NMCS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2007/HCV00427

IN THE MATTER OF AN Arbitration Award dated the 17th May, 2006

IN THE MATTER OF all those parcels of land comprised in Certificate of Title registered at Volume 962 Folio 49 of the Register Book of Titles

BETWEEN	WILLOWOOD LAKES LIMITED	CLAIMANT
AND	THE BOARD OF TRUSTEES OF THE KINGSTON PORT WORKERS SUPERANNUATION FUND	DEFENDANT

Ian Wilkinson and Sashawa Grant instructed by Ian Wilkinson and Co. for Willowood Lakes Ltd.

Courtney Bailey instructed by DunnCox for The Board of Trustees of the Kingston Port Workers Superannuation Fund.

Arbitration - Application to strike out claimant's statement of case – claim seeking to challenge award by arbitrator – whether any reasonable ground for bringing the action

Heard: 28th June and 7th August 2007

Brooks, J.

Willowood Lakes Limited is unhappy with an arbitration award which it views as having been improperly made. It has brought this claim to have the court set aside the award on the basis that the arbitrator has erred. In its

Claim Form, Willowood also requests that the court make certain declarations, in place of the arbitrator's award.

The other party to the reference to the arbitrator is The Board of Trustees of the Kingston Port Workers Superannuation Fund. The Trustees have brought the present application to have Willowood's statement of case struck out. The Trustees assert, firstly, that the Arbitration Act restricts the types of challenge which may be made to an arbitration award and that Willowood has not disclosed any challenge, which falls within that restriction. Secondly, say the Trustees, even if the court disagrees with the award, it has no authority to substitute its own view as to what the award should be.

In assessing this application, the court has to bear in mind that it is not, strictly speaking, considering the question of whether there is, or is not, any misconduct or error on the part of the arbitrator, which would justify setting aside his award. That would amount to a trial of the claim. The question is, instead, whether it is so clear that there has been no such error or misconduct which would allow a court to set aside the award, that Willowood's claim is certain to fail and so, to allow the claim to continue would be a waste of the court's resources, if not an abuse of the process of the court.

In assessing the matter, it will be necessary to examine the law concerning striking out statements of case, and how that law applies to awards made by an arbitrator. Thereafter, an examination of the award has to be made to determine whether the claim breaches the rules concerning challenging awards.

Background

The dispute giving rise to the reference to the arbitrator, concerns Willowood's attempt to purchase real estate from its landlord, the Trustees. The leased land, which is situated in Negril, Westmorland, is the subject of the proposed sale. When Willowood initially leased the property, it carried out certain works on the land to make the land 'buildable'. It has also constructed structures on the land.

The lease agreement stipulated, in part, that in the event that the Trustees retook possession of the land, they would pay compensation to Willowood, "equivalent to the market value of such facilities and amenities".

A dispute about a renewal of the lease arose between the parties and they sought to resolve the matter by arbitration. Subsequent to the start of hearings, the parties informed the arbitrator, the Honourable Dr. Lloyd Barnett, O.J., that the initial dispute had been abandoned and that instead,

they wished for him, among other things, to stipulate the appropriate price for which the legal estate in the property should be sold to Willowood.

The terms of reference to the arbitrator:

The amended terms of reference were delivered to the learned arbitrator by joint letter, signed by the parties and dated March 3, 2006. I admitted the letter into evidence, despite an objection by Mr. Wilkinson, who appeared for Willowood. Even in the absence of the letter, Willowood seems to accept (by virtue of paragraph 28 of the affidavit of Mr. Elworth Williams filed in support of the claim) the learned arbitrator's interpretation of those terms. The learned arbitrator stated at paragraph 5 of the award that he had been asked to:

> "(1) determine and fix the sale price of the said property based on my interpretation of the Valuation Reports prepared by D.C. Tavares & Finson Realty Company Limited for the purpose of establishing the market price of the property;
>
> (2) award that the Respondent is to pay the said sale price within a stated period, failing which the Claimant will be entitled to re-enter and take possession of the property, and the Respondent will surrender the said property to the Claimant without any further claim against the Claimant, save and except for any entitlement arising under sub-paragraph 3 hereof;
>
> (3) determine whether the Claimant is to be required to compensate the Respondent for the value of its improvement to the aforesaid property upon its surrender under sub-paragraph (2) above, and if so to make a finding as to the amount of such compensation to be paid to the Respondent upon surrender of the said property to the Claimant in the event the Respondent fails to pay the sale price fixed by the Arbitrator within the period stated by the Arbitrator, as provided under sub-paragraph (2), above; and also
>
> (4) determine whether the improvements/works done by the Respondent on the property should be taken into consideration in arriving at the sale price under sub-paragraph (1) above."

