[2013] JMSC Civ. 50

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO.2012 CD00138

BETWEEN	**M & A CONSTRUCTION HEAVY EQUIPMENT COMPANY LTD.**	**CLAIMANT**
A N D	**GLOBE INSURANCE COMPANY OF JAMAICA LIMITED**	**DEFENDANT**

Mr. Franklyn Halliburton for the claimant

Mr. Patrick Foster QC & Mrs. Camille Wignall-Davis for the defendant

Whether arbitrator misconducted himself - whether misconstruction of clauses constitute misconduct- whether matter should be set aside or remitted
Heard: 23and 24 January, 25 and 26 February 5, 12, 13, 14 and 22 March 2013

SINCLAIR-HAYNES J

[1] These proceedings arise out of an arbitral award of fifty three million nine hundred and forty six thousand dollars made by the arbitrator Mr. Justice Roy Anderson (Retired) on the 29 June 2012. The defendant (Globe Insurance Company Ltd) seeks an application to set aside the award or alternatively to have the award remitted to the Arbitrator for his reconsideration. The grounds on which the application is sought are as follows:

(a) the Arbitrator misconducted himself by misconstruing the relevant terms of the policy and consequently the award is inconsistent with the terms of the said policy; and

(b) the amount of the award is incorrect.

THE BACKGROUND

[2] On the 24 December 2008, the claimant (M&A Construction & Heavy Equipment Company Limited) entered into a Plant and Equipment All Risks insurance policy with the defendant, for the coverage of its bulldozer. The policy was terminated less than a

year after but was reinstated seventeen days before the bulldozer was damaged by fire and deemed a total loss. The claimant's claim for indemnity was met with resistance on the grounds that:

(a) the claimant failed to disclose material facts which were crucial in deciding whether the defendant ought to accept the risk and if so on what terms;

(b) the policy of insurance was breached by the failure to disclose material facts.

[3] The arbitrator found that there was no non-disclosure which amounted to a breach of contract which would entitle the defendant to deny an indemnity. The defendant accepts that decision of the arbitrator. The sore point lies in the answer to the question which arose as a consequence of the arbitrator's decision: "What award should be consistent with the terms of the policy?" It is his answer that has incurred the ire of the defendant. The defendant asserts that he erred on the face of the award by determining the extent of that indemnity by reference to clause 7 of the insurance policy instead of clause 10.

[4] Examination of the competing clauses is necessary.

Clause 7 provides:

> *"It is a requirement of this insurance that the sum insured shall be equal to the cost of replacement of the insured machinery and plant by new machinery of the same specifications and same capacity including all freight costs to the site, erection cost and customs duties and other dues."*

Clause 10 reads:

> *"Loss Settlement*
> *...In the case of a total loss, the actual value of the property immediately before the occurrence of loss less the salvage."*

WHICH CLAUSE WAS APPLIED?

[5] Inexorably, the applicable clause is 10. The question is, which clause did he apply? Mr. Foster QC submits that he relied on clause 7. Mr. Halliburton says his application was hybrid as he applied both. It is helpful to quote the salient portions of his decision. He said:

> *"Under item 10, the policy deals with "Loss Settlement". In paragraph 2, it is stated: "In the case of a total loss, the actual value of the property immediately before the occurrence of the loss less salvage. The Respondent says that, based on the evidence of Mr. Hucey, it has identified a Komatsu D 475-5 bulldozer in Cleveland Ohio in the United States of America. The machine is being sold for US$198,000.00. The first difficulty with this is that, given the nature of the specific machine in question, I believe that it would be useful and perhaps even necessary to provide some expert evidence as to the comparability of the two bulldozers. There is no such evidence; rather only Mr. Hucey's evidence as a loss adjuster as to how he arrives at a "replacement value". He specifically points out that the identified machine had done some 22,500 hours of work. However, there is no evidence as to the hours logged by the claimant's bulldozer."*

[6] Those comments of the arbitrator demonstrate his appreciation that clause 10 is the applicable clause. The fact that he expressed concern as to the absence of evidence 'as to the hours logged by the claimant's bulldozer' seemingly suggests that in quantifying the award, his mind was directed to the actual value of the bulldozer at the time of loss which is contemplated by clause 10, as opposed to a new bulldozer which would be consistent with clause 7.

