IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E 335 OF 1991

IN THE MATTER of the Arbitration Act

AND

IN THE MATTER of the Arbitration between SUPERLITE COMPANY LIMITED and LUE'S STONE & QUARRYING LIMITED.

BETWEEN	LUE'S STONE & QUARRYING LIMITED	PLAINTIFF
A N D	SUPERLITE COMPANY LIMITED	DEFENDANT

Hon. D. Muirhead, Q.C., Mr. Peter Goldson instructed by Myers, Fletcher & Gordon, for plaintiff.

Mrs. P. Benka-Coker, Mr. C. Samuda and M s. E.J. Donaldson instructed by Clinton Hart & Co., for defendant.

HEARD: 18th February, 26th March and 15th May, 1992

REID, J.

This is an Originating Summons by the Plaintiff Lue's Stone and Quarrying Limited (hereinafter called Lue's) seeking a declaration that the questions therein named are also issues for arbitration according to the correct interpretation of a clause in a certain lease between them and Superlite Company Ltd. (Superlite for convenience). Lue's also seek an order pursuant to Section 6 of the Arbitration Act as will appear further. In support is an affidavit by Henry Lue, Managing Director of Lue's and it speaks to the grant on 26th March, 1986, of a five year quarrying lease by Superlite to Lue's. The recitals describe Superlite as equitable owners in fee simple of certain lands of which details appear in a schedule annexed; that Superlite are in the process of applying for a registered title under the Registration of Titles Act. The lease reserves landlord's rights as well as secure tenant's covenants and provides for a renewal upon expiration, in terms substantially similar, for a further five years. Paragraph 1 thereof in excerpts, reads:

i) ...

ii) That on the grant of such renewal of Tenancy and in the event that the tenant decides to sell the Landlord shall then have the first right of refusal to purchase the plant (etc.) ... at a price to be determined but based on an independent assessment ...

iii) In consideration of the foregoing and of the payment on or before the expiration of twelve months from the date of this agreement by the Tenant to the Landlord of the amount of One Hundred Thousand Dollars ($100,000.00) the Landlord hereby agrees to cause the transfer to the Tenant of a one-third interest in the share holdings of (Superlite) within one month of the date of this Agreement, provided that the Tenant at any time in the future wishes to sell the said one-third interest he (sic) shall give the Landlord the right of first refusal to purchase at the price of One Hundred Thousand Dollars ($100,000.00) for the said one-third interest in the said shareholdings.

iv) ... (v) ...

vi) If any dispute or difference shall arise between the parties hereto touching or concerning the construction of any clause herein contained or the rights duties and liabilities of the parties hereto the same shall be referred to the determination of a sole arbitrator in accordance with the Arbitration Act or any amendment thereto.

During 1987, disputes had arisen between the parties and a submission with terms of reference under an order of the Court by Harrison, J., named Mr. Don Chin See, Q.C. as arbitrator. The arbitrator at a meeting on 29th August, 1991, by a summons for directions, ordered each party to give discovery of documents. The list supplied by Superlite's Attorneys-at-Law had an item captioned:

"Title to the land referred to in the schedule to the lease."

Therein, was described an area of land considerably less than that in the schedule to the lease. Lue's complain that Superlite had thereby failed to establish the foundation of an assertion of equitable ownership, this, notwithstanding numerous letters of request for an explanation. At the commencement of the arbitration on 1st October, 1991, the Attorneys-at-Law for Lue's intimated that they would seek to amend the Points of Defence. Accordingly, the proceedings were adjourned with no new date fixed. Lue's contend that the proposed amendment which seeks to challenge Superlite's ownership is at the heart of the issues before the arbitrator. The Originating Summons seeks:

