C.A. ARBITRATION — Building Contract — Arbitration award — set aside by Sup. Ct. (Wright J.) on ground that arbitrator in making his award did not follow the terms of reference and that there was an error on the face of the record — whether Trial Judge erred — Appeal set aside for which I entered.

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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 3, 4 & 5/87

COR: The Hon. Mr. Justice Rowe, P.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

MARLEY AND PLANT LIMITED — APPELLANTS

V.

MUTUAL HOUSING SERVICES LIMITED — RESPONDENTS

Hilary Phillips and Denise Kitson for the Appellant

Carl Rattray, Q.C., & John Thompson for the Respondents

October 12, 13, 14 & 15, 1987

& February 5, 1988

DOWNER, J.A. (Ag.):

Marley and Plant, the appellants before this Court, are a firm of building contractors who entered into a contract to build 216 houses on a site in Hellshire Park, St. Catherine, at a cost of $8,000,000. for Mutual Security Housing Services Limited. Prior to this appeal, there were lengthy hearings before Mr. Alex Twyman, a chartered surveyor who was the chosen arbitrator by the parties. Those hearings were the result of a reference by the Supreme Court after both parties had consented to a stay of proceedings and that the issues which were in dispute were to be determined by

arbitration. The matter returned to the Supreme Court at the instance of the respondent who persuaded Wolfe, J., to set aside the award of $1,203,036.70 to Marley and Plant on the ground of misconduct, in that the arbitrator in making his award did not follow the terms of reference and that there was an error on the face of the record.

The jurisdiction of the Supreme Court to set aside the award of an arbitrator is circumscribed because the parties have chosen their own tribunal and the findings of an arbitrator expressed or necessarily implied are not to be disturbed save in certain well defined circumstances. Here is how McNair, J., defined these circumstances in Demolition & Construction Company, Ltd. v. Kent River Board [1963] 2 Lloyd's Reports 7 at page 13 -

> "In an arbitration, the arbitrator's views of the law may be controlled in two ways. If he states on the face of the award a theory which shows that he has committed an error of law—and deciding the matter without any 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. Alternatively, if it is suspected by either party that there is a danger that the arbitrator may be going to commit an error of law in his decision, he may be asked to state a case upon that matter. That is the right way of raising matters of this kind."

Moreover, in interpreting an award, Courts are mindful that many arbitrators are not learned in the law so that there is a reluctance to set aside awards when there is a reasonable interpretation which will uphold it.

It is necessary to set out the terms of reference as so much turns on them, and the decision of Wolfe, J., is based on the construction of Clause (c) of the Terms of Reference. The terms are as follows:

"The Arbitrator is appointed herein

(a) To hear and determine the claims submitted by MARLEY AND PLANT LIMITED and the counter claims of MUTUAL HOUSING SERVICES LIMITED arising out of a construction contract dated 15th September 1982, as amended by Deed dated 21st May 1984, for the construction of 216 houses including infrastructure works on land owned by MUTUAL HOUSING SERVICES LIMITED at Hellshire Park in the parish of Saint Catherine

(b) to make such awards as to any quantum of moneys, compensation or other remedies as the Arbitrator may in his findings deem fit

(c) to rule on the issues set out in the Claims and counter claims before him and to hand down such findings as he may deem fit based on the evidence placed before him A N D

(d) to award such other remedies as may be reasonable in all the circumstances."

No dispute arose concerning Clause (a). It is patent that in hearing and determining the claims by Marley and Plant and the counter-claims by Mutual Housing Services Limited, issues of law and fact were to be decided by the arbitrator. Clause (b) required him to make an award in terms of money compensation and other remedies which he might in his findings deem fit.