This interpretation compares favourably with the terms of the reference letter. In fact, it borrows heavily from the exact terms of the letter.

The award by the arbitrator:

The learned arbitrator made his award on 17th May, 2006. The award was, among other things, that:

> "(1) The sale price is fixed at US $2,225,000.00...
>
> (4) The said sale price shall be reduced by US$ 150,000 being the value of the buildings and amenities for which the Respondent is entitled to be compensated...."

The award was a "speaking" one, in that the learned arbitrator gave reasons for his decisions. A pivotal aspect of the learned arbitrator's reasoning is contained in paragraph 18 of the document containing his reasons. He stated:

> "In my opinion the provisions for compensation do not extend to such site works as were executed for the specific purpose of making the land "buildable", but to tangible erections or structures which could be "demolished". It is for this reason that I hold that the Addendum to the Valuation which deals with the land in its original state is inapplicable."

Based on that approach, the learned arbitrator found that the valuers' Addendum to their Valuation was, "not relevant to the determination of the appropriate market price" (paragraph 13 of the award).

The complaint:

Willowood filed the present claim on 24th January, 2007. Essentially it complains that the learned arbitrator erred in fixing the values which he

did, for the sale price and for the "buildings and amenities" effected by Willowood. Mr. Elworth Williams's complaint concerning the sale price is encapsulated at paragraph 31 of his affidavit mentioned above:

> "the sale price of US$ 2,225,000 decided or established by the Arbitrator for the said land is incorrect as it is not supported by the valuation reports Appraisal Report prepared by D.C. Tavares & Finson dated October 24, 2005 and its Addendum dated October 31, 2005 or with Clauses (sic) 4(2) of the Lease Agreement which defines the work done by the Claimant..."

In respect of the value of Willowood's improvements to the property, Mr. Williams' complains that the learned arbitrator erred in finding that an appraisal provided by the valuers in an Addendum to their Report, was "not relevant to the determination of the appropriate market price". Paragraphs 1, 5, 6, and 10 - 13 of the Fixed Date Claim Form deal with Willowood's two basic complaints, which I have outlined above.

In paragraphs 2 – 4, 7- 9 and 14-15 inclusive, Willowood has sought this court's declaration as to what it views as being the correct decisions to have been made by the learned arbitrator.

The application to strike out:

Mr. Bailey representing the Trustees has strenuously criticized Willowood's claim. He asserts that it flies in the face of the philosophy behind arbitrations. Mr. Bailey contends that having submitted to a valid arbitration, presided over by a validly appointed arbitrator who delivers his award in writing, Willowood's mere disagreement with the award does not

provide it with a proper basis on which to apply to have the award set aside. Further, Mr. Bailey submits, this court has no power to alter or amend the award; the court can only set it aside or remit it to the arbitrator.

The Law:

The jurisdiction to strike out the claim

Rule 26.3(1)(c) of the Civil Procedure Rules (2002) provides the court with specific jurisdiction to strike out a statement of case, or any part thereof, if the court is of the view that it discloses no reasonable ground for bringing or defending the claim. The authorities point out that the power to strike out should be exercised only in plain and obvious cases where there is no point in having a trial. (See *Three Rivers District Council v Bank of England (No. 3)* [2001] 2 All ER 513.)

The law regarding challenging arbitrations in the context of the standard to be used in considering applications to strike out

An overriding principle concerning arbitral awards is that, "as the parties choose their own arbitrator to be the judge in the disputes between them, they cannot, when the award is good on its face, object to his decision, either upon the law or the facts". (See *Russell on the Law of Arbitration* 18th Edition at page 367) This principle was cited by Forte J.A. (as he then was) in *National Sugar Co. Ltd. and others v American International Underwriters (Ja.) Ltd. and others.* (1991) 28 J.L.R. 276 at p. 281:

> "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."

Setting aside an arbitral award is therefore subject to fairly stringent requirements. In this context, that there have been several decisions defining the extent to which a court may interfere with an award. A number of principles may be derived from those cases. I shall outline only the three which I view as relevant to this application.

First, Section 12 (2) of the Arbitration Act allows the court to set aside the award if the arbitrator has misconducted himself or if the award has been improperly procured. The term "misconduct", according to the learned author of *Russell* (*supra*), at page 349, is "to be used in its widest sense". It is not restricted to any moral turpitude. Broadly, "misconduct" also contemplates an irregularity or breach of natural justice. (*Russell (supra)* at page 378)

The second principle is that, as the learned author of *Russell (supra)* points out (at page 349), "the court also has an inherent power to set aside an award that is bad on its face: either as involving an apparent error in fact or law". This power is only exercised in certain circumstances. It will not be exercised, for instance, where a specific question of law, has been referred to the arbitrator. Then, even if he is error in answering the question, the award

will not be disturbed. The case of *The Insurance Company of the West Indies v G.G. Records Ltd.* (1987) 24 J.L.R. 351), is authority for this proposition.

