C.A. CIVIL — ARBITRATION — Power of Court to set aside arbitrator's award — it must appear on the face of the award that the arbitrator had proceeded on principles which were wrong in law — CONSTRUCTION — Insurance Policy — whether policy covering "building" included "bridge". APPEAL against Order of Edwards J examining an application to set aside an arbitrator's award (that "building" did not include "bridge" DISMISSED

(Cases referred to) Carlisle's v Comp

Legal Drafting and Interpretation Arbitration

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 78/90

COR: THE HON. MR. JUSTICE CAREY - P. (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	NATIONAL SUGAR CO LTD & ORS	APPELLANTS
AND	AMERICAN INTERNATIONAL UNDERWRITERS (JAMAICA) LTD & ORS	RESPONDENTS

Miss Hilary Phillips & Mrs. Denise Kitson instructed by Perkins, Grant, Stewart, Phillips & Co for Appellants

Dennis Morrison & Miss Ingrid Mangatal instructed by Dunn Cox & Orrett for Respondents

27th, 28th, 29th May & 11th June, 1991

CAREY, P. (AG.)

This appeal relates to arbitration proceedings involving a dispute whether a bridge came within the definition of "buildings" in a clause in an insurance policy covering the insured's property. The background of this matter is as follows:

The appellants entered into a written collective insurance agreement policy with the respondents whereby all the insured's property described in the agreement, were covered by the policy. As a result of loss occasioned by flood damage to their property, the appellants entered into negotiations with the respondents to settle their losses. The respondents, in the event, agreed to satisfy all claims except loss due to damage to a bridge known as Knight's Bridge which the respondents contend was not covered under the policy. The parties thereafter agreed to submit this dispute for settlement to an arbitrator. The actual term of the agreement was in these words:

> "All the matters in difference between the parties hereto as contained in and arising out of the aforesaid action especially the questions whether the said KNIGHT'S BRIDGE is included under the aforesaid Agreement and whether in the circumstances the INSURERS are liable to indemnify the INSURED for the said loss incurred shall be referred to arbitration for award and final determination by a sole arbitrator."

Consistent with that agreement, the declaration sought in the statement of claim recited as follows:

> "A Declaration that the aforesaid Knight's Bridge is included in the property Insured in the Collective Insurance Agreement Policy No. AH-MP-53-31018 and as a consequence the Insurers are liable to Indemnify the Insured for loss Including consequential loss and damage to the aforesaid bridge."

The defence averred (so far as is material) as follows:

> "The Insurers say and continue to say that Knight's Bridge was not covered under the said Policy.
> The Insurers will contend that the said bridge was a road or formed a part of a road and that it was an express term of the said policy that the Insurance did not extend to cover roads."

The parties selected Mrs. Angella Hudson-Phillips Q.C. as arbitrator. In her award, she stated (inter alia) that -

> "It was agreed by the parties on the 14th day of March, 1989 that I would only determine the question of liability, that is, whether KNIGHT'S BRIDGE is part of the property insured by the aforementioned Policy."

In refusing the declaration sought, she said -

> "I award and adjudge that the said Knight's Bridge is not part of the 'property insured' by the aforementioned policy and that the Insurers are not liable to the Insured in respect of damage caused to the said Knight's Bridge by flood."

The clause in the policy which the appellants claimed covered Knight's Bridge was expressed in these terms:

> "the Property Insured is Buildings, including 'Landlord's fixtures and fittings, foundations, Gates, Walls Fences, Paved Areas, Machinery, Plant, Equipment, Furniture fixtures and fittings, Spare Parts, Stores including Goods in Trust or on commission for which the Insured is responsible and All other Contents at the following locations:"

The appellants applied to the Supreme Court to set aside this award, but the application was dismissed by Edwards J, by an order dated 19th July, 1990. This appeal is from that order. We heard submissions from counsel between 27th and 29th May when having dismissed the appeal, we promised to put our reasons in writing. These are they.

