[2017] JMSC Civ. 169

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. 2017 HCV00156**

| | | |
|---|---|---|
| **BETWEEN** | **THE BOARD OF TRUSTEES OF THE KINGSTON PORT WORKERS SUPERANNUATION FUND** | **CLAIMANT/RESPONDENT** |
| **AND** | **ARD 2K ELECTRONICS COMPANY LIMITED** | **DEFENDANT/APPLICANT** |

**IN CHAMBERS**

**Mr. Adrian Cotterell instructed by Myers, Fletchers & Gordon for Claimant/Respondent.**

**Nigel Jones instructed by Nigel Jones & Co., for the Defendant/Applicant**

**HEARD: 4th, 10th July 2017 & 2nd November 2017**

***Lease Agreement with arbitration clause – Application for stay of proceedings - Whether applicant ready and willing to do all things necessary to the proper conduct of arbitration -– Proof required in readiness and willingness-Section 5 of the Arbitration Act***

**PALMER HAMILTON, J. (AG.)**

**INTRODUCTION**

**[1]** On the 4th and 10th of November 2017, I heard submissions from both counsel on an application for stay of proceedings made by counsel, Mr. Nigel Jones. I granted the application for stay of proceedings. These are the promised reasons for this decision.

**[2]** The Board of Trustees of the Kingston Port Workers Supera`nnuation Fund (hereinafter referred to as The Board) commenced proceedings against ARD 2K Electronics Company Limited (hereinafter referred to as ARD 2K) by way of Amended Fixed Date Claim Form filed May 12, 2017 along with Affidavit in Support filed on the same day. The documents were duly served on ARD 2K and sought the following orders:

1. A declaration that the Instrument of Lease between the Claimant and the Defendant is forfeited.

2. In the alternative, a declaration that the Instrument of Lease has been duly terminated by the Claimant.

3. The Defendant is to deliver possession of the property to the Claimant within fourteen (14) days of the date of the order or at such other time the Court deems fit;

4. The Defendant is to pay over to the Claimant the sum of US$52,953.96 (J$6,831,807.49) for unpaid rent under the lease.

5. The Defendant is to pay to the Claimant/Respondent mesne profits from the date of the filing of the claim until possession is recovered.

**[3]** ARD 2K filed a Notice of Application for Court Orders on the 19th May 2017 and sought the following orders; inter alia:

1. A Declaration that this Court has no jurisdiction to try the claim;

2. In the alternative, a Declaration that this court will not exercise its jurisdiction to try the Claim;

3. An order that the Fixed Date Claim Form filed herein be struck out.

4. Alternatively, an order that the proceedings be stayed.

It is this Notice of Application for Court Orders that is for my consideration.

**ARD 2K'S Submissions**

**[4]** Counsel for ARD 2K indicated that he was no longer pursuing prayer number 3 that the Fixed Date Claim Form should be struck out and instead focused on the stay of the proceedings. In so doing, he referred to the **Lease Agreement,** the **Arbitration Clause 7** (xv):

> *"In the case of any dispute or questions whatsoever arising between the parties hereto with respect to the cesser or abatement of rent or other moneys payable as foresaid and to the construction or effect of this instrument or any clause or thing herein contained or the rights, duties, or liabilities of either party under this agreement or otherwise in connection with the foregoing the matter in dispute **shall** (my emphasis) be settled by reference to a single arbitrator appointed by the President of the Jamaican Bar Association provided that this clause shall not apply or be deemed to apply to any dispute or matter touching or with respect to the rent thereby reserved or other monies payable hereunder save with regards such cesser or abatement of rent or other moneys payable as aforesaid."*

**[5]** ARD 2K contends that cesser of rent would not apply to them but abatement of rent would in light of the concerns expressed in the affidavit of Richard Hamilton, a Director in the company. It was borne out in this affidavit that ARD 2K was unable to load and off-load at times because The Board had customers on the premises which prevented access, use and visibility; the premises were delivered to them as a shell and was not in a condition to be used in a manner prescribed in schedule 9 of the Lease Agreement which stated as follows:

> *"Permitted Use: For the sale of household furniture and electronics only."*

**[6]** Additionally, ARD 2K's complaint was that the premises were given to them without electricity and they had to get occupation of the building before being in a position to commence operations. They contend that all these complaints were brought to the attention of The Board. Further, the signing of the Lease

Agreement which contained an Arbitration Clause was an indication that both parties would submit to arbitration and such this court should decline to exercise its jurisdiction over the matter. They relied on the cases of **Tri-Star Engineering Company Limited v Alu-Plastico Limited, Pamela Josephs** and **Judith Josephs, [2013] JMCC Comm. 9 and Leighton Chin-Hing v Wisynco Group Limited [2013] JMCA Civ. 19.**

**The Board's Submissions**

**[7]** The Board contends that the rent payable under the Lease Agreement dated September 9, 2014 is US$2,500.00 and rent in arrears is now US$52,953.96 with none paid except for US$2,363.54 on January 20, 2017. This application, they submitted, is a failed attempt to have the debt liquidated and does not fall within the ambit of abatement of rent. If abatement of rent was truly an issue then ARD 2K would not have admitted to owing any money in their email to the Claimant Company which was exhibited to the affidavit of Marcelle Dawkins.

**[8]** Having made such an admission, the issue of abatement was not raised by ARD 2K while trying to settle its arrears. The Claimant therefore contends that the issue of abatement raised by ARD 2K is not a genuine one and the pre-action of the party is what is paramount, not that it is raised after the matter is brought before the court. They also submitted that at the time the proceedings began, ARD 2K was not ready and willing to take all reasonable steps to rely on arbitration or for the conduct of arbitration. Additionally, a demand letter was sent on November 28, 2016 to ARD 2K and after receipt of this letter the Defendant did not indicate that circumstances would dictate abatement of rent. Further, it was argued that the Board of Trustees has a fiduciary duty to the Pensioners and must act in their best interest, and to go the route of arbitration would incur further costs and time because the pensioners' money would go to waste. Therefore the court should decline to grant a stay because Arbitration would incur further time and costs to the pension fund. They relied on the cases of **Satyanan Sharma and Chandrica Sharma v Christina Adit and Vashti**

**Mohammed, CV 2012-04258; Leighton Chin-Hing v Wisynco Group Limited [2013] JMCA Civ. 19** and **Hart v Windsor, 12 M & W67**

## Issues

**[9]** The issues that fall for my consideration are:

i. Whether the Claimant and Defendant are parties to a submission

ii. Whether ARD 2K was ready and willing to do all things necessary to the proper conduct of the Arbitration, and

iii. Whether this court has jurisdiction to try this case in light of the Arbitration Clause in the Lease Agreement, or should stay proceedings.

## Law and Analysis

## Whether Parties to a Submission

**[10]** Section 5 of the **Arbitration Act**, 1900 states:

> *"If **any party to a submission**, or any person claiming through or under him, commences any legal proceedings in the court against any other party to the submission, or any person claiming through or under him; in respect of any matter agreed to be referred, any party to such legal proceedings may **at any time** after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court or a judge thereof, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and **that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration** may make an order staying the proceedings." (My emphasis)*

**[11]** The first question which must be answered is whether a submission exists in this particular scenario. Section 2 of the **Arbitration Act,** 1900, in the Interpretation section, attributes the meaning of submission to be "a written agreement to

submit present or future differences to arbitration, whether an arbitrator is named therein or not."

**[12]** Upon close examination of the Lease Agreement, Clause 7 (xv), which has been relied on by both counsel, expressly states that "in the case of any dispute or questions whatsoever arising between the parties... with respect to the cesser or abatement of rent or other moneys payable – shall be settled by reference to a single arbitrator."

