NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO HCV 02205/2004

BETWEEN	**VRL SERVICES LIMITED**	**CLAIMANT**
AND	**SANS SOUCI LIMITED**	**DEFENDANT**

IN CHAMBERS

Dr. Lloyd Barnett instructed by Hugh Hart of Hart, Muirhead and Fatta for the claimant

Mr. Stephen Shelton and Miss Haydée Gordon instructed by Noel Levy of Myers, Fletcher and Gordon for the defendant

November 8 and 9, 2004

Sykes J (Ag)

APPLICATION TO SET ASIDE PERMISSION TO ENFORCE ARBITRATION AWARD

1. On September 22, 2004, Reid J granted permission to VRL Services Ltd (VRL) to enforce its arbitration award against Sans Souci Limited (SSL). Section 13 of the Arbitration Act authorised this course. SSL now applies to set aside the order or in the alternative to stay execution of the award until the final determination of SSL's application in Claim No. 2004 HCV 2161. The grounds on which it relies are

a) VRL's application was made ex parte and it failed to disclose to Reid J that SSL had filed a challenge to the arbitration award before VRL had applied to enforce the award;

b) SSL should have the opportunity to argue its case first since it was filed first;

c) the award is ambiguous and cannot be enforced summarily under section 13 of the Arbitration Act.

2. The application was dismissed with costs of the application to VRL and leave was granted to SSL to appeal. These are my reasons.

History

3. VRL and SSL are companies incorporated in Jamaica. VRL is in the business of managing hotels. SSL is a hotel operator. SSL leased and operated a hotel known as Sans Souci, which is located near the St. Mary/St. Ann border. In October 1993, SSL contracted VRL to manage the hotel. A dispute arose between the parties because SSL purported to terminate the contract. VRL resisted the termination. It alleged that SSL was acting in breach of the contract. The matter was referred to arbitration in accordance with terms of the contract. The arbitrators found in favour of VRL and made their award accordingly. VRL obtained the order from Reid J referred to in paragraph one.

4. The Arbitration Act permits the successful party in the arbitration to utilise the court to enforce his judgment. The advantages are many but the most significant one is that once permission is given, the award can be enforced as if it were a judgment of the Supreme Court. In practical terms, this means that SSL is staring down the wrong end of the enforcement barrel. The award is a hefty JA$370,705,264.40 with interest of $14,731,116.08 added up to the end of September 2004. VRL is now in a position to enforce the award without any further litigation – no claim form, no witness statements and no case management. SSL wants to prevent this from happening or at least delay the pulling of the trigger. I will now deal with SSL's first major point, which is that VRL did not disclose that SSL had filed a legal challenge to the award.

The non-disclosure point

5. Mr. Shelton contended that the non-disclosure to Reid J that the defendant was challenging the arbitration award is sufficient for the order to be set aside. Mr. Shelton relied on ***Excomm Ltd. v Ahmed Abdul-Qawi Bamaoadah*** [1985] 1 Lloyds Rep 403, 411; ***Citibank N.A. v Office Towers Ltd and Adela International Financing Company S.A.*** (1979) 16 J.L.R. 502; ***Jamculture Ltd v Black River Upper Morass*** (1989) 26 J.L.R. 244. When I had delivered my oral judgment, I had not accepted the point made by Mr. Shelton. However having reread the cases and ***Excomm Ltd.*** in particular it does indeed support the point made by Mr. Shelton which is that on an ex parte application, even in one such as this, there is a duty to make full disclosure to the court. ***Excomm Ltd.*** was a case in which an application had been made to enforce an arbitration award.

6. Having said that, I am of the view that the omission to state to Reid J that the award was being challenged was not a material omission in the context of this case. In the event that I am wrong on this, I consider that discharging the order is not an appropriate remedy in the circumstances of this particular case. Lord Denning M.R. in ***Middlemiss & Gould (A Firm) v Hartlepool Corporation*** [1972] 1 W.L.R. 1643 stated that an arbitration award is like a final judgment which should be enforced unless it can be shown to be invalid. Edmund Davies LJ said much the same thing. In that case, the award was not challenged in the required time and so was final and conclusive. To that extent, the case before me is different from ***Middlemiss'*** case.

7. While I am not ignoring the law relating to full disclosure it does not seem right that I should reverse an order to which, prima facie, the claimant is entitled. The award was arrived after both parties had the opportunity to put forward their respective arguments. At this stage, if there is no prima facie showing of error in law or logic, I do not see how I could reverse an order made by this court on what

has amounted to just the opinion of learned counsel that the arbitrators erred in interpreting the contract.

