IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2005 HCV 5008

IN THE MATTER OF THE ARBITRATION ACT
AND
IN THE MATTER OF AN ARBITRATION

BETWEEN	**CFC CONSTRUCTION (ENGINEERS) LIMITED**	**APPLICANT**
AND	**RUNAWAY BAY DEVELOPMENT LIMITED**	**RESPONDENT**

IN CHAMBERS

Mr. Dennis Morrison Q. C. and Mrs. Stacey Ann Smith instructed by DunnCox for the applicant

Mr. Conrad George and Mr. Wieden Daley instructed by Hart, Muirhead and Fatta for the respondent

January 23, 24, 31, February 6, 7 and 13, 2006

APPLICATION FOR PERMISSION TO ENFORCE ARBITRATION AWARD UNDER SECTION 12 OF THE ARBITRATION ACT

SYKES J

1. CFC Construction (Engineers) Limited (CFC) has applied for permission to enforce an arbitration award as if it were a judgment of this court. Section 12 of the Arbitration Act permits this. Runaway Bay Development Limited (RBDL) is opposing the application. This is an inter partes hearing. This came about because on December 20, 2005, at the commencement of CFC's ex parte application, RBDL appeared and indicated their opposition to the application. It was thought prudent to invite RBDL to make submissions in this regard.

How the courts should approach arbitration awards

2. The law is now at the point where the courts should seek to uphold arbitration awards rather than work assiduously to overturn them. There are a number of good reasons for this. I cite just some of the authorities that support this proposition. The quotations also include the reasons for this approach. In 1948 Lord Goddard stated in ***Mediterranean & Eastern Export Company Ltd v Fortress Fabrics (Manchester) Ltd*** [1948] 2 All ER 186, 189 said

> *The day has long gone by when the Courts looked with jealousy on the jurisdiction of the arbitrators. The modern tendency is, in my opinion, more especially in commercial arbitrations, to endeavour to uphold award of the skilled person that the parties themselves have selected to decide the question at issue between them. If the arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice, the Courts should be slow indeed to set aside his award.*

No doubt this was to refute the approach of Scrutton L.J in ***In re Boks & Co and Peters, Rushton & Co Ltd*** [1919] 1 K.B. 491 who said at page 497, that the summary method of enforcement is only to be used in reasonably clear cases.

The modern approach was affirmed by the English Court of Appeal in ***Middlemiss v Hartlepool Corporation*** [1972] 1 W.L.R. 1643. In February 1988 the Jamaican Court of Appeal said, through Downer J.A., in ***Marley and Plant Ltd v Mutual Housing Services*** (1988) 25 J.L.R. 38, 39D:

> *The jurisdiction of the Supreme Court to set aside the award of an arbitrator is circumscribed because the parties have chosen their own tribunal and the findings of an arbitrator expressed or necessarily implied are not to be disturbed save in well defined circumstances.*

3. While it is true that the application before me is an application for permission to enforce the arbitration award and not an application to set aside I cannot ignore how the courts treat arbitration awards. It seems to me that in light of the courts' attitude to setting aside awards courts should endeavour to facilitate enforcement of the awards rather than seek to restrain enforcement.

4. I had a similar application to deal with in November 2004. In that case I declined to set aside a previous order for permission to enforce the award (see ***VRL Services Ltd v Sans Souci Limited*** Claim No HCV 02205/2004,(delivered November 9, 2004)). On appeal the decision was reversed on the basis that I had erroneously concluded that the failure by the

enforcing party to disclose the fact of a challenge to the judge who had granted permission to enforce the award was not a material non-disclosure (see ***Sans Souci Ltd v VRL Services Ltd*** SCCA No 108/2004 (November 18, 2005)). The Court of Appeal did not say that my views on the approach to applications of this nature were incorrect. The position I took then was advanced before the Court by Mr. Mahfood QC (see pages 18 and 19) but McCalla J.A. (Ag) declined to comment one way or the other preferring, instead, to resolve the case on the non-disclosure point. Consequently, I see no reason to revise them and I have seen no new material to show that I was misconceived in that approach. I therefore adhere to the approach set out at paragraphs 12 to 17 of my judgment in the ***San Souci*** case referred to above and so there is no need to repeat them at length here.