The general law is clear. It is that save in an award on a special case an arbitrator need not give any reasons for his award. Further, his findings of fact and law cannot be challenged unless an error of law appears on the face of the award and such an error can only be detected if there is a speaking award. In Heaven & Kesterton, Ltd. v. Sven Widaeus [1958] 1 All E.R. 420, Diplock, J., emphasised this at page 424:

> "Before I look at those reasons, I think it is desirable to consider what is the principle that lies behind the now established right of the court to interfere with the exercise of the discretion of an arbitrator in regard to costs. The basis and utility of arbitration as a method of determining disputes is that the parties select their own tribunal and agree to be bound by its decision on fact and, in so far as they do not take advantage of the special remedies by way of a Special Case, on questions of law. In general, an award of an arbitrator cannot be set aside for error whether of fact or of law except by the machinery which is supplied through a Special Case, or if he chooses to make a speaking award, when it may be set aside for error on its face."

Against this background, findings of law and fact on which the arbitrator based his award pursuant to clause (b), need not be expressed and a statement that no award was made on a claim or counter-claim, as was done in this instance, must mean that the findings of law and fact are against the claimant Marley and Plant or the counter-claimant Mutual Housing Services Limited. It is in the light of such circumstances that we turn to the interpretation of clause (c). To my mind the requirement that the arbitrator rule on the issues set out in the claims and counter-claims means no more than to make an award on the separate claims and counter-claims, instead of making a global award. Such a global award could have been made had the arbitrator's terms of reference stopped at (b). As regards the mandate to make such findings as he deemed fit, once an award was made on a claim or counter-claim, then the findings were implicit on the award and there was no need to express either the findings of law or fact unless a special case was requested by the parties or it was resorted to by the arbitrator. Nor could clause (c) require a speaking award as Mr. Rattray contended, or it would have specifically

expressed it. In matters of construction it is the words which express the meaning and I cannot find any words in clause (c) which compel a speaking award.

The first and second grounds of appeal of Marley and Plant read:

> "1. That the Learned Trial Judge erred in law in finding that the Arbitrator's ruling on the issues in relation to the Counter-claims 1 - 7 inclusive, was insufficient having regard to the Terms of Reference.
>
> 2. That the Learned Trial Judge erred in finding that the Arbitrator failed to rule on the question of liquidated damages."

It is appropriate to cite a relevant passage from the judgment to see whether the submissions developed by Miss Phillips were correct. Page 156 of the record reads:

> "I take the view that the arbitrator in keeping with paragraph C of the Terms of Reference ought to have made specific findings in respect of the claim for liquidated damages. I am inclined to this view because the claim raised fundamental issues on the question of performance. What really does "No award" mean in relation to this claim. Does it mean that the contract has been performed in keeping with the terms of the contract. Does it mean that by virtue of Clause 17 of the Deed the owner was estopped from recovering liquidated damages or is it that the arbitrator concluded that the allegation of misrepresentation had been established. These questions posed involved issues of law and fact which necessitated the arbitrator making specific findings. The owners were entitled to know the basis on which the "No award" was made. My reasoning is applicable to counter-claims 2 - 7 all of which are claims arising out of the performance or non-performance of the contractor.
>
> Failure to have dealt with the issues in accordance with paragraph C of the Terms of Reference is an irregularity. The parties who were responsible for drafting the Terms of Reference must have had reasons for

> "framing and including paragraph C in the Terms of Reference. The obvious reason, if one were to hazard a guess, was that the parties were not only seeking monetary awards but wished to have the issues between them decided and ruled upon by the arbitrator. An arbitrator is under a duty to strictly observe and comply with the Terms of Reference."

So far as the award is concerned, the arbitrator in dealing with Counter-claims 1 - 7 inclusive, stated: "I make no award in respect of these claims." It is instructive to reiterate that the arbitrator is a chartered quantity surveyor and that the appellant and the respondent are in the field of construction.

The simple statement that no award was made on the counter-claim meant that the counter-claimant failed both on the law and on the facts. The counter-claims were not part of the award so as to be read with it. The law on this aspect has been accurately stated in the headnotes of Belsfield Court Construction Co. Ltd. v. Pywell [1970] 1 All E.R. 453, and it reads as follows:

> "..... (ii) there was no indication in the relevant authorities, dating from 1857, that pleadings were documents of such a specialised nature in relation to an arbitration that they could always be looked at by the court, and they were therefore not in a special class and the court's approach must be the same narrow and critical one employed when considering whether contracts or clauses in contracts had been incorporated into awards."

