IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M 168 of 1993

IN THE MATTER OF AN ARBITRATION BETWEEN NAKASH GOSHINE ENGINEERING COMPANY LIMITED AND ALCAN JAMAICA COMPANY PURSUANT TO A REFERENCE IN WRITING; IN THE MATTER OF THE ARBITRATION ACT.

BETWEEN	ALCAN JAMAICA COMPANY	APPLICANT
A N D	NAKASH GOSHINE ENGINEERING COMPANY LIMITED	RESPONDENT

Allan Wood and Ransford Braham instructed by Livingstone Alexander and Levy for the Applicant

Dennis Morrison Q.C. and John Givans instructed by Dunn Cox and Orrett for the Respondent

Heard: April 28 and 29th; May 5 and 6 and June 3, 1994

CLARKE J.

On 17th December, 1990 the respondent (the contractor) contracted with the applicant (the employer) to construct piled foundations at Kirkvine in the parish of Manchester. A dispute between the parties over questions of the contractor's entitlement to be paid additional sums (and if so, the amounts thereof) for specified work led to a reference by the parties to arbitration and to an award by Mr. Brian Goldson, the arbitrator appointed under the agreement of reference.

The employer attacks the award. Its attack stops short of requesting the arbitrator to state his award in the form of a special case for the opinion of the Court. Instead, by notice of motion, it seeks to move the court to set aside the award on the following grounds:

(1) That the said Award is bad on the face of it;

(2) That the said award is contrary to law, unreasonable and/or inconsistent.

Made and published on 15th October 1993 the award reads as follows:

"Whereas:

1. By a contract in writing dated 17th December, 1990 the claimants undertook to construct, complete certain works comprising piled foundations at Kirkvine Works, Manchester.

2. The said contract provided that in the event that any dispute between the parties might arise it should be referred for Arbitration to a person appointed by Agreement between the parties.

3. A dispute having arisen and following an Agreement of Reference dated 12th January, 1993 did appoint me Brian L. Goldson of 23 Parkington Plaza, Kingston 10 to be Arbitrator in the matter in dispute in accordance with the Terms of reference submitted and agreed by the said parties to the dispute and contained in the Agreement of reference.

Now I the said Brian Goldson having heard and considered the evidence both orally and written submitted by both the parties concerning the matters in dispute do make my award as follows:

POINTS OF CLAIM:

(a)	Is the Contractor entitled to claim additional sum for the work described in the Bills of Quantities as stated.	No
(b)	The additional sum to which the Contractor is entitled is	Not Applicable
(c)	The rate to be applied is	Not Applicable
(d)	The Contractor is entitled to claim as a Variation any additional sum for an Item "To drill and clean out pile shell"	
(e)	The sum due for this to the Contractor is 2,737 Ln. Ft. at 166.67 per Ln. Ft. =	$456,175.79
	Allow for Interest on the above at a rate of 30% per annum for 26 months =	353,385.24
	TOTAL	$809,561.03

The award then directs that fees and costs are to be paid by the employer.

Now, the basis and utility of arbitration as a method of determining disputes rests on this, that the parties choose their own tribunal and agree to be bound by its decision not only on fact but also in so far as they do not take advantage of the special remedies by way of case stated, on law: see **Heaven and Kesterton Ltd. v Sven Widaeus A/B** [1958] 1W.L.R. 248,254, per Diplock J. Once the parties choose to have their disputes settled by arbitrators then, subject to certain limited exceptions, the attitude of the Courts has been that the parties should take arbitration for better or for worse. And that attitude accounts for the general common law rule that an award is final as to both fact and law: see **Hodgkinson v Fernie** (1857) 3 C.B. (N.S.) 189; **Gunter Henck v Andre & Cie** S.A. (1970) 1 Lloyds Law Reports 235, 238.

Declaratory of the general common law rule is Section 4 of the Arbitration Act. That section provides inter alia that a submission, unless a contrary intention is expressed therein, shall be deemed to include the provision that the award to be made by the arbitrator "shall be final and binding on the parties."