8. The case of ***Excomm*** shows that when deciding how to deal with any alleged non-disclosure the courts look at everything in the round. The courts look at the significance of the non-disclosed material and its possible effect on the case. The ***Jamculture*** case was one in which the very foundation of the action was removed once the true position was admitted by counsel. In ***Citibank,*** the nature of the non-disclosure had the effect of causing a second mortgage to be registered out of time and in priority to another mortgage that existed before the second mortgage. This fact was known to the person who applied to register the mortgage out of time. The situation here is far removed from that of ***Jamculture*** and ***Citibank.***

9. Non-disclosure is not considered in splendid isolation. The cases of ***Jamculture*** and ***Citibank*** were cases in which the information that was not disclosed would have had the effect of puncturing the case of the beneficiary of the order below the water line. This is not to say that this must be the effect of non-disclosure before an order is set aside on this basis, since it is well known that a court may, purely as a punitive measure, set aside an order obtained in breach of the duty of full disclosure. I am not under estimating the need to make full disclosure but the sanction, assuming there has been a breach of the duty, has to be applied on the context of the particular case. A judicial discretion ought not to be reduced a mechanical application of the law without reference to all the circumstances of the case. I take this approach in this case. I have concluded that while it is true that VRL did not disclose that SSL was challenging the award, I am not convinced that the sanction of reversing the order of Reid J is appropriate. I now say why.

10. The comments I am about to make are restricted to the circumstances of this application. Sometimes reasons are given in support of an arbitration award. If these reasons are available then in my view a court can look at these to see if they

are logical and internally consistent. This examination by the court must include looking to see if the relevant law was identified and applied. If Mr. Jones is going to succeed in setting aside the order of Reid J, there must be something that suggests that award is incorrect. The say so of the challenger cannot fulfil this test because if that were allowed the result would not be the exercise of discretion but a metamorphosis of the challenger's opinion into a judicial order through the medium of a judge who would not have examined the matter at all.

11. What I am saying in paragraph 10 is that if this order is to be reversed it seems to me that there has to some kind of qualitative assessment of the award. I am not saying that one has to establish that success in setting aside the award is assured. I think that would be setting the bar to high. However it cannot be as low as legal advice suggesting that there are good grounds for setting aside the award. To my mind there has to be material that shows that a different order was likely had the additional information been brought to the attention of Reid J. That is to say that there has to be some examination of the award to see if there are errors, whether patent or latent.

Application to case

12. In this case, the reasons for the award were made available to me. I have examined the reasoned decision of the arbitrators. On the face of it I have not detected any failure by the arbitrators to identify the correct law and to apply the relevant legal principles. Section 13 of the Arbitration Act does not state the applicable criteria when an application to set aside the permission granted to enforce an award.

13. They have correctly identified the correct principles of law applicable when interpreting a written contract. The correct approach to the interpretation of contracts is objective. This was affirmed by the House of Lords in ***Investors Compensation Scheme v West Bromwich Building Society*** [1998] 1 W.L.R.

896 and ***B.C.C.I. v Ali*** [2001] 1 A.C. 251. The arbitrators identified the correct legal principles applicable to force majeure clauses in particular.

14. The arbitrators had to determine whether the contract could be terminated under clause 14 (iv) of the contract between the parties. In so doing they said that they looked at the purpose of the contract in order to interpret the relevant provisions. This is consistent with the fourth principle of contractual interpretation identified by Lord Hoffman in the ***Investors Compensation*** case. Lord Herschell LC in ***Glynn v Margetson & Co*** [1893] A.C. 351 stated over 100 years ago that it is legitimate to have regard to the commercial purpose of the contract when it is being interpreted. Lord Steyn reaffirmed this principle in ***Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*** [1997] A. C. 749.

15. The next step the arbitrators took was to apply the law to the contract. Their conclusion, on the face of it, was quite logical and rational. I do not see any error in the internal logic of the arbitrators' approach to the contract. The reasoning and analysis are linear proceeding on an identifiable path, building upon the established premises of fact and law, to their ultimate conclusion. I was not pointed to any example of bad logic or wrong law. In the absence of anything of this nature it seems to me that the award is valid and the fact of a challenge, however dramatic the language, is not sufficient to prevent effect being given to it.