The relevance of this rule of law is that Wolfe, J., was not empowered to examine the claims and counter-claims as part of the award and in so far as he did so he was in error and this error justified the appellant's fourth ground of appeal which reads:

"4. That the Learned Trial Judge erred in law in holding that he was entitled to have referred to material not mentioned or incorporated in the award."

The respondent's complaint that the arbitrator failed to rule on issues was not well founded. Although the issues were formulated in the Claims and Counter-claims, when the award stated on its face "no award", the findings of fact, rulings of law, on the claims and counter-claims were implicit on the award. In Oleifico Zucchi S.P.A. v. Northern Sales, Ltd. [1965] 2 Lloyd's Reports 496 at 522, McNair, J., stated the position thus:

> "Now, admittedly, it is misconduct for an arbitrator to fail to decide issues in the sense of claims which have been submitted to him or to decide an issue in the sense of a claim which has not been submitted to him, but, as I see it, it cannot be misconduct for an arbitrator to wrongly decide or wrongly to state a contention or way in which a claim is put because that is not the issue which is referred to. The issue is the claim."
> [emphasis added]

The issues on the counter-claim were decided against Mutual Housing Services Limited, and in this instance, they cannot be disturbed unless misconduct is established. Since the first counter-claim was for liquidated damages, that as well as the other counter-claim failed also.

In addition to awarding separate sums of money in respect of Claims 1 - 6 which amounted to $1,203,036.70, the arbitrator also awarded interest at the rate of 15% on the sum from 29th April, 1984 to August 1985. Here is how the amount relating to interest was set out:

"SUMMARY

The amount awarded to the Plaintiff, Marley and Plant Ltd. in respect of their Claims Nos. 1 to 6 inclusive, is $1,203,036.709.70 (sic) (ONE MILLION, TWO HUNDRED AND THREE THOUSAND, THIRTY SIX DOLLARS AND SEVENTY CENTS). Interest at the rate of 15% (FIFTEEN PER CENT) should be paid on this sum from 28th April 1984 until 27th August 1985."

"COSTS.

The costs of this Arbitration which should be AGREED OR TAXED will be paid by the RESPONDENTS - MUTUAL HOUSING SERVICES LTD."

In this regard, it is Mutual Housing Services Limited, who challenged the award of interest in their respondent's notice. The contention was that if there was no power to award interest, the award would be bad on its face and that the arbitrator misconducted himself. On this aspect of the matter, Wolfe, J., contented himself by adopting the elaborate and learned reasoning of Smith, C.J., on the question of interest in Raymond International (Jamaica) Ltd. et al v. The Government of Jamaica (unreported) Supreme Court Judgment Suit No. M. 60 of 1974, and decided that the arbitrator had the powers he assumed in awarding interest. What was the basis of the decision in the Raymond International case? The Court examined the provisions of the two relevant statutes, namely, Provisions of Interest (Allowance by Jury) Act 1908 and Law Reform (Miscellaneous Provisions) Act 1955. It is pertinent to set out the relevant provisions of both Acts so that effect of the latter Act on the earlier one can be easily grasped. Sections 2, 3, & 4 of the earlier Act are as follows:

> "(2) Upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue or inquisition of damage may if they shall think fit allow interest to the Creditor at a rate not exceeding six per centum per annum at the time when such debt or sum certain were payable or if some such debt or sum be payable by virtue of some written instrument at a certain time or if payable otherwise then from the time when the demand of payment shall have been made in writing so as demand shall give notice to the debtor that interest will be claimed from the date of such demand until the terms of payment, provided that interest shall be payable in all cases in which it is now payable by law."
>
> "(3) The jury on trial of any issue or inquisition of damages may, if they think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure in all actions of trover or trespass de bonis asportatis and over and above the money recoverable in all actions on/or policies of Insurance made after the passing of this Act."
>
> "(4) In all cases where resort shall be had to arbitration in order to settle the sum payable to any creditor or claimant, the arbitrator, arbitrators or their umpire shall have the like power of allowing interest as a jury has under this Act."

