[2017] JMCC Comm. 09

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2016 CD 00329

IN THE MATTER of the Arbitration Act

AND

IN THE MATTER of the appointment of an Arbitrator

BETWEEN	**BRIDGETON MANAGEMENT SERVICES LIMITED**	**CLAIMANT**
AND	**MAYBERRY INVESTMENTS LIMITED**	**DEFENDANT**

Arbitration- Margin agreements – Arbitration clause – Application to appoint arbitrator - Whether claim statute barred – Whether issue for court and not arbitrator to determine – Whether jurisdictional issue – Arbitration Act.

Ransford Braham QC and Jeffrey Foreman instructed by Brahamlegal for the Claimant

Jerome Spencer and Vanessa Young instructed by Patterson Mair Hamilton for the Defendant

Heard : 28th and 30th March and 7th April 2017.

IN CHAMBERS

COR : BATTS J

1. By a Fixed Date Claim filed on the 30th September 2017, the Claimant, pursuant to Section 6 of the Arbitration Act, seeks to have Justice Roy Anderson (Retired) appointed sole Arbiter of a dispute between the parties. The Defendant opposes the application. The Claimant relies on the affidavit of Mr John Jackson filed on

the 30th September 2017 whilst the Defendant filed an affidavit of Mrs Vanessa Young on the 16th February 2017. There were however no issues of fact for my determination. Each party filed written submissions and authorities; each was also allowed to make oral submissions before me.

2. Having carefully considered the authorities cited it is clear to me that the Claimant must prevail in this application. I shall state my reasons for this conclusion without a too detailed reference to the arguments presented.. In so doing I intend no disrespect to counsel whose urgings were well researched and consequently of great assistance.

3. The dispute between the parties concern contracts which are called "margin agreements". The details of which thankfully I need not go into for the purpose of this decision. Suffice it to say that margin agreements relate to monetary investments in securities. One party is allowed to borrow against the value of eligible securities provided the investment / deposit is retained at a certain level The interest charged on the amounts borrowed is called the margin rate. In this matter there is a difference of opinion between the parties as to whether the appropriate investment/deposit was maintained, the interest to be paid, whether the circumstances for payment of interest arose and how that interest is to be calculated ,among other things. This dispute continued for several years and the exchange of correspondence exhibited attests to that.

4. The Claimant and Defendant agree that both margin agreements contain arbitration clauses. The wording in each is similar, but not identical, to that in the other. I will therefore quote both of them.

The 2004 agreement:
:

> **"The undersigned agrees, and by carrying an account for the undersigned you agree, that all controversies which may arise between us concerning any transaction or the construction, performance or**

> **breach of this or any other agreement between us, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. Arbitration is final and binding on all parties."**

The 2006 agreement:

> **"The undersigned agrees, and by carrying an account for the undersigned, Mayberry agrees, that all disputes, differences or controversies which may arise between us concerning any transaction or the construction, performance or breach of this or any other agreement between us, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. The choice of Arbitrator shall be in the first instance chosen from a panel of three persons by Mayberry from whom the undersigned shall select one."**

5. There is no dispute that the Claimant has called on the Defendant in the manner required to satisfy section 6 of the Arbitration Act. The relevant notices are attached as Exhibits JJ5 to the affidavit of Mr John Jackson.

6. The Defendant's objection to an order pursuant to section 6 is one which they term "jurisdictional". It is alleged that the, or any alleged, breach of contract by their client is now barred by statute of limitation. It is submitted that it is therefore an exercise in futility to appoint an arbitrator. In any event, contends the Defendant, an arbitrator cannot be asked to determine issues related to his own jurisdiction. Therefore, since the question whether or not the claim is time barred will in this case turn on whether the parties had entered into a settlement agreement, the issue is not a matter for the arbitrator. Finally, the Defendant also submitted that section 6 of the Arbitration Act is not mandatory and that, in the circumstances of this case, I should exercise my discretion and decline to appoint an arbitrator.

