[2018] JMCC Comm 37

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL COURT

CLAIM NO. 00279/2018

BETWEEN	**JOSA INVESTMENTS LIMITED**	**CLAIMANT**
AND	**PROMOTIONS AND PRINT ESSENTIALS LIMITED**	**DEFENDANT**

Application to Strike out Claim –Arbitration- Section 12 (2) Arbitration Act (1900) – Construction of Contract – Mitigation of Damages – Whether misconduct- Whether error of law on face of the record – Court's inherent jurisdiction – Whether reasonable ground to bring claim.

Carol Davis, Symone Mayhew for the Claimant

Emile Leiba, Jonathan Morgan for Defendant instructed by Dunn Cox

In Chambers

Heard: **1st November, 2018 & 14th November, 2018**

BATTS J.

[1] By order dated 29th June 2018 the trial of the Fixed Date Claim was fixed for the 21st February, 2019. At the same time the Defendant's application to strike out the claim was fixed for the 1st November, 2018. The grounds stated for the application were that the court has no jurisdiction to consider the matter and, alternatively, that there is no reasonable ground to bring the Claim. The claim, filed on the 3rd May 2018, seeks to have an arbitral award set aside "*for misconduct pursuant to section 12 (2) of the Arbitration Act 1900 and/or pursuant*

to the inherent jurisdiction of the Court." The Defendant asserts that there is no misconduct alleged, within the meaning of the Arbitration Act, and that the Claim is misconceived and should be struck out.

[2] This shortly expressed issue occasioned well researched written and oral submissions. I am grateful to both counsel for their assistance. I will not, in the interest of time, detail them. Instead I will only reference such of the material as I deem necessary to explain my decision. In this regard I remind myself that both parties agreed that the relevant legislation is the Arbitration Act (1900). This is because the arbitration in question was heard and determined before the new Arbitration Act (which repealed the old) came into force. The Defendant has brought this application pursuant to rules 9.6 (6) and/or 26.3(1) (c) of the Civil Procedure Rules (2002).

[3] The relevant facts are that the parties submitted their dispute to arbitration. The Arbitration Submission Agreement in recital (a) described the issue for the arbitrator as follows:

> "(a*)* *The Claimant and the Respondent have an unresolved dispute arising out of a commercial agreement relating to the rental of premises located at 61 Constant Spring Road Kingston 8 in the parish of St. Andrew.*
>
> *(b)* *Dan. O. Kelly is an attorney at law of D.O. Kelly & Associates of 1A Holborn Road Kingston 10 in the parish of St. Andrew and who also provides arbitration services.*

(c) *the parties have determined that they will promptly and finally resolve the dispute through final and binding arbitration. This Agreement evidences their submission of the dispute to arbitration and sets forth the terms on which the arbitration will be conducted."*

The Agreement thereafter provided for the filing of Statements of Case and Response and as to the general conduct of the arbitration.

[4] On the 12th day of April 2016 the arbitrator made an order for the presentation of the respective statements of case and other matters. The laws of Jamaica governed the issues in the case and the UNCITRAL rules applied insofar as they did not conflict with the Arbitration Act. The claimant before the arbitrator is the Defendant in the action before me. Its statement of claim in the arbitration stated the issue for determination at paragraph 20 as being :

> *"Whether Josa's Termination of the Agreement in the circumstances constitutes a breach of contract entitling Signarama to Compensation."* [Josa is the Claimant before me and Signaroma the trade name of the Defendant before me].

The relief sought was damages in the form of compensation for: alleged abortive investments, lost trading revenue, and an abortive investment in a digital screen. The claim before the arbitrator totalled $230,410,500.00

[5] In its statement of defence to the arbitrator, the response to Paragraph 20 of the statement of claim was,

> *"With regard to paragraph 20 the Defendant says that the points of issue are to be determined in accordance with the pleadings."*

There is a denial of most of the facts alleged as well as of the entitlement to the damages claimed. There is also an express plea of mitigation that is an allegation of a failure to mitigate.

[6] In his final arbitration award the arbitrator, having referenced the arbitration clause in the commercial agreement, the background to the dispute and the witness statements, identified the issues for his determination thus:

> 1. *"Whether the Commercial Agreement between the Claimant and the Respondent was valid.*
> 2. *Whether the erection of the hoarding was a condition precedent to the Commercial Agreement coming into effect.*
> 3. *Whether the Respondent's termination of the Commercial Agreement constitutes a breach of contract.*
> 4. *Whether the Claimant suffered any loss or damage as a result of the Respondent's termination of the Commercial Agreement."*

[7] In his "Conclusion and Award" the arbitrator states his decision as follows:

> 1. *"The Commercial Agreement dated the 5th day of October 2015 is a valid, legally binding and enforceable Agreement as between the Claimant and the Respondent.*
> 2. *The erection of the hoarding was not a condition precedent to the Commercial Agreement dated the 5th day of October 2015 coming into effect.*
> 3. *The Respondent's termination of the Commercial Agreement by way of Notice to Quit dated the 18th day of December 2015 constitutes a breach of contract.*
> 4. *The Claimant has suffered loss and damage as a result of the Respondent's breach of contract*

> *5. The Respondent shall forthwith pay to the Claimant the sum of Sixteen Million Eight Hundred and Twelve Thousand Eight Hundred and Eleven Dollars and Twenty Cents ($16,812,811.20) as damages for breach of contract."*

The arbitrator gave detailed reasons with reference to the evidence and a breakdown of the damages. The latter included a deduction of 20% for failure to adequately mitigate losses. He also awarded interest and costs.

[8] The Arbitration Act (1900) provides, in Section 12,

> *"(1) Where an arbitrator or umpire has misconducted himself, the Court may remove him.*
>
> *(2) where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured the Court may set the award aside."*

The issue before me therefore is whether the Fixed Date Claim discloses averments that may give rise to or support an application pursuant to Section 12 (2) or under the Court's inherent jurisdiction.

[9] Miss Davis, for the Claimant, submitted that misconduct did not necessarily involve any moral turpitude or dishonest conduct, and that an error of law on the face of the record would suffice. In this regard she relied upon ***Sans Souci Ltd. v. VRL Operators Limited SCCA No. 20/2006 paragraphs 16 to 19,*** and ***The Attorney General of Jamaica v National Transport Co-operative Society Ltd., an unreported judgment of Brooks J*** *(as he then was)* ***dated 29 November 2004.*** I did not understand those cases to support the entirety of that proposition.

[10] Mr. Leiba is, I think, correct in his submission that an error of law on the face of the record is not an example of misconduct falling within Section 12 (2). The jurisdiction, to set aside an award for error on the face of the record, is one which inheres in the Court as being one of superior record. The statutory basis, for setting an award aside pursuant to Section 12 (2), is distinct see ***National Housing Trust v Y. P. Seaton & Associates Co. Ltd. (2015) UKPC 43; 162 Con LR 117 @ 139***. In that case the Judicial Committee of the Privy Council distinguished the basis for remitting a case from the basis to set aside an award. Errors of law, which go to jurisdiction or which amount to mistake misconduct or mishap such as to justify Section 11 remittal, do not have to appear on the face of the record, see page 141 para 597 of the Privy Council's judgment. **Halsbury's Laws of England**, cited by the Claimant, makes clear the distinction between misconduct and error of law on the face of the record, see: **Vol 2 Hal 4d paras 621, 622 and 623**. Paragraph 623 entitled "Error of law on face of award" is worthy of full quotation:

> "*An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute.*
>
> *In order to be a ground for setting aside the award, an error in law on the face of the award must be such that there can be found in the award, or in a document actually incorporated with it, some legal*

proposition which is the basis of the award and which is erroneous.

If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and, where the question referred for arbitration is a question of construction, which is generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

But the court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award; it must take the award at its face value.

An award in the form of a special case may be set aside under the jurisdiction. The award may be remitted instead of being set aside." [Emphasis added]

The several authorities cited by the parties support rather than detract, from, one or other of the principles espoused in Halsbury's Laws of England. In particular, see ***Moran v Lloyds* (A Statutory Body) [1983] 1 QB 542 @ 549F per Sir John Donaldson M.R. : "***For present purposes it is only necessary to say ,as Mr Littman fully accepted ,that the authorities established that an arbitrator or umpire does not misconduct himself or the proceedings merely because he makes an error of fact or of law."*

[11] The Fixed Date Claim asks that the arbitral award be set aside; '*for misconduct pursuant to Section 12 (2) and/or pursuant to the inherent jurisdiction of the Court."* Therefore even if, as I have decided, the allegation of error of law on the face of the record does not constitute misconduct, the inherent jurisdiction of the court has also to be considered. This latter plea is sufficient to incorporate an error of law on the face of the record. This is because it is in such a case that the court's inherent jurisdiction to revoke an arbitrator's award arises. It flows from the court's supervisory jurisdiction over inferior tribunals. I therefore hold that there is jurisdiction to consider the claim as pleaded.