He continued:

> *"More fundamentally, the premise of his calculation is that the insured is entitled to a sum equal to what is termed "Replacement Value". This is not what the policy provides for. "*

[7] That statement seems to confirm an acceptance of clause 10 and a rejection of clause 7. His following comments however, suggest otherwise. He seemed to have resiled from his reliance on clause 10 and embraced instead clause 7.

> *"Indeed, it must be wrong conceptually that if because of increased demand for an asset, the item becomes more valuable than its cost or the sum for which it was insured, the insured could recover as, "replacement value" such greater sum than that for which he had insured. It seems to me that the basis for this submission is the term of policy found at paragraph 7 of the section entitled, "Property Insured".*
>
> *That provision is in the following terms.*
>
> *It is a requirement of this insurance that the sum insured shall be equal to the cost of replacement of the insured machinery and plant by new*

machinery of the same specifications and same capacity including all freight costs to the site, erection cost and customs duties and other dues. Notwithstanding the above stipulation, the sum insured for camps, hutments, workshops, scaffolding, moulding and shuttering shall be equal to the actual value at the time of concluding the policy.

It seems to me that this clause imposes a requirement that the sum insured (in this case $74,000,000.00) should be at least equal to the cost of replacing the asset. I also take this to mean that the cost of replacing the asset with a new asset of the same type and specifications should not be greater than the sum insured. By way of an aside, it should be noted that the evidence from Mr. Hucey concerning the Komatsu D475-3 which had been identified in Cleveland, Ohio, does not say how that machine compares with the asset which had been destroyed in terms of its performance. In any event, however, if the provision quoted above ("Sums insured") is to be considered relevant for these purposes, it would seem on its face, to require a computation based on the cost of "new" equipment "of the same specifications and same capacity" rather than the cost of machinery or plant of the same vintage as the destroyed asset"

(Emphasis mine)

[8] By that statement, he seems to have recognized that a computation pursuant to clause 7 required consideration of the sum insured and the replacement of a new machine. His further statements erase any doubt that he misconstrued section 10. He said:

> *"Finally the respondent's submissions on the extent of the award, posit that should the arbitrator find in favour of the claimant, such award should be reduced by the 10% Excess stipulation in the policy. Based on the loss adjuster's evidence, the excess is calculated to be $7.4 million, the equivalent of 10% of the sum insured.*

He then said this:

> *"No evidence has been led for the respondent that the "value of the property immediately before the occurrence of the loss" adverted to in clause 10 paragraph 2 under "Loss Settlement" is other than the "sum insured". The evidence of Mr. Hucey seems to support this proposition."*

[9] Clause 10, however speaks to the actual value immediately before the loss less the salvage, not the sum insured. It is noteworthy that the sum insured is seventy four million dollars. The arbitrator continued:

"On the other hand, the claimant points to the total loss provision which I set out above and claims on that basis that the sum due for a total loss is J $74,000.000.00 for which it was insured. This submission does not seem to comport completely with the policy for it does not acknowledge the excess payable by the claimant and the question of ownership of the salvage."

"No evidence was led by either side, nor indeed any submission made, as to the proper treatment to be accorded to such salvage as is available. Notwithstanding this apparent shortcoming, I am satisfied that the better view must be informed by the general principle that once the insured has been indemnified under the terms of the insurance policy, the insurer is subrogated to all those rights which the insured may have had. This would seem to me to include the salvage unless the insured agrees to acquire that salvage from the insurer."

[10] Evidently, the arbitrator regarded clause 7 as the relevant clause as the only issues taken by him with that submission concerned the excess and the salvage. His further comments are helpful in deducing his thought process:

"Having formed the view that I have on the bases advanced by the respondent to the claim by the claimant, the question of a figure now has to be considered in light of my comments above.