7. The Defendant, in its written submissions, cited authority on the applicable limitation period. I did not understand the Claimant to take issue with that aspect

before me. Rather the learned Queens Counsel focused on the terms of the relevant arbitration clause. The agreement of 2004 referenced "*all controversies*". That of 2006 applied to "all *disputes differences or controversies*". Both Clauses applied to "*any transaction or the construction performance or breach of this or any other agreement between us whether entered into prior*, on *or subsequent to the date hereof*". Counsel submitted that a limitation of actions defence is one which may be (and ought to be) taken before the arbitrator in the course of the arbitration. He referenced correspondence between the parties and contended that the parties had arrived at a settlement agreement or accord as to how the disputed rates and/or their computation was to be treated. This latter agreement, he contends, is now breached hence the need for referral to arbitration. Insofar as the arbitration clause governs future agreements, it can be applied to the later settlement agreement.

8. I agree with counsel for the Claimant. On a true construction of the relevant arbitration clause, the parties intended it to apply to disputes in relation to the particular margin agreement as well as in relation to any other agreement. Manifestly this must also include an agreement to settle disputes arising out of the agreement which contains the arbitration clause. The Limitation Of Actions Act does not go to jurisdiction. It is trite law that if not pleaded a court can proceed to hear and determine a matter even if the relevant limitation period has passed. It is a statutory defence that is waived if not taken. If the defence is raised before the arbitrator it will therefore be for him to decide, as a mixed question of law and fact, whether the claim is time barred. It will be in the context of making that determination that the arbitrator may be required to consider if the subsequent exchange of correspondence created a new arrangement, agreement or acknowledgement.

9. The situation before me is, I think, clearly distinguishable from that in the authorities relied on by the Defendant. **Mustill's "Law and Practice of Commercial Arbitration**" **second edition** ,relied on by the Defendant, states the

applicable principle correctly at page 114: *"Just as an arbitrator cannot make a binding award as to the existence of a contract which, if it does exist, is the source of his authority to act ,so also does he lack the power to make a binding decision as to the existence of the facts which are said to found his jurisdiction".* In the case at bar there is no challenge to the terms or existence of the arbitration clause. The arbitrator will not therefore be called upon to determine the existence of the clause or facts related to its existence.

10. Defendant's counsel relied also on **Goldsack v Shore [1950] KB Div 708.** However, the dicta at page 712, must be read in the light of the issue before the court**.** The case concerned the **Agricultural Holdings Act 1948 (UK).**That statute stated that certain issues were to be referred to arbitration. The English Court of Appeal was, by this decision, reaffirming that it will always be the responsibility of courts to construe legislation. Therefore, the question whether an agreement fell to be referred to arbitration under the Act was for the court and not the arbitrator. The Defendant also relied on dicta at page 276 in **Attorney-General for Manitoba v Kelly and others [1922] 1 AC 268**. In that case the court had given judgment and referred issues, related to the quantification of damages, to an umpire. The question their lordships in the Judicial Committee of The Privy Council had to decide was whether the umpire had exceeded his jurisdiction when determining the loss. It was, the court decided, not for the umpire to decide what was the extent of his jurisdiction. I find the case, with respect, to be of little assistance in the matter I have to decide.
11. In this matter, there is no doubt or confusion as to the extent of the intended arbitrator's jurisdiction. The clause says he is to determine all disputes present and future with respect to the existing agreement and any others to be entered into. Whether or not the claim is barred by statute of limitation will be a matter, if the Defendant takes the point, for the arbitrator to decide. This may necessitate a decision, as a matter of mixed law and fact, whether the correspondence established an acknowledgment or whether there was an accord and satisfaction or a settlement agreement. If there is a settlement agreement, and a dispute as

to its performance, that also will be a matter for the arbitrator to resolve. In circumstances, where parties clearly manifest a desire to have all disagreements determined by arbitration, I see no credible reason not to assent to this application. In arriving at this decision I find some comfort in the words of the judges of the Caribbean Court of Justice:

> "*The 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"* **Belize Natural Energy Ltd v Maranco Ltd [2015] CCJ 2(AJ) paragraph 16.**

12. In the result my decision is as follows:

    (i) Pursuant to Section 6 of the Arbitration Act The Honourable Mr Justice Roy Anderson (retired) is appointed sole arbitrator to determine the matters in dispute between the parties of and concerning the construction, performance or breach of the Margin Agreements dated the 12th September 2004 and 16th September 2006 or any other agreements entered into between the Claimant and Defendant.

    (ii) Liberty to Apply

    (iii) Costs to the Claimant to be taxed or agreed.

David Batts
Puisne Judge