Similarly, the court will not interfere with an award where a question of construction is the very thing referred for arbitration, even if it would itself, have decided differently. Carey J.A. in *National Sugar (supra)*, approved the following explanation as given in *Kelantan Government v Duff Development Co. Ltd.* [1923] All. E. R. 349 at page 354-355:

> "If this be so (that the reference related to a matter of construction), 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 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." (Emphasis supplied.)

If there is a mixed question of fact and law, then the award may be disturbed where the court finds that the arbitrator is in error in respect of either or both questions. (See *The Insurance Company of the West Indies v G.G. Records Ltd. (supra).* 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 Company Ltd. v Kent River Board*

[1963] 2 Lloyd's Reports 7 at page 13. The passage was approved by our Court of Appeal in *Marley and Plant Limited v Mutual Housing Services Limited* (1988) 25 J.L.R. 38 at p. 39:

> "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...."

Third, and finally in this context, there is also a well established principle that the court has no power to alter or amend an award; it may only set it aside or remit it to the arbitrator. (*Moore v Butlin* (1837) 112 E.R. 594.)

From the above it may be seen that there are restrictions placed on the scope whereby a claimant may validly challenge an award, and to make a challenge outside of those strictures is most likely to result in a failure of the claim. Such a challenge should therefore be disposed of at the earliest stage.

Application to the instant claim

I now examine Willowood's claim against the three broad principles outlined above. I find that I may quickly dispose of the question of misconduct. There has been no allegation of misconduct made against the learned arbitrator. As a result section 12(2) of the Arbitration Act does not apply.

I now turn to the question of whether it is clear that there is no error of law or fact appearing on the face of the award. Although I have borne in

mind that this is, strictly speaking, not a hearing of Willowood's claim, I think that I may properly ask whether the reference to the arbitrator was purely one of construction.

The learned arbitrator's main task was to "determine and fix the sale price of the said property based on (his) interpretation of the Valuation Reports prepared by D.C. Tavares & Finson Realty Company Limited for the purpose of establishing the market price of the property". His other main task was to value Willowood's improvements to the said property. The learned arbitrator's other tasks were ancillary, or consequential to the findings on these main issues. I find that the main issues were purely ones of construction.

The learned arbitrator has addressed all the issues referred to him. He has provided reasons for his findings. In particular, he has specifically stated his reason for finding the Addendum to the Report irrelevant. I find that, the question being purely one of construction, Willowood is not entitled to challenge that finding.

Mr. Wilkinson submitted that all the documents referred to by the learned arbitrator would properly be the subject of examination by the court to determine whether the learned arbitrator erred in coming to his finding. In fact, says Mr. Wilkinson, such an examination would make it, "clear that

he misconducted himself in how he dealt with the evidence before him i.e. the Valuation Report".

The flaw in Mr. Wilkinson's submission, in my view, is that Willowood, in supporting its claim, has to show that the learned arbitrator was asked to do more than interpret the documents referred to him. If he were not, then even though Willowood, and perhaps a court, may disagree with the theory which the learned arbitrator utilised in arriving at his award, the court is not permitted to substitute its own view. This theory has specifically affected the values which the learned arbitrator arrived at in his award. On my finding therefore, Willowood would fail in respect of paragraphs 1, 5, 6, and 10 - 13 of the Fixed Date Claim Form.

Different considerations apply to paragraphs 2 – 4, 7- 9 and 14-15 inclusive. The result however is the same. Those paragraphs seek to have the court substitute its own views for that of the learned arbitrator. That is not permissible, as was pointed out above. In any event those paragraphs would be struck out as disclosing no reasonable prospect of success and therefore no reasonable basis for being included in the claim.

Conclusion

When parties agree to proceed to arbitration, they must abide by the decision of the arbitrator, unless it is apparent on the face that some illegality

influenced the award. In this matter, it was specific questions of construction which were referred to the arbitrator, and those are the questions which he has answered. For that reason, even if a court were to disagree with the learned arbitrator's award, it would not be permitted to set it aside. I am also satisfied that striking out the claim at this stage will allow the parties to quickly put this matter behind them and move forward. That is the objective that they hoped to achieve by referring the matter to arbitration. In the circumstances the application to strike out must succeed.

The Trustees had filed their own claim to enforce the award. That claim will have to be heard on a date to be fixed by the Registrar.

The order of the court is therefore as follows:

1. Application to strike out the Claimant's statement of case is hereby, granted.
2. Costs to the Defendant to be taxed if not agreed.