The better view would seem to be and I so rule, that the starting figure is the sum insured, in this case $74,000,000.00. From this figure must be deducted the excess of 10% provided for in the policy to reduce that figure to $66,600,000.00. I also take the view that, just as in awarding damages a court is entitled to take into account taxes for which the beneficiary of the award may be liable, (See ***BTC Gourley*** *[1956] AC 186) it is permissible to take into account tax benefits to which the beneficiary would be entitled by virtue of the ownership of the asset, such as capital allowances. On an asset such as the bulldozer in the instant case, the annual allowances would normally have been an annual sum of 10% of the written down value. Alternatively, the asset would have suffered depreciation over the period in excess of two years since the incident giving rise to the claim. I believe that the use of the capital allowance approach gives a better result and using that methodology, I come to the view that the award for the claimant should be in the sum of $53,946,000.00."*

[11] The arbitrator considered depreciation in his computation. A cursory reading of this could lead Mr. Halliburton to the conclusion that the award is a hybridization of clauses 7 and 10. Closer scrutiny however reveals that the period of depreciation of the

asset which the arbitrator considered was not before the damage (as is required by the policy) but subsequent to the damage.

HIS TREATMENT OF THE SALVAGE

[12] The learned arbitrator arrived at the erroneous conclusion that the salvage became the property of the Defendant. He said:

> *"But this also raises the question of whether in the case of a total loss, which this is agreed to be, the option to take over the salvage is that of the insurer or the insured. It is my understanding that the amount of salvage value of an insured asset in the case of a total loss is what the insured or a third party would pay to take ownership of the damaged asset or its usable components. It is not something which the insurer says to the insured: "The value of the salvage is $X. I will give you what is due under the insurance less the value of the damaged asset which you can keep". It seems to me that this reasoning would be flawed."*

[13] It is manifest that the arbitrator has erred in law by his failure to comprehend the contractual provision contained in the contract of insurance between the parties regarding the treatment of the salvage. He disregarded the agreement between the parties contained in clause 10 of the policy which required the deduction of the salvage in computing the sum payable. Further, it is plain that he arrived at a decision without evidence. He expressed the following view:

> *"No evidence was led by either side, nor indeed any submissions made, as to the proper treatment to be accorded to such salvage as is available. Notwithstanding this apparent shortcoming, I am satisfied that the better view must be informed by the general principle that once the insured has been indemnified under the terms of the insurance policy, the insurer is subrogated to all those rights which the insured may have had. This would seem to me to include the salvage unless the insured agrees to acquire that salvage from the insurer."*

[14] The learned Arbitrator also misapplied the law on subrogation. The learned authors of **Halsbury's Laws of England** Volume 60 (2011)5th Edition at paragraph 217 explain the principle thus:

:

"In the strict sense of the term, subrogation expresses the right of the insurers to be placed in the position of the insured so as to be entitled to the advantage of all the rights and remedies which the insured possesses against third parties in respect of the subject matter. The precise nature of the third party's liability to the insured is immaterial; subrogation applies even to a statutory liability. If the third parties are insured, the ultimate liability for the loss falls on their insurers. The right does not arise until the insurers have admitted their liability to the insured, and have paid him all amounts due in respect of the loss."

[15] Clause 5 of the contract of insurance provides:

"The insured shall not be entitled to abandon any property to the company whether taken possession of by the company or not."

The damage to the bulldozer rendered it a total loss. The insured had specifically contracted not to abandon the same to the company. The arbitrator ignored the fact the parties had bound themselves to dealing with the bulldozer pursuant to clause 5. In any event the doctrine of subrogation is not applicable in the circumstances.