**[13]** It is therefore evident that a submission, within the meaning as utilized in section 5 of the **Arbitration Act**, exists in this particular context. The parties who signed the Lease Agreement were duly authorized officers of Kingston Port Workers Superannuation Fund (the Claimant/Respondent) and ARD 2K Electronics Limited Jamaica (Defendant/Applicant) with their official seals affixed. I find that the proceedings were brought by a party to the Arbitration Agreement and they were brought by Kingston Port Workers Superannuation Fund. I also find that the applicant is a party to the Arbitration Agreement and the legal proceedings, that applicant being ARD 2K Electronics Company Limited.

**Whether the Applicant was Ready and Willing To Do All Things Necessary to the Proper Conduct of the Arbitration**

**[14]** In the affidavit of Mr. Richard Hamilton filed on the 19th of May 2017, he avers in paragraph 7 that:

> *"My attorneys have advised me that these loses (sic) that I have incurred are **best dealt with at an arbitration** and may ultimately be set off against any rent claimed. We have correspondence (letters and whatsapp messages) exchanged with the Claimant regarding these issues. We also take issue with claim being filed and served on us prior to the expiration of a Notice served upon us. Finally, (sic) **in the Arbitration** we will establish that there would be great hardship experienced by us if recovery of possession is granted. In the circumstances there in no basis for a claim for possession."*

**[15]** However, in written submissions filed by The Board on June 26, 2017, Learned Counsel for The Board of Trustees of the Kingston Port Workers Superannuation Fund, Mr. Adrian Cotterell, relied on the Trinidadian High Court decision in **Sharma v Adit et al, Claim No. CV 2012 – 04258**, delivered on the 8th day of February 2013. In this case, Gobin, J held that the burden was on the defendants to show they were ready and willing to do all things necessary for the proper conduct of the arbitration. Mr. Cotterell further submitted that it was noteworthy that in the **Sharma** case **Gobin**, J considered the lack of response to the Claimant pre-action letter and stated that "had they been so ready and willing I would have expected a response to that effect." Mr. Cotterell argues that "the Defendant, in its affidavit, did not even condescend to state that it was ready and willing to arbitrate at the time when these proceedings began. This lacuna is hardly surprising since there is no evidence of this. The company's pre-action behaviour is also testament to the fact it was not ready and willing." Mr. Cotterell concluded that the reasoning in **Sharma** should be applied to the case at Bar in finding that the company was not ready and willing to arbitrate at the time of the filing of these proceedings.

**[16]** In my judgment, a formulaic approach to demonstrate one's readiness and willingness to arbitrate should not be the focal point. Certainly, a party or applicant cannot be expected to strictly use the specific words "I am ready and willing to go to arbitration." The pragmatic approach must be that once it can be demonstrated from the applicant's affidavit, and perhaps other actions, that there is a readiness and willingness to go to arbitration, then that is satisfactory. I find that implicit in paragraph 7 of Mr. Richard Hamilton's affidavit (as quoted supra) is that readiness and willingness to do all things necessary to the proper conduct of the arbitration. In any event, the **Sharma** decision is not binding on this jurisdiction.

**[17]** Additionally, in the **Tri-Star Engineering Compay Limited v Alu-Plastics Ltd Pamela Josephs and Judith Josephs**, [2014]JMCC Comm.9, Mangatal, J poignantly states at paragraph 41, in analysing the **Sharma** case:

> *"Whilst it is clear that the Defendants must show that they were at the time of the commencement of the proceedings, ready and willing to do all things necessary for the proper conduct of the arbitration, it is obvious to me that the section must be interpreted reasonably and practically. The consideration must also depend on the circumstances existing, and the stage at which the party suing chooses to file a law suit against the express agreement of the parties to submit to arbitration. Indeed, the extract from* ***The Law and Practice of Commercial Arbitration*** *is interesting, because it suggests that the burden is also on the claimant in respect of satisfying the court about the issue of whether the defendant is ready and willing to submit to arbitration."*

**[18]** Mangatal, J also opined that it was easier to find that a party was not at the time of commencement of the proceedings ready and willing to do all things necessary for the arbitration, if there were overt acts upon which to carry out such an evaluation.