The approach of this Court as indeed of Edwards J, to this award can be informed by the dicta of Lord Cave L.C. in **Kelantan Government v. Duff Development Co., Ltd** [1923] All E.R. (Rep.) 349. The learned Lord Chancellor having held that the reference in the case before their Lordship's House related to a matter of construction, continued thus at pages 354-355:

> "If this be so, I think it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is generally speaking - a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally for instance, that he has decided on evidence which in law was not admissible, or on principles of construction which the law does not countenance, then there is error in law

> "which may be ground for setting aside the award, but the mere dissent of the court from the arbitrator's conclusion on construction is not enough for that purpose."

The House approved the statement of the rule by Channell J. in the King's Bench Division in **Re King and Duveen and Others** [1913] 2 K.B. 32 at page 35-36 where he said:

> "... It is no doubt a well-established principle of law that if a mistake of law appears on the face of the award of an arbitrator, that makes the award bad, and it can be set aside. The decision of the House of Lords in British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London [1912] A.C. 673, though that was in some respects a somewhat peculiar case, clearly shews that the general principle is as I have stated; but it is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator."

This court itself recognized the limits of a superior court's powers to interfere with arbitration awards in C.A. 3, 4 and 5/87 **Marley & Plant Ltd v. Mutual Housing Services Ltd** (Unreported) 5th February, 1988:

> "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."

Finally, I would mention **F.R. Absalom Limited v. Great Western (London) Garden Village Society Limited** [1933] A.C. 592. The House of Lords reviewed the authorities with respect to the two different types of situations in which an arbitrator's award may be set aside.

Lord Russell at page 607 expressed his opinion thus:

> "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."

Lord Wright to the same effect at page 615:

> "The rule was again restated with approval by Lord Dunedin giving the opinion of the Privy Council in Champsey Bhara & Co v. Jivraj Balloo, etc., Co [1923] A.C. 480. I know of no authority that limits its application so as to exclude cases in which a question of law must necessarily arise; indeed, if that were so, the rule would be in effect meaningless. The rule in truth applies to the ordinary case where, in the words of Lord Dunedin [1923] A.C. 488, 489, the submission refers 'to the arbitrator the whole question whether it depends on law or on fact.' To be contrasted with such cases there is the special type of case where a different rule is in force, so that the Court will not interfere even though it is manifest on the face of the award that the arbitrator has gone wrong in law. This is so when what is referred to the arbitrator is not the whole question, whether involving both fact or law, but only some specific question of law in express terms as the separate question submitted; that is to say, where a point of law is submitted as such, that is, as a point of law, which is all that the arbitrator is required to decide, no fact being, quoad that submission, in dispute."

The question referred to the arbitrator was, quite clearly, a specific question of construction, viz, was Knight's Bridge a "building" within the terms of the clause in the policy. It was argued by the appellants, not with any degree of confidence,

that a specific question had not been referred to the arbitrator, rather it was a mixed question of fact and law. Counsel relied on Parsons v. Brixham Fishing Smack Insurance Co. Ltd [1918] 118 L.T. 606. But, with all respect to Miss Hilary Phillips that case is plainly distinguishable from the instant case. In the case cited, the operative part of the reference were the words - "all matters in difference between the parties hereto in reference to the said claim for a general average contribution by the assurer against the society." The Kings Bench Division properly came to the conclusion that the question was of a most general character. Contrast that with the situation in the present case. The parties agreed that the question for decision was whether Knight's Bridge was a "building" within the meaning of the clause of the policy. That was a specific question of law which the arbitrator answered, unhappily for the appellants, not in their favour. It is settled law that this court cannot interfere merely on the ground that we would come to a different conclusion. We may only interfere where the arbitrator has proceeded illegally viz, on principles of construction which the "law does not countenance." Lord Cave himself explained that phrase as "wrong principles of construction."