[16] The learned authors clarified the distinction between subrogation and abandonment. Paragraph 217 further reads:

"In a case of total loss, the rights given by subrogation must be distinguished from those resulting from abandonment. By virtue of abandonment the insurers become entitled to the property in the thing insured and to all rights incident to the property, whereas by subrogation they become entitled to rights and remedies which may not depend on the ownership of the thing insured. Thus, where the owners of an insured ship have been paid as for a total loss, the property, is transferred to the insurers as from the time of the casualty in respect of which the total loss is paid. For instance, the right to receive payment of freight accruing due, but not earned, at the time of the casualty is one of those rights incident to the property in the ship, and it therefore passes to the insurers on abandonment."

THE LAW

[17] Section 12 (2) of the Arbitration Act provides:

> *"Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside."*

Are the errors of the caliber required to impeach the award?

What constitutes misconduct?

I feel constrained to state that the terminology "misconduct" is not being used in the *'ordinary sense'* as pointed out by Sir John Donaldson MR in **Moran v Lloyd** 1983 LR 542. At pages 548 and 549 he said: *"The term "misconduct" can give a wholly misleading impression of the complaint being made against an arbitrator or umpire."* The terminology does not refer *"to dishonesty or a breach of business morality upon the part of the arbitrator or umpire.* In reference to the English Arbitration Act of 1950 which is worded in similar terms as section 12 of our Act he expressed the view that: *"The section has been held to apply to procedural errors or omissions by arbitrators who are doing their best to uphold the highest standards of their profession."*

HAS THE ARBITRATOR MISCONDUCTED HIMSELF WITHIN THAT MEANING?

[18] The arbitrator was under no obligation to provide reasons for his decision. Had he abstained from so doing, the court would have had no basis to interfere. He has however done so. The question is whether his misapplication of the clause 7 and his erroneous dealing with the salvage constitute misconduct. There is no exhaustive list of matters which constitute misconduct. As Fox JA in **Kaiser Bauxite Co. v National Worker's Union** (1956) 9 JLR 283, pointed out, the terminology captures a wide range of matters, from misconstruction of documents to fraud. The arbitrator's application of clause 7 amounts to a misconstruction of clauses 10 and 7. His reasons for the award are therefore inconsistent with the terms of the policy.. (See **Kiril Mischeff Ltd v Constant Smith & Co.** [1950] BK 616.

[19] It is settled law that an arbitral award determined by reference to both fact and law can be set aside if it is manifest on the face of the award that the arbitrator has

misconstrued the contract. Campbell's JA enunciations in the Court of Appeal case of **ICWI v GG Records Ltd** 1987 24 JLR 350, 353 plainly state the law. He said:

> *"A considerable number of cases have been cited by the parties, designed to summarize the learning on the distinction between firstly, a reference of a specific question of law, the award in relation to which cannot be set aside by the court however erroneous the award is on its face, secondly, a reference of a specific question of fact, the award in relation to which is equally beyond the jurisdiction of the court to interfere, and thirdly, a reference of what may conveniently be described as an issue which is a composite of fact and law, in that it involves the finding of primary facts and the application of law in these primary facts to arrive at a decision which constitutes the award. Such a reference presumes knowledge by the arbitrator of the principles of law applicable to the issue or if he has not the knowledge, that he will obtain advice thereon. An award from a reference in this last category may be set aside if, inter alia, there is an error of law on the face of the award manifested by a patent misinterpretation or misapplication of the law in arriving at a decision on the primary facts.*
>
> *In my view, the reference in this case was not one of construing the policy of insurance insofar as determining whether the master tapes were stock in trade. No assistance in determining this issue can be derived from the policy. The issue had to be determined aliunde. If his determination is that the master tapes are stock in trade, then the policy speaks unambiguously that they are insured, and compensation for their loss is then determined as prescribed equally unambiguously in the policy. The reference was equally not one of pure fact because the concept of stock in trade, albeit popularly considered as one of fact in any particular circumstance, is dependent on the application of principles of law distinguishing between fixed assets and circulating assets dependent on the purpose for which they are respectively acquired or manufactured and/or the role played by them in any particular business enterprise."*

[20] **Lord Russell of Killowen in the English House of Lords case of Absolom (FC) L d v Great Western (London) Garden Village Society Ltd HL(E)** [1933] AC 592,at 607-8 said:

> **"***My Lords, it is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. I am not sure that the Court of Appeal has done so. The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the court can interfere if and when any error of law appears on the*

face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one.