**[19]** In the **Tri-Star** case, the **Sharma** case was also distinguished and I readily adopt the point on which it is distinguishable from the case at Bar. In the **Sharma** case, as Gobin, J pointed out, the Defendants instituted summary proceedings in the Chaguaramas Magistrates Court for possession of the premises, almost four weeks after the pre-action letter was sent. There was no such action on the part of the Defendants (ARD 2K) in the case at Bar, in fact from the correspondences and affidavits it is clear that the matter had not reached a stage of discussion as to arbitration.

**[20]** Mangatal, J in the **Tri-Star** case at paragraph 45, relied on **Russell on Arbitration** under the heading "Ready and Willing" and states that "the readiness and willingness of the Defendant is measured in relation to things to do with arbitration, and that merely not saying anything about arbitration, depending on the stage the dispute has reached, will not without more, demonstrate a lack of readiness or willingness."

**[21]** In the case of **Leighton Chin-Hing** v **Wisynco Group Limited**, [2013] JMCA Civ. 19, Phillips', JA skilful analysis of "ready and willing" at paragraph 21 is very instructive and I adopt it wholeheartedly:

> *"...the **assertion** of an applicant who seeks to have proceedings stayed that it is willing and ready to arbitrate is sufficient evidence upon which a court may find that it is indeed willing and ready unless there is evidence to the contrary. There need not be any further facts in support of that assertion although such facts would strengthen its position. There is no evidence that the respondent refused to or stated that it was unwilling to arbitrate.*

**[22]** Phillips, JA further expounded on the meaning of "ready and willing" by stating:

> *"Silence or inaction on the part of the respondent to a suggestion to arbitrate is insufficient to ground a finding of unwillingness. According to the text, Law and Practice of International Arbitration, a party initiating recourse to arbitration must give to the other party a notice of arbitration. The notice of arbitration, it states, shall include, among other things: a demand that the dispute be referred to arbitration and a reference to the contract out of which the dispute arises; the general nature of the claim; and an indication of the amount involved, if any, the relief and remedy sought, and a proposal relating to the number of arbitrators, if not already agreed. This is a step which could have been taken by the appellant to put in motion arbitration proceedings. This would have served as formal notice to the respondent of his intention to have the matter arbitrated. The appellant failed to take this step and to that extent, may also be viewed as being inactive in having the matter resolved by arbitration. The respondent's lack of response or its failure to give a positive indication or statement to the effect that it objected to the notice of arbitration would have been a clear indication that it*

*was not interested in arbitration. It would have provided cogent evidence of the respondent's unwillingness."* (My emphasis)

**Whether Court has jurisdiction to try this Claim in light of the arbitration clause in the Lease Agreement or should stay proceedings**

**[23]** It is a long established principle in arbitration law that whether the court exercises the power to stay the Claim, pursuant to section 5 of the **Arbitration Act** in this case is entirely a matter of discretion. This is supported in the text **Russell on Arbitration**, 19th Edition, page 187 which states:

> *"This discretion, in accordance with the ordinary rules of law must be judicially exercised but where it has been so exercised it will not readily be interfered with, even though the tribunal which is asked to review it may feel that, if the decision had rested with them, their own conclusion might have been different."*

**[24]** In the **Tri-Star** case**,** Mangatal, J adopted this principle in her decision and further stated in paragraph 30:

> *"where parties have agreed to refer a dispute to arbitration and one of them notwithstanding that agreement commence an action to have the dispute determined by the court, the prima facie leaning of the court is to stay the action and leave the plaintiff to the tribunal which he had agreed... Once the party moving for a stay has shown that the dispute is within a valid and subsisting Arbitration Clause, the burden of showing cause why effect should not be given to the agreement to submit is upon the party opposing the application to stay."*

**[25]** In The **Law and Practice of Commercial Arbitration in England** at page 467, section 4 (1) of the 1950 **Arbitration Act** stipulated certain requirements that must be satisfied for the granting of a stay. It was said by Mangatal, J in the **Tri-Star** case that section 4 (1) of the 1950 Act was equivalent to our section 5 of the 1900 Act. In summarizing those principles, Mangatal, J stated, inter alia, that the court must be satisfied that:

i. The applicant was and is ready and willing to do all things necessary to the proper conduct of the arbitration, and

ii. There is no sufficient reason why the dispute should not be referred to arbitration.