Miss Phillips fully appreciating, there was nothing in her first salvo, next submitted that the arbitrator had indeed proceeded on a wrong principle of construction. She said that the word "building" was interpreted without reference to the word "including landlord's fixtures and fittings" which followed. The plain intention of the draftsman she said was to expand or enlarge the meaning of "buildings" in the term in the policy. Further the meaning of buildings was extended to include landlord's fixtures and fittings. By stating as she had in her reasons that building was to be interpreted in its plain, ordinary and popular meaning as "involving a structure with a roof and a support for that roof," she had construed including in a restrictive sense as opposed to

the expansive or extensive sense which the cases showed it had. She cited cases where the word "includes" was construed in the sense for which she contended. As a further or subsidiary point, she said that, the arbitrator imported words not included in the clause being interpreted. She was alluding to the arbitrator's reasoning at paragraph (g) of her reasons, where she wrote -

> "(g) However, in the light of the use of the word "including' after the word "Building' in the description of the 'property insured' and of the fact that the phrase 'including landlord's fixtures and fittings' is in parenthesis, the landlord's fixtures and fittings referred to must, in my opinion be landlord's fixtures and fittings attached to, or affixed to, or referable to, buildings in the nature of structures with roofs and supports for the roofs;"

The words underlined constitute the imported words.

These arguments do not show that the arbitrator acted illegally, that is, used any rule of construction not countenanced by law. A restrictive interpretation of "including" is not a wrong principle of construction: it is no more than a construction with which the appellant does not agree. There is no inflexible rule of construction that the word "including" must be construed in a sense of enlargement, regardless of the context. Mr. Morrison was entirely correct when he called attention to some three cases where that word was construed in a restrictive sense. In **Commissioners of Customs and Excise v. Savoy Hotel Ltd** [1966] 2 All E.R. 299 at page 301, Sachs J, pointed out the protean qualities of the word. He said:

> " 'Included' is a word to which parliamentary draftsmen seem considerably addicted: one reason for this may be that in law it can have, according to its context, not only one or other of simple but in essence quite differing effects (for instance, in relation to the words that follow it may be found to have been used simply to enlarge, to limit, to define exhaustively or for the avoidance of doubts to repeat the preceding

> "word or phrase), but it may also be used to secure on one and the same occasion more than one of those effects thus putting the draftsman, but not necessarily the court, in a happy position."

Mr. Morrison argued that the cases cited as to the construction of "including", demonstrate not a rule of construction but an approach that might be appropriate in the circumstances and context of a particular case. That argument, in my opinion, is well-founded.

Counsel for the appellants failed to recognize that in giving the word "building" its plain, ordinary and popular meaning, the arbitrator was invoking a principle countenanced by law. She did not ignore the word to which, Sachs J, suggested, draftsmen seem considerably addicted. She construed it as enlarging building, albeit, not in the way counsel suggested. That is not "illegality" which would constrain the court to interfere; it is a difference in construction. No wrong principle is involved. The arbitrator also considered the context in which the word was used. See paragraph (g) of her reasons which have already been recited.

I have said enough to show that there was no error on the face of the award which would allow me to interfere by setting aside the award. A specific question of construction which is a question of law was submitted to the arbitrator. She answered that question. Even if the decision is erroneous, that would not make the award bad on its face to allow its being set aside. The last words must be those of Bray J in Re King and Duveen (supra) at page 37:

> "... The parties agreed to be bound by the decision of the arbitrator and they are bound by it, although it may be erroneous in law."

The conclusion is inevitable that the appeal must be dismissed.

FORTE, J.A.

I have had the opportunity of reading the judgment of Carey P, (Ag.) and agree with the reasons and conclusions therein. In my view the dicta of Lord Russell and Lord Wright in the case of **F.R. Absalom Ltd v. Great Western (London) Garden Village Society Ltd** [1933] A.C. 592 referred to in the judgment of Carey P, (Ag.) settles very clearly the issue involved in this case. Persons agreeing to refer specific questions of law to an Arbitrator, must abide the decision of the Arbitrator unless it is apparent on the face that some illegality influenced the award. In this case, despite the enthusiastic efforts of counsel, the appellant has failed so to show, and consequently I agree that the appeal should be dismissed.

GORDON, J.A.(AG.)

I entirely agree.