In the **Kelantan case** (1) *Lord Cave made this distinction clear, and came to the conclusion, after considering the submission and the pleadings there in question, that specific questions of construction had been submitted to the arbitrator for his decision, with the result that his decision could not be interfered with merely on the ground of its being wrong. He adds, however, that if it was apparent on the face of the award that the arbitrator in arriving at his decision had proceeded illegally (e.g. on inadmissible evidence) that would be ground for interference. Lord Parmoor makes the same distinction, and so does Lord Trevethin when he says (2): "This is not ... a submission to arbitration of such a nature that though the law be bad upon the face of the award, the decision cannot be questioned. That happens only when the submission is of a specific question of law, and is such that it can be fairly construed to show that the parties intended to give up their rights to resort to the King's Courts, and in lieu thereof to submit that question to the decision of a tribunal of their own."*

"The same distinction appears in the judgment of the Privy Council in the case of ***Attorney-General for Manitoba v. Kelly*** **(3)**, *in which the following passage occurs: "Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award."*

[21] The question which the learned arbitrator was required to adjudicate upon was:

"In the event Globe is found to have wrongfully denied cover, the amount if any of the loss suffered."

He was therefore required to determine both facts, that is, whether the claimant was wrongfully denied cover and if so, he was required to quantify the loss by way of application of the relevant clauses. By referring to and detailing his interpretation of clauses 10 and 7 the learned arbitrator has exposed the fact that he misconstrued the said clauses. The error is therefore on the face of the award. The comment of Brooks J, as he then was, in the unreported matter of **The Attorney General of Jamaica v National Transport Co-operative Society Ltd** which **was** delivered on the 29 November 2004, supports this view. At page 16 he said:

"*The misconstruction is itself an error on the face of the record. This is because a "question of construction is generally speaking, a question of law." So stated Viscount Cave in Kelantan Government v Duff Development Co. [1923] All E.R. Rep 349 at p. 354 I."*

In light of the obvious errors on the face the award it is the finding of this court that:

(a) the arbitrator misconducted himself by misconstruing the terms of the policy;
(b) the award is inconsistent with the terms of the policy; and
(c) the amount of the indemnity awarded to the claimant is incorrect.

What is the consequence of his misconduct?

The law

[22] **SECTION 11(1) OF THE ARBITRATION ACT PROVIDES:**

"In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire."

Brooks J as he then was, in the unreported case of **Willowood Lakes Limited v Board of trustees of Kingston Port Workers Superannuation Fund** Claim No2007 HCV 00427 considered the bases on which an arbitral award may be set aside. He said:

"*An example of the ways in which the court will intervene is demonstrated in the following passage from the judgment of McNair J in **Demolition & Construction Co. Ltd. v Ken River Board**...approved by our Court of Appeal in **Marley and Plant Limited v Mutual Housing Services Limited**...:"*

"In arbitration, the arbitrator's view of the law may be controlled in two ways. If he states on the face of the award a theory which shows he has committed an error of law –and deciding the matter without evidence is an error of law – then the award may be set aside or remitted on the ground of error of law on the face of the award..." (Our Emphasis)

SHOULD THE MATTER BE REMITTED TO THE ARBITRATOR OR SHOULD THE AWARD BE SET ASIDE

[23] Mr. Patrick Foster, Queen's Counsel submits that the award ought not to be remitted to the arbitrator but be set aside. According to him the arbitrator has already formed views on the evidence which he heard and made certain decisions which suggest that he may not be able to reconsider the issues with a fresh mind. Mr. Halliburton however urges the court to remit the matter to the arbitrator. Whether the matter is remitted or set aside is discretionary. In the matter of **Moran v Lloyd's (A Statutory Body)** [I983] LR 542, Sir Donaldson MR however expressed the view that