**[26]** Therefore, if the above requirements, including (a) the applicant proving the existence of an arbitration agreement viz a written agreement to submit present and future differences to arbitration; (b) proof by the applicant that the legal proceedings commenced in a court and are brought in respect of any matter agreed to be referred; (c) proof by applicant that the proceedings are brought by a party to the arbitration agreement; (d) and that the application is made after the applicant has entered an appearance but before he has delivered any pleadings are taken any other steps in the proceedings, then the applicant has a prima facie right to a stay. In these circumstances the court **will** grant one unless the person resisting the application persuades the court that there are good reasons why one should not be granted.

**[27]** In other words, there is a reverse onus placed on The Board in the case at Bar, whilst the court goes through the process of ascertaining whether the requirements are satisfied. The burden of proof remains on the applicant throughout except where (i) a determination is to be made as to the readiness and willingness of the applicant to do all things necessary to the proper conduct of the arbitration, and (ii) The Board resisting the application is to persuade the Court that there are **good reasons** (my emphasis) why a stay should not be granted.

**[28]** I have already dealt with my findings with respect to points (a) – (c). I have noted that ARD 2K did not file a defence to answer the substantive claim, but filed an Acknowledgment of Service of the Fixed Date Claim Form. In ARD 2K's written submissions the reason proffered for so doing was that they did not wish to submit to the jurisdiction of the court. I am therefore satisfied that the application

was made after the applicant had entered an appearance but before he had delivered any pleadings or taken any other steps in the proceedings, therefore (a) – (d) of my listing have been satisfied by the applicant.

**Is the Case at Bar Outside The Ambit of the Arbitration Clause**

**[29]** The Board submitted that the claim is a dispute pertaining to the rent reserved and not cesser or abatement of rent. Learned Counsel, Mr. Adrian Cotterell, suggested that cesser of rent is a term that refers to situations where a tenant stops paying rent for a number of reasons including if the property is destroyed. He defined abatement of rent as being where the tenant pays no rent or less than originally agreed in the event of damage to the property which reduces the tenant's use of said property and further submits that none of these situations exist in the case at Bar and are not the subject of this Claim.

**[30]** In contrast, Learned Counsel for ARD 2K, Mr. Nigel Jones, admits that the case at Bar does not fall under the rubric of cesser of rent, but abatement of rent and by extension the validity of the lease. Mr. Jones relied on **Stair Memorial Encyclopaedia/Landlord and Tenant (Re-issue)/General Law (15) Remedies/191** and offers a more thorough definition, which I accept, of abatement of rent which states as follows:

> *"The tenant is entitled to an abatement of rent if he loses the enjoyment of all or any part of the subjects let to him either through the fault of the landlord or through some unforeseen calamity. The subjects must usually be in such poor state of repair that they cannot be said to be in a tenantable state of repair before abatement is justified. The fault of the landlord may be that part of the subjects are withheld from the tenant or that the landlord fails to put them in a tenantable state. If the tenant remains in possession he may not rescind the contract but this does not deprive him of his right to abatement. An abatement of rent is similar to a claim for damages, but abatement is due for the loss of possession for which the rent is payable, while damages must be proved in a separate action."*

**[31]** In justifying that the dispute is an abatement of rent, the Defendant/Applicant submitted that they were let the premises for the purpose of selling household furniture and electronics. However, they were unable to load and off load at certain times as a result of the Claimant having containers stationed on the demised premises for long periods, preventing access and use and causing lack of visibility. They further submitted that the demised premises were delivered to the Defendant as a shell and was not in a condition to be used in the manner permitted. The result being that all these complaints should be resolved through arbitration.