[12] The Defendant also contends, in its Notice of Application before me, that the Fixed Date Claim should be struck out as disclosing no reasonable grounds for being brought. The question therefore arises whether there are reasonable grounds to allege error of law on the face of the record and therefore to invoke the court's inherent jurisdiction. The errors allegedly made by the arbitrator are that:

> i. *"The Arbitrator erred in that he did not seek to construe the commercial agreement by determining the intention of the parties taking into consideration the matrix of fact in which the contract arose.*
>
> ii. *The Arbitrator erred when he concluded that the termination of the Commercial Agreement by the Claimant by way of Notice to Quit dated 18th December 2015 constituted a breach of contract, as he erred in his construction of the termination clause and in particular his construction of the term "for the better amenity of* ***adjoining*** *land;*

iii. *In concluding that the Claimant was in breach of contract the Arbitrator made an error of law as he wrongly determined that the Claimant had terminated the agreement in order to secure a greater economic benefit to itself by leasing its properties at 59 1/4 , 59 ½ and 61 Constant Spring Road to one tenant instead of several, as was previously contemplated in circumstances where there was no evidence of any greater economic gain arising from the leasing of the property to one tenant instead of several.*

iv. *The Arbitrator accepted that the term "better amenity" in the context of the Agreement was never intended to include using the rental property in such a way as to earn more income from its use in circumstances where there was no evidence that renting the property to one tenant earned more money for its use and there was not contention by either party was(sic) that this was the intention.*

v. *The Arbitrator wrongly construed the agreement to exclude the desires of the landlord in the circumstances where the termination clause in the agreement permitted the landlord to terminate the agreement "if the Landlord requires the Site ... for the better amenity of any adjoining land of the Landlord."*

vi. *The Arbitrator said that he accepted that the use of the words better amenity of adjoining land indicates that the said land was to be used to benefit of adjoining land and not the owner of the such land. Since the adjoining land is inanimate and unable to determine what is for its benefit, it is only a conscious person such as the owner of the land that could determine what is for its benefit.*

vii. *Having found that the Defendant failed to mitigate its loss the arbitrator erred when he sought to reduce his award of damages by 20% only in circumstances when the defendant should have recovered no damages at all on account of their failure to mitigate their losses.*

viii. *The Arbitrator made an error of law in accepting the letter dated 18th December, 2015 from Pepsi Cola Bottling Company to the Defendant as a clear*

indication of the loss sustained by the Defendant in circumstances where the letter did not constitute any evidence of any contract between the Defendant and Pepsi-Cola Bottling Company Limited.

ix. *The Arbitrator erred when he awarded the Defendant loss revenue for 6 years when the term of the Commercial Agreement was for only 3 years and in circumstances where the option to renew stated therein was invalid, void and/or unenforceable for uncertainty."*

[13] The Claimant relied on both the ***Sans Souci*** and ***National Transport Cooperative*** cases (cited at para. 10 above) in support of a submission that an error in construction of a contract is an error of law and therefore reviewable by the court. This is not always the case. An error of law occurs where the interpretation of the contract is done using an approach to construction which the law does not accept. The mere misapplication of the correct principle of construction will not suffice. The court will not interfere with the decision of an arbitrator, tasked to construe an agreement, merely because it disagrees with his interpretation of the agreement, ***Government of Kelantan v Duff Development Company Ltd [1923] AC 395 at 409 and 411.***

[14] In this case there is neither a misstatement of the applicable or any principle of construction, nor is it manifest on the face of the record that the arbitrator applied a, or any, principle of construction that was repugnant. So, for example, the arbitrator sought comfort in Black's Law Dictionary insofar as the meaning of "amenity" was concerned. This was a central issue in the arbitration. He could not be faulted for so doing. Furthermore, the arbitrator's conclusion, on the meaning of the words allegedly misconstrued, far from being an obvious error, is

reasonable and one that any reasonable arbitrator might have arrived at. As he said at paragraphs 32 (e) and (f) of his award:

> *(e) The better amenity of adjoining land therefore refers to the implementation of improvements on land, which adjoins another, with the effect that it would increase the pleasantness or desirability of the adjoining land or contributes to the pleasure and enjoyment of the occupants and not to the desires of the owner of such land.*
>
> *(f) Accordingly, in the context of real property law, the better amenity of adjoining land does not require the land to be put to its best use or to a use most agreeable to the landlord, as is suggested by the Respondent."*

The complaints, in paragraphs (i), (ii), (iii), (iv), (v), (vi), (viii) and (ix) of the grounds of the Fixed Date Claim, are really efforts to overturn either factual findings or the arbitrator's interpretation of the contract. They do not constitute errors of law on the face of the record. Those averments, on the facts of this case, disclose no reasonable ground for bringing this claim.

[15] The arbitrator's decision as it related to mitigation of damages (Para (vii) of the grounds in the Fixed Date Claim) caused me to pause. The allegation is that an error of law on the face of the record occurred with the arbitrator's treatment of the question of mitigation of damages. I have come to the conclusion that the arbitrator's treatment of this issue does not disclose an error of law properly so called because the arbitrator correctly stated the relevant principle with respect to mitigation of damages :

"36. *To reiterate, it is trite law that the purpose of an award of damages for breach of contract is to compensate the injured party for the loss sustained as a result of the breach. Generally, the damages awarded are meant to put the injured party in the same position that the injured party would have been in had the contract been performed in accordance with its terms....*

....