On the other hand, the material part of the Law Reform (Miscellaneous Provisions) Act reads:

> "3. In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

It is clear that Section 3 of the Law Reform (Miscellaneous Provisions) Act impliedly repeals Sections 2 and 3 of the earlier Act and that Section 4 of the ~~earlier~~

Act still stands and that empowers an arbitrator to award interest like a jury under the Act. But the power of the jury in Sections 1 and 2 to award damages under the earlier Act has been repealed so there is no longer this statutory power in an arbitrator to award interest in the nature of damages over and above the money recoverable.

How then did Smith, C.J., justify the power to award interest in the Raymond case? In Chandris v. Isbrandtsen Moller Co. Inc. [1950] 2 All E.R. 618, it was decided that by virtue of Section 3 of the Law Reform (Miscellaneous Provisions) Act 1934, (U.K.) which was the origin of Section 3 of our 1955 Act cited previously, the award of interest is now part of the general law of contract and that since an arbitrator must apply the general law, then he is empowered to award interest. Here is how Tucker, L.J., summarised counsel's argument which he approved and made the basis of his judgment. At page 621 he said:

> "The argument for the claimant is that just as in 1851 the arbitrator derived his power to give interest directly, not from the Act of 1833, but from a submission to him of all matters in dispute, so, now, in 1950, the arbitrator does not derive his jurisdiction to give interest from the Act of 1934, but from the submission to him of the disputes, which involves that he has to deal with those disputes according to the law of the land and that he is clothed with authority to give to the claimant such rights and remedies as would have been available to him in a court of law having jurisdiction to deal with the same subject-matter. Counsel submits that, applying the reasoning of SIR JOHN JERVIS, C.J., in Edwards v. Great Western Ry. Co., [1851], 11 C.B. 586; 21 L.J.C.P. 72; 138 E.R. 603; 2 Digest 473, 1176, to the statute of 1934, in which we find a court of record substituted, for a jury, the same result should follow, viz., that, by reason of the submission, the arbitrator has been clothed with authority to deal with this matter in the same way as that in which it could have been dealt with by a court of record."

Accordingly, therefore, the award of interest was appropriate.

The other area which was challenged by Mr. Rattray by virtue of the respondent's notice was that the statement "I make no award" and the statement "I award the plaintiff", did not satisfy the essential characteristics which the court requires in an award. Miss Phillips, in her admirable submissions, pointed out that the award determined the dispute, that it was certain, in that it showed who was obliged to pay whom, and that it stipulated the manner of payment and made an award of costs. In supporting her submissions, counsel illustrated them with appropriate authorities. In Brown v. Croydon Canal Company [1839] A & E 522, the arbitrator examined all the evidence and awarded a balance despite the fact that there were competing claims. It was held that the award was sufficient. Here the award made separate findings on each claim and counter-claim in accordance with the terms of reference.

In Wynne v. Edwards [1844] 12 M. & W. 708 and Jewell v. Christie [1866] L.R.C.P., 296, it was decided that if by any intendment the words could be construed as final, the court should uphold the award. Alderson, B., in the earlier case said at page 712: "Why should we go out of our way to put an unnatural construction on the words, in order to defeat the award, which we ought rather to struggle to uphold?" In my opinion, it is clear that "I make no award on the counter-claim", means that Mutual Housing Services were not to be paid, and that correspondingly "I award $X to Marley and Plant" meant that the contractors were to be paid. On this aspect of the case also, the respondent has failed.

The result is that the appellant has succeeded on every ground of appeal and the award which was set aside by Wolfe, J., must be restored. The respondent must pay the taxed or agreed costs both here and below.

ROWE, P.:

I have read the opinion of Downer, J.A. (Ag.). I agree with his reasoning and his conclusions, and I too would allow the appeal and restore the award made by the Arbitrator.

WHITE, J.A.:

I agree with the judgment of Downer, J.A. (Ag.).