Issue whether the reference was a specific question of law

It is well established on the authorities that save in cases of 'illegality' the rule remains that an arbitrator's award will not be set aside even for errors of law on its face where what was referred to him was a specific question of law. The parties would have made the arbitrator the judge of the law on the question; and as Channel J. shrewdly remarked in one case, "[o]therwise it would be futile even to submit a question of law to an arbitrator": **In re King and Duveen** [1913] 2 K.B. 32,36. So it is important to determine at this stage the competing contentions of counsel on both sides about the nature of the

reference left to the arbitrator in the present case.

Mr. Wood submitted that the questions posed to the arbitrator were mixed questions of law and fact. Mr. Morrison on the other hand submitted that the arbitrator was asked to determine a specific question of law, namely, whether the contractor having performed a certain item of work was entitled to be paid for it and, if so, upon what basis. The determination of that question, Mr. Morrison argued, did not require the arbitrator to resolve disputed facts but called upon him to resolve rival contentions as to the contractor's entitlement under the contract. That, so the argument ran, was essentially a question of the interpretation of the contract, which is a question of law.

I would respectfully say that all that is correct so far as it goes. But surely the formulation of the question is Mr. Morrison's. He says that that was the question specifically referred to the arbitrator for his decision. Yet it is plain that that question does not represent the whole dispute referred to the arbitrator. That question is extracted from the five questions set forth in the reference. Those five questions define the dispute and are as follows:

(a) Is the Contractor entitled to claim additional sums for the work described in the bill of quantities as follows:-

> "Clean out pile shell and drill through hard gravel layer beneath tip or shell to specified penetration depth as indicated on the drawings, to develop ultimate required lateral resistance as specified."

(b) If the answer to (a) hereof is in the affirmative, what would be the additional sum to which the Contractor is entitled.

(c) If the answer to (a) hereof is in the affirmative what would be the rate or rates to be applied to the work described in (a) hereof?

(d) Is the Contractor entitled to claim as a variation, by letter dated 7th October 1991, any additional sum for the item "to clean out pile shell."

> (c) What is the sum, if any, due from the Employer to the Contractor for the work described as "to clean out pile shell", after taking into account the payments made by the Employer to the Contractor for such work."

So the arbitrator was required to determine whether or not the contractor was entitled to additonal payment for the specified work and if so the rates and amounts payable. He was also obliged to determine whether there was variation in the light of the letter of 7th October 1991 and, if so, what additional sum was payable to the contractor. The reference was not in my opinion one where a specific question of law was referred to the arbitrator as the sole tribunal. It was plainly a reference in which questions of construction arose as being material in making a practical decision on the disputed issues of whether additonal sums were payable to the contractor for the work stated in the reference and, if so, how much. The present case is far away from cases such as **National Sugar Co. Ltd. and Others v American International Underwriters (Jamaica) Ltd. & Others** S.C.C.A NO. 78/90 Judgment delivered on 11th June, 1991 (unreported) where what was referred to the arbitrator was a specific question of law. In that case the arbitrator was asked to decide a specific question of construction viz, was Knight's Bridge a building within the terms of the clause of an insurance policy covering the insured's property. Carey P. (Ag.) who delivered the judgment of the Court of Appeal said this at page 6:

> "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.

All that is, of course, not this case, for the questions

referred to the arbitrator in the present case were composite questions of law and fact, or at all events, other than specific questions of law. This court therefore has an inherent jurisdiction to set aside the award if an error of law appears on its face: see for instance Hodgkinson v Fernie (supra) and **F.R. Absalom Ltd. v Great Western (London) Garden Village Society** (1933 A.C. 592.

Question of error of law apparent on the face of the award

Mr. Wood submitted that error in law appears on the face of the award on the ground that the contract including the Bills of Quantities and/or the terms of reference, both of which he contends are incorporated in the award, show that the arbitrator erred in the answers given at (d) and (e) of the award. He further submitted that the award itself is, in any case, inconsistent.