**[32]** ARD 2K also raised a complaint about the validity of the Lease Agreement because they would not have been able to fulfil their purpose or permitted use under the Lease Agreement due to the fault of the Claimant.

**[33]** It is my view that the issue of abatement of rent in these circumstances is a live one, and once that looms large it then gives rise to the issue of the validity of the Lease Agreement, if the tenant's loss of enjoyment of any of the subjects let to him is attributable to the fault of the landlord. The question of the validity of the lease is for the determination of the arbitrator to be made based on the construction of the lease agreement and evidence as to the factual circumstances surrounding the state of the premises which prevented the Defendant from enjoying that which was let to him. (See **Leighton Chin-Hing** case**,** paragraph 25, and **Rom Securities Ltd. v Rogers (Holdings) Ltd., 205;427)**

**[34]** Counsel for The Board, Mr. Adrian Cotterell, raised another issue with respect to the Board having a fiduciary duty to the pensioners and the impact, these acts of the Defendant would have on this fiduciary responsibility. As previously mentioned, he submitted that the Fund was set up for the benefit of pensioners and that the Board invested in the real estate market in order to earn rent profits for the Superannuation Fund. The Board having a fiduciary duty to the pensioners, he submits, must act in their interest. Mr. Cotterel's view was that

because the company was a serial delinquent tenant, the Board therefore is seeking to have the company vacate the premises and pay its arrears. He contends that if this matter does not proceed in court and has to go to arbitration the board will incur further costs and further time will be wasted. "Time and costs which, as a fiduciary, the Board cannot afford to expend."

**[35]** With respect, I do not find favour with the views expressed by Learned Counsel, Mr. Cotterell. The Lease Agreement was prepared and signed to by The Board and they saw it fit to include an Arbitration Clause. Evidently, parties would be encouraged to seek the route of arbitration therefore costs, expenses and delays (perceived or actual) must have been contemplated. Additionally, the fact that this matter includes these points of law does not preclude arbitration or make it undesirable. Allowing the matter to proceed to arbitration would, far from preventing the just disposal of proceedings, be promoting adherence of the parties to what they have contracted for. (See **Leighton Chin-Hing** case**,** paragraph 27). Ms. Justice Mangatal aptly and succinctly summarises the pragmatic approach in the **Tri-Star** case:

> "Section 20 of the **Arbitration Act** provides that the Arbitrator may state in the form of a special case for the opinion of the court, any question of law arising in the course of the reference."

**[36]** Similarly, if the issues of validity of the lease and the fiduciary duty of the Board arise for determination by the Arbitrator, then it is possible for the points to be stated by way of special case.

**[37]** Justice Mangatal continues:

> *"There is in any event nothing to preclude the parties appointing an arbitrator with legal training to resolve all questions…it is for all these reasons that I think that the tension (if any) between the principle that parties should be held to their bargain to go to arbitration, and the principle that points of law are best determined by the court, should resolve itself,*

*and tip, in favour of a stay of proceedings in order for the matter to be arbitrated as agreed."*

**Disposition**

**[38]** In concluding, I am of the view that the Defendant/Applicant, ARD 2K Electronics Company Ltd., is entitled to the stay which it has sought. The Claimant/Respondent, Board of Trustees of the Kingston Port Workers Superannuation Fund, has not satisfied me that there is any good or sufficient reason to refuse a stay. Any anticipated points of law can be adequately dealt with by the Arbitrator utilizing prescribed procedures under the Arbitration Act. There is nothing for this court to try or determine having referred the matter to arbitration.

**[39]** It is hereby ordered and declared as follows:

(1) This court has no jurisdiction to try the Claim;

(2) A stay of proceedings is granted pursuant to section 5 of the Arbitration Act, pending the submission of the matters in dispute to Arbitration ;

(3) Costs of the application to the Defendant to be taxed if not agreed

(4) Defendant/Applicant's Attorney-at-law to prepare, file and serve the formal order;

(5) Permission to appeal is refused.