1) A declaration that the following questions are issues which should be resolved by arbitration pursuant to the arbitration agreement contained in clause 7 (vi) of the lease between (Superlite) and (Lue's) dated ... namely ...
   (a) Is Superlite the equitable owner in fee simple of all lands ... in the schedule ... as stated in Clause 1 of the lease?
   (b) If (Lue's) are entitled to a one-third interest in the shareholdings of (Superlite) and (Superlite) is not the equitable owner of (the land) ... what legal consequences flow ...?
2) An order pursuant to Section 6 of the Arbitration Act 1900 and under the inherent jurisdiction of the Court that Mr. Don Chin See, Q.C. ... of Kingston be appointed to act as arbitrator under the Arbitration Agreement to arbitrate the abovementioned issues and that these issues be arbitrated at the same time as the other disputes between the parties that have been referred to (him) for arbitration under the said Arbitration agreement.
3) An order that the costs ... incidental to this application be costs in the arbitration proceedings.

At the hearing of this summons, Mrs. Benka-Coker's two points of objection in limine were merged into her substantive arguments. Referring to the consensual nature inherent in all agreements to

refer to arbitration, she submitted that two preliminary issues arose:

1) Whether there has been any valid agreement to submit a dispute to arbitration.

2) Whether a dispute that has in fact arisen is one within the scope of the agreement to refer.

She contended that:

1. The issues now being sought to be arbitrated did not fall within the scope of that which as agreed between the parties, had already been referred.

2. That the said issues, moreover, did not fall within the ambit of the agreement to refer envisaged in paragraph 7(vi) of the lease and for them properly to be referred to arbitration, they would have to be "... disputes or differences ... touching or concerning the construction of any clause herein contained or the rights, duties and liabilities of the parties hereto".

Only after 5½ years' exclusive occupation did Lue's see fit to question Superlite's ownership; the parties were bound by the provisions of the lease and the words abstracted above were not apt to sanction an excursus such as proposed. And so, reliance was placed on the case of Monro v. Bognor Urban District Council (1915) - 3 K.B. 167. There, in a contract for the construction of certain sewage works, the arbitration clause referred to disputes which might arise between the parties 'upon or in relation to or in connection with the contract'. The Court of Appeal had to decide whether or not an action for damages for fraudulent misrepresentation should be stayed on the ground that it was within the scope of the arbitration clause. The Court held that it was not a matter "upon or in relation to or in connection with the contract" and so did not entitle the defendant to have the proceedings stayed. Mrs. Benka-Coker submitted also that Section 6 of the Arbitration Act was inapplicable as none of the situations postulated in that section obtained here. The arbitrator having already been appointed, the

terms of reference settled, the Court was now being asked unilaterally to approve amendments to the following documents:-

1) The agreement to refer

2) The written submission and terms of reference

3) The pleadings settled by the parties and exchanged.

The case of Morgan v. Tarte - May 8, 1955 - reported in 11 Exchequer Reports 82 was relied on. The report states:

> "Where a cause is referred to arbitration without power of amendment, a judge has no power except by consent of the parties, to order the particulars of demand specially endorsed on the writ to be altered by increasing the amount of one of the items".

It was only the arbitrator, she submitted, who had a power to amend the pleadings, but not a power to amend the agreement to refer to arbitration; nor did he have the power to amend the dispute reflected in the written terms of reference. Moreover, the plaintiff could not under the guise of seeking an amendment, introduce a fresh dispute. See Vanderbyl v. Sir J. N. McKenna L.R. Vol. 111 257. There Chief Justice Bovill had said:

> "When an order of reference has been drawn up by consent, and it is made manifest to the Court that there has been some omission on the part of its officers, or that by some accident or mistake the order is not in accordance with the intention of the parties, it is agreed on both sides that the Court may make such amendments as will give effect to that which the parties have agreed to ... but after the affidavit which has been made I am unable to come to the conclusion that it was ever agreed that the arbitrator should have power to determine the questions now posed."

Furthermore, there was nothing to occlude the estoppel which arose from the relationship of Landlord and Tenant. (See Hill & Redmon - Law of Landlord and Tenant 14th Edition, Introduction, Paragraph [31].

> "As between the landlord and tenant ... in their capacities as such, the tenant is estopped from denying the title of the landlord by whom he had been let into possession at the time of the demise."