As to the argument that the award is inconsistent (an argument which bears on the issue whether the arbitrator misconducted himself in the technical sense), Mr. Wood says that question (a) in the award viz, "Is the contractor entitled to claim additional sum for the work described in the Bills of Quantities "as stated," is a general question while the question or statement at (d) of the award is specific viz, "The contractor is entitled to claim as a variation any additional sum for an item, "To drill and clean out pile shell'." Mr. Wood says that both relate to the same subject matter in the sense that an affirmative answer to (a) is a precondition to an affirmative answer to (d).

Now, it is plain, as Mr. Morrison submitted, that from the text of the questions in the reference the arbitrator was asked two separate and distinct questions at (a) and (d) thereof. In (a) he was referred specifically to the item of work described in the Bills of Quantities and set forth in the terms of reference itself. He was therefore invited to decide whether the contractor was entitled to claim an additional sum for that item of work. Then questions (b) and (c) follow question (a). And the answers

given to (b) and (c) are clearly consistent with the answer given to question (a).

Question (d) asks the arbitrator another and different question. It directs his attention not to the Bills of Quantities as question (a) does, but to the contractor's claim by letter dated 7th October 1991 to an additional sum as a variation. Question (c) follows question (d), for question (c) asks what sum, if any, is due to the contractor. Question (c) must, as Mr. Morrison contended, be predicated on the assumption that an affirmative answer to question (a) was already covered by question (b) and (c).

As Mr. Morrison pointed out, if Mr. Wood is right that in order to answer question (d) in the affirmative the arbitrator would have had to answer question (a) in the affirmative, what was the necessity of posing question (d)? Mr. Wood answered that at a certain point that was the basis upon which the contractor mounted its claim for an additional sum. I agree with the other side that that answer takes the matter no further because if Mr. Wood is right about there having to be consistency in the answers to questions (a) and (d) then question (d) was superfluous, which plainly is not so.

The fact of the matter is, as Mr. Morrison observed, that the scheme of the questions contemplates the arbitrator dealing with the two questions separately and the consequences of his answer to each. There clearly is therefore consistency in the award and so there is no error on its face on the ground of inconsistency.

Mr. Wood properly conceded that if the award is consistent no error of law will be apparent on the record in the absence of incorporation. The question therefore arises whether there is any material incorporated by the award thereby entitling the Court to look behind the award so as to determine whether the arbitrator

erred. In other words does the award incorporate another document or other documents so as to entitle the Court to read that or those documents as part of the award and by reading them together, find some error on the face of the award?

It is settled law that recitals in an award which refer (as do the recitals in the award in the present case) to documents do not incorporate those documents in the award. Mr. Wood argued, however, that the arbitrator's reference in the answer to question (a) in the award to the Bills of Quantities is sufficient to incorporate that contract document so as to permit same to be considered in determining whether an error of law is apparent upon the face of the award. But I bear in mind this, that the arbitrator answered that question in the employer's favour; and nothing in what he said in answer to that question called for, or necessitated, reference to the Bills of Quantities.

D.S. Blaiber & Co. Ltd v Leopold Newborne (London) Ltd [1953] 2 Lloyd's Report 427 cited by counsel on both sides was an appeal from a dismissal of a motion to set aside an award on the ground that there was an error of law on the face of the award. As there was simply a recital of the contract which was not incorporated into the award, the English Court of Appeal in dismissing the appeal held that it was not open to the Court to go behind the award and look at the contract terms; and that it was therefore impossible to say that the award was bad on the face of it.

In the case before me Mr. Wood relied not on the recitals but on the reference to the Bills of Quantities in the introductory part of the award at question (a) as thereby incorporating the Bills of Quantities which form part of the contract. That reliance is, in my view, misplaced. The following dictum of Somervell L.J. in the D.S. Blaiber & Co. Ltd. case (supra) at page 429 (first column) is, I think, as instructive as it is

persuasive, uttered, as it was, after the learned judge had, if I may so with respect, incisively compared and contrasted the approach of the Judicial Committee of the Privy Council in **Champsey Bhara & Co. v Jivraj Ballo Spinning and Weaving Co. Ltd.** [1923] A.C. 480 with that of the House of Lords in **F.R. Absalom Ltd. v Great Western** (London) **Garden Village Society Ltd.** [1933] A.C. 592 on the question of the extent to which contracts or other documents may be incorporated in arbitral awards:

> "Having regard to those two cases, one on one side of the line and one on the other I am clear myself that in this case we are not entitled to look at the contract. It is referred to generally in the recital and I do not think it would make any difference if it had been referred to generally in the award or in matters introductory which was not in form of a recital. (Emphasis supplied)

So far from conflicting with those observations, the oft quoted dictum of Denning L.J. in the same case complements them by offering a test as to whether a contract or a clause in a contract is incorporated in an award. That learned judge said at page 429 (second column):

> "The question whether a contract or a clause in a contract is incorporated into an award is a very difficult one. As I read the cases, if the arbitrator says: On the wording of this clause I hold so-and-so, then that clause is implicitly incorporated into the award because he invites the reading of it; but if an arbitrator simply says: 'I hold that there was a breach of contract' then there is no incorporation."

In any event it seems to me that even if I am wrong in holding that the reference to the Bills of Quantities "as stated" in question (a) of the award does not incorporate in the award the Bills of Quantities or other contract documents, I agree entirely with Mr. Morrison that all that these words, "as stated", can at the highest be taken to incorporate is the full quotation from the Bill of Quantities which appears in the terms of reference, to wit:

> "Clean out pile shell and drill through hard gravel layer beneath tip of shell to specified penetration depth as indicated on the drawings, to develop ultimate required lateral, resistance as specified."

Even so, there is no error of law on the face of the award in the sense that the arbitrator has not tied himself down to some special legal proposition which when examined can be demonstrated to be unsound: see Champsey Bhara & Co. v Jivraj Balloo Spinning Co. Ltd. (1923) A.C. 480, 487, per Lord Dunedin.

Question of Certainty of the award

As there is no inconsistency in the award there is no question of uncertainty of the award remaining. The arbitrator was asked two separate questions. He answered one in the affirmative thereby directing the parties to the basis upon which he was making the award and he went on to make his award accordingly.

Question of excess of jurisdiction

The terms of reference at (d) thereof called upon the arbitrator to determine whether the contractor was entitled to claim any additional sum for the item "to clean out pile shell." In his award the arbitrator purports to make an award "to drill and clean out pile shell."

I agree with Mr. Wood that although the latter phrase is put in quotes by the arbitrator, it is not in fact a quotation from the terms of reference. Nor is that phrase a quotation from the letter of 7th October, 1991 which makes the claim for variation. That circumstance led Mr. Wood to submit that the arbitrator went beyond the matter he was asked to determine; and that by expressly including the word "drill" the arbitrator has made a mistake which goes to jurisdiction.

In my view it is clear from all the material before the Court that by using the words "to drill and clean out" the arbitrator was as Mr. Morrison submitted, purporting to do no more

than answer the question which he had been asked in question (d) of the terms of reference. I read (d) in the award as the arbitrator's answer to question (d) posed in the terms of reference. Test that interpretation: given the way the questions were framed the arbitrator could not have answered question (e) in the way he did unless he had answered (d) affirmatively.

So, the insertion of the word "drill" in his answer to (d) is not, as Mr. Wood contends, an excess of jurisdiction and therefore does not fall within the principle of the cases laying it down that an award may be set aside on the ground that the arbitrator in making it exceeded his jurisdiction.

The dispute was about whether the contractor should be compensated for cleaning out and so in that context it is reasonable to conclude that by including the word "drill" in answering question (d) the arbitrator made a mistake rather than assumed a jurisdiction which he did not have. Such a mistake could have arisen, as Mr. Morrison pointed out, from the fact that the two activities "clean out" and "drill" are juxtaposed elsewhere in the terms of reference.

In my judgment the mistake is purely semantic in the overall context of the award and falls within the general rule that awards should not be set aside for mistake: Phillips v Evans (1843) 152 E.R. 1216.

There being no error of law on the face of the award, no excess of jurisdiction and no misconduct by the arbitrator within the meaning of section 12 (2) of the Arbitration Act, the motion is dismissed with costs to the contractor, to be taxed if not agreed.