> *"It is in terms wholly discretionary, but that discretion has to be exercised in accordance with established principles."*

The exercise of my discretion in this regard is as Edmond Davis J in the matter of **S J &M M Price Ltd v Milner** [1966] WLR 1235, at page 1239 said:

> *"...its exercise must be a matter for the court's discretion and one to be determined by consideration of what is best calculated to do justice between the parties."*

[24] An important consideration is the speedy disposition of the matter. This is a factor which must be desirable to both parties. The learned arbitrator is *au fait* with the matter. Should the matter be remitted, his attention would then be drawn to the relevant clause and applicable law. I find support for this view in the following statement of Edmund Davies J in **SJ &MM Price Ltd v Milner** at page 1239 of his judgment:

> *"...it would as it seems to me, be deplorable if this dispute had to begin all over again before a fresh arbitrator. No kind of attack has been made on the bona fides of the present arbitrator and, notwithstanding his extreme dilatoriness, he is (or should be) seised of all the facts and, properly guided, should now be capable of presenting his award as a special case properly stated"*

[25] By setting out his reasons for the award, the learned arbitrator has exposed the flaws in his award. As Devlin J in **Kiril Mischeff, LD v Constant Smith & Co** [1950] KBD] 616 opined at 621 and 622:

> *"It is true that the arbitrators are not obliged to give any reason for their decision:but if they have done so, and it appears to be defective, I cannot see why they should not be given an opportunity of curing that defect...I think it is consistent with the general principles that have been laid down in these matters. ...It is worth referring to* ***Hodgkinson v Fernie*** *where Cockburn CJ after referring to section 8 of the Common Law Procedure Act, 1894, which contains the provisions now embodied in the Act of 1889, said:*

"I am, however, clearly of opinion that it was not intended by that enactment to alter the general law as to the principles upon which the courts had been in the habit of acting in determining whether they would or would not set aside awards; but merely to give the court power to remit the matter to the arbitrator for reconsideration in all cases, though the submission should not contain that extremely useful clause giving them that power, where it turned out that there was a fatal defect in the award, but of such a nature as not to render it expedient to set aside the award, and thus render nugatory all the expense that had been incurred under the reference."

*...*an *award should be remitted only if that can be done with justice to the parties."*

[26] In my view, the scales of justice are weighted in favour of remitting the matter to the arbitrator. There is no evidence of conduct on the part of the arbitrator which constitutes misconduct of the nature which would justify this court setting aside the award, for example, fraud or recalcitrance such as was exhibited by the arbitrators in the case of **re An Arbitrator between Fischel & Company and Mann & Cook** [1919] 2 KB 431. In that case the arbitrators, were informed at the time of their appointment, that they would be required to state a case for the court on questions of law should the need arise. They flagrantly refused the repeated requests of the buyers to do so. The court granted the buyers application to set aside the award. Avory's J comments provide guidance. At page 441 he said:

"It has been suggested on behalf of the sellers that the Court instead of setting aside the award of the umpire should remit it to the same umpire directing him to restate it in the form of a special case, and that this would probably be found the less expensive course to adopt. I cannot accede to that view. While I have no wish to characterize the conduct of this umpire in stronger terms than may be necessary, I feel bound to say that he appears to me to have adopted throughout an attitude of unmistakable opposition to any interference by a Court law with the proceedings of the arbitration tribunal. I am satisfied that his conduct has all along been actuated by a settled though no doubt perfectly honest conviction that a Court of law ought not to be allowed to interfere at all with the exercise of his powers as umpire. Having regard to that attitude of his, I can foresee that if the matter were again to go before him in order that he might state

his award in the form of a special case on the points of law which it is desired to raise, very considerable trouble would in all probability ensue to the parties.
Upon the whole, therefore, I have come to the conclusion that the proper order to make is that this award should be set aside."

In the circumstances, the award is remitted to the arbitrator for his reconsideration.

Cost to the defendant with certificate for counsel.