Mr. Muirhead, Q.C., submitted that the application did not constitute an ad hoc submission but flowed from the agreement of

the parties in advance to refer future disputes to arbitration. This was implicit in the words "... touching or concerning (not only) ... the construction of any clause herein contained ..." (but also touching or concerning) "... the rights, duties and liabilities of the parties ..." (underlinings applied for emphasis). Clauses 7(ii) and 7(iii) of the lease, he submitted, had been introduced against the background of Clause 1 which made an assertion of equitable ownership. Thereby was created a vendor-and-purchaser relationship on which the state of the assets of Superlite had a direct bearing. Since the tenant might at some time exercise that option of purchase, it followed that on a proper construction of the arbitration clause, Superlite's equitable ownership was in issue. He further submitted that the caption 'Submission and terms of reference' was as inaccurate as it was misleading, since either party was entitled to the determination by arbitration of any dispute arising. The express terms of reference could not derogate from the provisions in general of clause 7(vi) which reflected the consensual nature of the agreement between parties. There was need, he said, to distinguish between an agreement to refer and a submission. A passage cited from Encyclopaedia of Forms and Precedents Fourth Edition - page 366 paragraph 6 emphasizing this, reads:

> "It is convenient to distinguish between (1) agreement that if a dispute arises it shall be referred to arbitration, and (2) agreements to submit an existing dispute or disputes to the determination of a particular arbitrator or arbitration tribunal, and to call the first kind "Agreements to refer" and the second "Submissions".

The provisions of Clause 7(vi) were wide enough, to contemplate and include disputes that might arise in the future. The real issue then was whether or not all the disputes including those the subject of this application ought to be referred to arbitration all on one occasion or separately. Good sense would dictate that, if possible, they be all resolved together. Should the new issues be not included with the arbitration submission pending, they would then have to be the subject of separate litigation. As primacy

ought to be given to their being resolved by arbitration in keeping with the intention of the parties, an endeavour to this end must, perforce, be a condition precedent to the alternative process of litigation. He noted that Superlite had not raised an objection on the ground that an allegation of fraud ought properly not be a matter before the arbitrator, but instead were merely setting up an estoppel to divert a challenge to an asserted landlord's title. Such an argument should not suffice to derogate from the generality of the Clause 7(vi) provisions. With propriety the Court might indicate whether or not the declaration sought was within the scope of the clause, the only consideration being the expediency of ordering adjudication at one and the same time with the issues already referred. On this note his submissions ended.

Whether or not a dispute falls within the ambit of an agreement clause to refer to arbitration is primarily a question of construing the words used by reference to other circumstances.

In Ashville Investments Ltd. v. Elmer Contracts Ltd. [1988] 3 All E.R. 577, May L.J. said at p. 582:

> "I do not think that there is any principle of law to the effect that the meaning of certain specific words in an arbitration clause in one contract is immutable and that the same specific words in another arbitration clause in other circumstances in another, must be construed in the same way."

While not disagreeing with the ruling in the Monro case (supra) he like the other members of the Court, preferred the other limb of the judgment of Pickford L.J. as expressing the acceptable ratio decidendi thus:

> "... but the essence of the clause is that the plaintiff is asserting that he was induced by fraud to enter into the contract and that as a consequence the contract was never binding ..."

The implication, as May L.J. observed, was this:

> "In other words, if the claim based on fraud has been left to the arbitrator he would have been asked in reality to adjudicate on his own jurisdiction, which is never permissible as Heymans v. Darwins Ltd. [1942] 1 All E.R. 337 - makes clear.

That on a proper construction Clause 7(vi) could well include futuro

disputes, that is, arising subsequent to the submission, is hardly a matter for controversy. It is quite another thing to permit an amendment which creates a fresh dispute and by the next step accommodate same for determination as a compendious submission. Accommodation merely for the sake of economy cannot be the determinant. As a general rule the arbitrator has no jurisdiction over disputes which were not in existence at the time he was appointed to act. The appointment defines his jurisdiction at the same time as creating it; it cannot be taken as conferring a jurisdiction over something which did not then exist.