16. Mr. Shelton said that my approach is not appropriate at this stage. He submitted that what I am doing can only properly arise when the actual challenge to the award comes up hearing when at that time more detailed arguments will be deployed before the court in order to demonstrate that the challenge has some merit and should go forward. If this is correct, which I doubt, logically, I am unable to see the value that would be added to Reid J's evaluation, if he adopted Mr. Shelton's approach. This would mean that Reid J would not look to see if there was any defect in the award. On Mr. Shelton's submission, simply telling Reid J that there was a challenge to the award, without more, would be sufficient to

prevent him granting the order. The problem I have with this approach is that it would reduce the court to a rubber stamp – once there is the fact of a challenge then that without more is sufficient to either prevent the enforcement of the award or to reverse an order granting permission to the successful party to enforce the award. If this is what the function of the court is reduced to, then the law ought to make it very explicit.

17. I do not see any ambiguity in the award that would make the award unenforceable. On the question of damages, the arbitrators had before them a number of witnesses. The arbitrators, as they were entitled to do provided the basis was rational and reasonable, clearly preferred the method of calculation used by Miss Kathleen Moss. The arbitrators suggested that the defendant's method involved a double discounting. Again the internal logic of the analysis of the arbitrators appears to be faultless. My conclusion is the same regarding interest.

18. I now consider the alternate ground of a stay of execution. Mr. Shelton relied on ***Flowers, Foliage & Plants of Jamaica Limited and others v Jamaica Citizens Bank Limited*** SCCA No. 42/97 (September 29, 1997). In that case Rattray P cited with approval the decision of Staughton LJ in ***Linotype-Hell Finance Ltd v Baker*** [1992] 4 All ER 887. The principle apparently accepted by both Courts of Appeal is that a stay of execution should be granted if the applicant can show that he would be ruined if execution proceeded and that he has an appeal which has some prospect of success. The question is what does some prospect of success mean? Neither case attempted to define the expression. In ***Linotype-Hell*** the applicant raised the issue of forgery. This was quite a generous interpretation of the evidence by the Lord Justice. What the applicant was saying was that he could not recall signing the questioned document. He wished to have it analysed by a handwriting expert. If a handwriting expert was needed, it does suggest that the likeness between the questioned signature and the genuine must have been very close, so close that the applicant needed an expert to resolve it,

given the applicant's memory loss. In ***Flowers Foliage,*** the applicant raised issues challenging the validity of a guarantee and whether the bank acted legally in unstamping the mortgage.

19. These cases demonstrate that, whether a stay of execution is granted, depends on the material before the court at the application is made. I have not seen any material that suggests that SSL has any prospect of success. It may that this is the result of the opinion of Mr. Shelton that at this stage he is under no obligation to deal with the merits of the award in any detail. He said that since the matter is coming up for hearing later in this month it would be more appropriate at that stage to go more into the merits of the award in order to show the prospect of success. To put it bluntly, he was saying that I should not embark upon any qualitative examination of the award. This kind of reasoning involves the court in hopeless circularity. Mr. Shelton's submissions can be set out in this way:

Counsel: *A stay should be granted because there is some prospect of success.*
Judge: Why do you say that there is some prospect of success?
Counsel: *I cannot tell you because that is not an appropriate enquiry at this stage.*
Judge: How then do I decide whether you have some prospect of success?
Counsel: *Well, eminent counsel has so advised?*
Judge: Why does eminent counsel say he has some prospect of success?
Counsel: *That is not an appropriate enquiry at this stage.*

As I understand it, it is not sufficient for the applicant to state he has some prospect of success. It has to be demonstrated. To demonstrate that one has some prospect of success does not mean that the applicant has to show that he is virtually bound to succeed. The two cases cited by Mr. Shelton on this ground show that some qualitative assessment was done. The cases do not say so explicitly but unless that were done, there would be no rational or logical basis for

the courts to have concluded that there was "some prospect of success." It is because of this analytical approach why I dismissed the application for a stay of execution without prejudice to SSL renewing the application on November 30, 2004

21. The first-in-time point was not seriously pursued and so I do not address it. In any event, Mr. Hugh Hart swore an affidavit dated October 28, 2004 on behalf of VRL in which he stated that VRL does not intent to enforce the award until SSL has had its day in court on the issue of setting aside the award. Permission to enforce was simply an act designed to secure for VRL the ability to enforce the judgment should that become necessary.

Conclusion

22. There is no evidence before me that suggests that Reid J would or might have made a different order had he been told that SSL was challenging the award. The applicant has not demonstrated any prima facie error in logic or legal principle in the award. The assessment of the damages appears to be based on sound evidence; so too, the calculation of interest.

Orders

(a) Application to set aside order of Reid J dismissed.

(b) Application, in the alternative, to stay execution until matter heard dismissed without prejudice to SSL making another application for stay of execution.

(c) Costs to VRL

(d) SSL granted leave to appeal