....

45. Importantly, the issue of the mitigation of damages must also be considered. The basic rule of mitigation is simply that a Claimant may not recover losses which he or she should reasonably have avoided. Consequently, any failure by the Claimant, in the instant case, to mitigate its loss must reduce its claim to damages....

48. it is my finding that the Claimant failed to appropriately mitigate its losses when it neglected to take advantage of the Ministry of Justice's non-objection to the erection of the hoarding or its offer to enter into a sub-lease.........

50. Taking the foregoing matters into consideration, I have found that the award of damages for loss of expectation must, of course, be reduced to take into account the insufficiency of the Claimant's attempt to adequately mitigate its losses."

[16] The Claimant takes no issue with the statement of principle by the arbitrator. Rather the complaint is that, in applying the principle, he adopted a wrong approach. The Claimant contends that instead of reducing damages by 20%, as he did, the arbitrator ought to have used a more mathematically correct approach. As per paragraph 16 of the Claimant's written submissions:

"*16. The other main issue raised in the claim is mitigation of damages. The Arbitrator having accepted that the Respondent failed to mitigate their loss proceeded to*

> *"reduce" the claim by 20%. At the hearing of the Fixed Date Claim Form it will be submitted that the Arbitrator failed to assess the proper loss to the Respondent, especially in circumstances in which if they had properly mitigated they would have suffered no loss."*

In oral submissions this was expanded. It was argued that, as the evidence demonstrated that the Ministry of Justice was prepared to offer to the Defendant a contract on the same or similar terms, the arbitrator ought to have made no award for damages.

[17] It is clear to me that the complaint is about the arbitrator's factual finding. Inherent in his assessment of a 20% reduction for mitigation is an assessment of probabilities. The arbitrator having correctly stated the principle was, on the evidence, satisfied neither that the possibility to mitigate was 100% certain nor that the effort to mitigate would have been 100% effective. That assessment is one of fact not law.

[18] There is a further reason to dismiss the Fixed Date Claim. This is because it is manifest, on the agreement to arbitrate, on the statements of case filed and on the arbitrator's statement of the issues before him, that the matters complained of in the Fixed Date Claim were questions the arbitrator had been asked to decide. They were not tangential to the result. As indicated , at paragraph 10 above, where the alleged error of law is central to the issue the arbitrator was asked to determine the court ought not to interfere, see also ***National Housing Trust v Y P Seaton & Associates [2015] UK PC 43; (2015) 162 Con LR 117 @ 134 para [34].*** The parties agreed that the arbitrator would, as between them,

finally resolve issues related to the interpretation of the agreement and damages including the issue of mitigation . A submission that the arbitrator was not asked to construe the contract, even though such construction was necessary for his decision, is untenable, see ***Government of Kelantin v Duff Development Company Ltd.*** (cited at para 14 above) at page 418, per Lord Parmoor,:

> "*In the present appeal it was argued by the counsel on behalf of the appellants that the question of the construction of the deed had not been specifically referred to the arbitrator, although the construction of the deed was absolutely necessary for the determination of the disputes which had been referred to him. In my opinion this contention is not maintainable."*

Save in a most egregious case of injustice or absurdity, the arbitrator's decision on the meaning of a contract and the consequences flowing from its breach should, where these are the issues he was asked to determine, be allowed to stand. It creates no binding precedent and applies, in the final analysis, to no one except the parties who agreed to be thereby bound.

[19] Finally, I am fortified in the result I have arrived at because courts are slow to upset the decision of an arbitrator. The words of Anderson J, in the Caribbean Court of Justice, are apt, (although delivered in the context of an arbitrator's decision on costs):

> *"17. This court recognises that arbitration is an increasingly preferred method of resolving complex commercial disputes and that it rests on the key principle of party autonomy. Parties to an*

> *arbitration agreement make the conscious decision to prefer the prompt expedient and final settlement of their disputes through the arbitral process rather than the often protracted process of court adjudication. As it is sometimes put, they choose finality over legality. Conflict resolution by arbitral means assists and encourages modern commercial activity and therefore the finality of arbitral awards is supported by public policy considerations. This is crystallized in S. 8 of the Arbitration Act which provides that, "the award to be made by the arbitrators or umpire shall be final and binding on the parties."* [see section 4 (h) of the Jamaica Arbitration Act 1900]. **Belize Natural Energy Ltd. v Maranco Ltd. [2015] CCJ 2 (AJ); [2016] 2 LRC 23 at 31.**

[20] In the result therefore the Fixed Date Claim is dismissed. There is, on the facts alleged by the Claimant, no reasonable ground for bringing this claim. Costs will go to the Defendant to be taxed it not agreed.

David Batts
Puisne Judge