> "This is reflected procedurally by saying that an arbitrator would have no power to allow amendments which would raise a new dispute."

(See the Law and Practice of Commercial Arbitration in England Second Edition by Sir Michael Mustill (a Lord Justice of Appeal)

As is pointed out (ibid) where it is sought to amend a claim, the arbitrator must decline to deal with a new claim unless the parties agree to give him a special jurisdiction so to do, or, a fresh notice of arbitration is given in respect of the new dispute, and he is again appointed arbitrator.

Respectfully, I adopt the view of the learned author where at page 126 he says:-

> "Expediency does however, suggest that the respondent should be allowed to amend, provided of course, that the arbitrator considers that the circumstances make it fair for him so to do."

Once the issue raised constitutes a dispute which on the proper construction of the agreement, belongs to arbitration procedures, then clearly, that avenue must be pursued before recourse to litigation. Should the Court be moved to make the declaration sought, it does not follow that it is appropriate to order, for inclusion, the subsequent dispute. The captioned submission may be epitomized as seeking the determination of the following questions:

1. Whose obligation was it to procure the quarry lease?
2. Whose obligation to secure compliance with Special Condition 2 thereof and what consequences ensue?

3. Was there a waiver of the obligations under -

(a) Clause 6(i) - payment of royalties, the times and manner prescribed for payments?

(b) Clause 7(ii) - conditions prerequisite to the exercise of the option to acquire the one-third shareholding?

The Points of Claim allege breaches of Tenant's Covenants, failure to observe proper mining practices and marketing procedures, and would justify Superlite's repudiation of the purported exercise by Lue's of the option to acquire and perfect the shareholding.

In response, the Points of Defence in paragraph 5 makes admission of paragraphs 8 and 9 of the Points of Claim respectively where they speak to:

(a) The agreement "... to hold the land for five years ... determinable by mutual agreement or by breach ... of any covenant."

(b) The agreement to perform the obligations enumerated.

Paragraph 6 of the Points of Defence is a qualified repudiation of the Points of Claim (paragraph 10), thus: "... the Respondent further says that the only conditions it was therefore obliged to observe were those stipulated in the lease agreement."

Of significance too, is paragraph 13 (Points of Defence) which reads:

> "Paragraph 20 of the points of Claim is denied and the Respondent says if the <u>lease had been legally terminated by the claimant</u> which is denied, then the Defendant claims to be entitled to recover the value of the improvements it has effected to the said land -
>
> (a) Construction of buildings
> (b) Erection of structures
> (c) ...
> (d) ...
> (e) etc. (proposed amendments underlined)

Notwithstanding the averment by Lue's that they now own 7½ acres of the lands, their express acknowledgement of the validity of the lease remains a focal point of reference in their pleadings. The allegation of fraudulent misrepresentation to induce a collateral agreement to acquire shares cannot, in my view, by being designated

a vendor and purchaser relationship operate to exclude the estoppel created by a relationship of landlord and tenant.

Not even on the expiration of his term may a lessee deny his lessor's title in respect of the period for which possession had been enjoyed, unless after termination, a claim was made against the lessee by title paramount touching some part of the period, so that he became in peril of an adverse claim. See Industrial Properties (Barton Hill) Ltd. and others v. Associated Electrical Industries Ltd. and others [1977] 2 All E.R. 293. However wide the scope of the words of clause 7 (vi) the question remains whether or not a fresh dispute as claimed, has in fact arisen.

All things considered, the emergence of a new dispute is not manifested. If that view is incorrect, I would still hold that what the application seeks to gloss on the arbitration proceedings pending is not warranted either by virtue of Section 6 of the Arbitration Act or by an order under the inherent jurisdiction of the Court. An incantation much stronger than the faint blush of the exhibit letters is required to exorcise what is no more than the tenuous apparition of a fresh dispute.

The declarations sought by paragraph 1 of the Originating Summons are hereby refused and likewise the order sought in paragraph 2 thereof. An award is made to the defendant for costs, to be agreed or taxed, and which will include a certificate for counsel.