also submitted that Hyundai complied with section 56 of the Arbitration Act by providing a copy of the award in circumstances where Key Motors was unable to make out any of the defences listed under section 57 of the Arbitration Act (except for that pursued in its notice of appeal).

Discussion

[111] Section 4(1) of the AREFA Act provides:

> "A foreign award shall, subject to the provisions of this Act, be enforceable in Jamaica, either by action or under the provisions of section 56 of the Arbitration Act."

[112] The Arbitration Act 1900, to which the AREFA Act originally referred, was repealed, and in its stead, the Arbitration Act 2007 was passed. That Arbitration Act includes provisions for the recognition and enforcement of awards and specifically provides that it applies to both domestic arbitration and commercial arbitration. Sections 11, 12, 28, 29, 30, 56 and 57 apply to international commercial arbitration (as stipulated by section 2(2) of the Arbitration Act). Section 56 of the Arbitration Act provides:

> "(1) An arbitral award**, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the Court, shall be enforced subject to the provisions of this section and section 57**.
>
> (2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof.
>
> (3) If the award is not made in English, the Court may request the party to supply a translation thereof into English." (Emphasis supplied)

[113] The AREFA Act refers to the Arbitration Act in so far as the enforcement of an arbitral award is concerned, and section 56 of the Arbitration Act states that the award may be enforced irrespective of the country in which it was made. The application for the enforcement of the award referred to section 4 of the AREFA Act, as well as sections 56 and 57 of the Arbitration Act. The court, therefore, had jurisdiction to enforce the award in question pursuant to section 56 of the Arbitration Act. The learned judge cannot be faulted in his conclusion that the application for recognition and enforcement was made pursuant to section 56 of the Arbitration Act, which provides for enforcement and recognition of arbitral awards "irrespective of the country in which it was made".

[114] It is also noteworthy that counsel for the appellant indicated that the only real difference between the Arbitration Act and the AREFA Act, on which they were relying, was the requirement under the AREFA Act, by virtue of Article IV of the Convention, for a party applying to enforce an award to provide a "duly authenticated original award or a duly certified copy thereof". I agree with the comment made by the learned judge, at para. [35] of the judgment, that the authenticity of the award presented to the court is not in issue and "the fact that it is not duly authenticated is not a sufficient ground on which the Court should disregard it". Contrary to the submissions of the appellant, the learned judge did not place any obligation on the appellant to provide an authenticated copy of the award. The award placed before the court was accepted as correct and sufficient (see para. [35] of the judgment).

[115] In all the circumstances it was unnecessary to wade into any further discussions about the AREFA Act. The grounds of appeal concerning the interaction between the Arbitration Act and the AREFA Act also fail.

[116] **Czarina v Poe Syndicate**, a case determined by the United States Court of Appeals, Eleventh Circuit, on which the appellant relies, is inapplicable. In that matter, Czarina appealed the district court's denial of its application to confirm a foreign arbitral award. The district court concluded that it did not have subject matter jurisdiction to confirm the award. At the arbitration hearing, Poe asserted that it had never agreed to arbitrate the dispute and gave other reasons why it should prevail on the merits of the dispute. Nevertheless, the arbitration panel concluded that Poe had agreed to submit to arbitration and made a monetary award to Czarina. The district court, however, found that there had been no agreement to arbitrate and refused to confirm the award due to lack of subject matter jurisdiction.

[117] The Federal Arbitration Act, pursuant to which a party may apply for an order confirming an arbitration award provided that the court would confirm the award "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention" on the recognition and enforcement of foreign

arbitral awards. Article IV of the Convention provides that a copy of the arbitration agreement is a pre-requisite to the court's power to confirm an award. The court concluded that there was no arbitration agreement between the parties. Thus, the district court was correct that it did not have jurisdiction to confirm the award. The case is, therefore, unhelpful in respect of the issues at bar. In this case, the respondent satisfied the requirements under the Arbitration Act.

A perspective

[118] In reviewing this matter, I was reminded of an aspect of the following ruling made by their Lordships in the Privy Council in the case of **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12:

> "31. Standing back therefore this was in the Board's view, a summary judgment case in which, even if a main plank in the pleaded claim was susceptible to a challenge (forgery) which could only be resolved at trial, nonetheless the defendant's response to it was one which, if true, simply demonstrated the claimant's entitlement to the relief sought by the claim. It was therefore a case in which a trial would have amounted to no more than a serious waste of time and expense for the parties, where the defendant's case disclosed no real prospect of her successfully resisting the Bank's claim and where the grant of summary judgment was the appropriate relief for the judge to grant the Bank, on the hearing of the parties' cross-applications."

[119] In that matter the respondent was raising different issues concerning the bank's application for summary judgment in its claim for monies that the respondent had borrowed. Their Lordships concluded that on the respondent's case, the monies were owed, and so it would have been a waste of time to proceed to a trial.

[120] In the case at bar, the appellant initiated a claim against the respondent before the tribunal and vigorously pursued it. Having lost in the proceedings that it initiated, the appellant now baulks at paying the costs and fees that the tribunal has awarded to the respondent for expenses incurred in defending the claim that it, the appellant, brought. The appellant has pursued nearly thirty grounds of appeal opposing enforcement of an

arbitral award, the contents of which are not in dispute. All the points raised are without merit. I am reminded of a comment that Langrin J made in **Lester Coke and Richard Morrison v The Superintendent of Prisons-General Penitentiary and the Attorney General** (1991), 28 J L R 363 at page 372:

> "The submissions advanced by [counsel] were pregnant with technicalities without seeking to apply principle and commonsense. Such narrow technical legislative interpretation cannot assist the development of any law. I have no difficulty in rejecting his submissions."

[121] It does appear, as the respondent has asserted, that the points raised by Key Motors are "in large part, an attempt to deprive [Hyundai] of the fruits of the Award" (para. 22 of the respondent's submissions). The appeal and the counter notice of appeal ought to be dismissed with costs to the respondent.

HARRIS JA

[122] I, too, have read in draft the judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusion and have nothing to add.

BROOKS P

ORDER

i. The appeals are dismissed.

ii. The counter notice of appeal is dismissed.

iii. The stay of execution granted on 19 January 2021 is hereby lifted. The sums held in interest bearing accounts in the joint names of the attorneys-at-law for both parties shall be paid over to the respondent's attorneys-at-law on or before 22 March 2024.

iv. Costs of the appeals on an indemnity basis to the respondent to be agreed or taxed.

v. No order as to costs on the counter notice of appeal.

vi. Any party who proposes a different order as to costs shall file and serve written submissions thereon on or before 29 March 2024.

vii. The other party shall file and serve its response on or before 12 April 2024.

viii. The court shall consider the submissions on costs on paper and deliver its decision thereon, thereafter.