5. The point therefore is that it is not sufficient for an opponent of the application for permission to enforce the award to turn up and simply say, "Judge, you cannot grant permission because I am challenging the award". The opponent must do more. He must show, from an examination of the award and/or other material before the arbitrator some defect that gives him a real prospect of successfully setting aside the award. This means he must identify some prima facie error on the face of the record or some error in logic or interpretation of law, evidence or application of law to fact or breach of natural justice or some other kind of misconduct before the pendulum in favour of permission to enforce begins to swing back in his favour. If it were otherwise, it would make nonsense of arbitrations because the parties who would have expended significant time and resources could not be confident that even the best arbitration would not be brushed aside. This is all the more important given the renewed thrust towards non-litigious resolution of disputes where this is possible. We as judges don't assume arbitrators are wrong thus shifting the burden to those who wish to enforce to show that the arbitrator was correct. Rather, we assume he did his job properly unless there is some showing that this might not be so. The opponent to the permission to enforce does not at this stage have show that he is certain to be successful but it surely cannot be as low as merely filing a challenge. This is how I approach the application in this case. I now turn to a brief history of the matter.

The contract

6. On September 17, 1997 RBDL employed CFC to construct a massive 225 room hotel in, the parish of St. Ann, the land of Marcus Garvey and Robert Marley, two of Jamaica's icons. They might not have approved of the eventual name of the hotel which was Hedonism 111 but they would have certainly welcomed the employment and income generated in the parish. The value of the contract was a substantial JA$726,850,869.04.

7. In contracts of this magnitude the parties anticipated that disputes would arise during the course of construction and so made provisions for resolving them. The contract stipulated that there would be a project manager and an adjudicator. These two persons were charged, inter alia, with the responsibility of settling the expected disagreements. The contract also provided for arbitration in the event the contracting parties could not resolve certain issues between them at the level of the project manager or the adjudicator. Another feature of the contract was a system of damages imposed on the contractor if he failed to meet certain targets and bonuses payable to him if he met certain targets.

The arbitration

8. Needless to say a severe dispute arose between the parties. They proceeded to arbitration. By joint letter dated January 3, 2001, both parties invited Mr. Joswyn A. Leo-Rhynie Q. C., an extremely experienced arbitrator, to arbitrate the dispute. He graciously accepted the invitation. Even though it is said that speed is a virtue in arbitration this particular one proceeded at a glacial pace. The hearings began on January 12, 2004 and ended in September 2005 when the arbitrator handed down his award with supporting reasons.

9. Very early in the arbitration it became clear that there would be much highly technical evidence that would pose quite a challenge even to the most astute non-engineer among us. At the suggestion of both parties and after discussion with counsel on both sides and with their full and unreserved concurrence the arbitrator, on February 26, 2004, made the following order:

> *The essential terms of the agreement between the Claimant and the Respondent contained in paragraphs numbered "1" to "4" of letter to the Arbitrator dated 20 February 2004 and signed by the Attorneys-at-Law representing the Claimant and the Respondents ("Agreement Appointing Assessors") be amended to reflect the new terms agreed to by the parties which are to the following effect (inter alia):*
>
> *1. In light of the technical nature of the dispute all issues will be referred to Mr.*

Maurice Stoppi and Dr. Wayne Reid for assessment.
2. Mr. Stoppi and Dr. Reid will complete their assessment and forward a written report of their recommendations to the Arbitrator, the Claimant and Respondent on or before the 6th April 2004.
4. (sic) All recommendations proffered by Mr. Stoppi and Dr. Reid will be binding on the parties subject to any modifications by the Arbitrator after legal submissions by the parties. "

10. These terms made it clear that the parties were referring all factual matters to the assessors. They agreed to be bound by all the findings of fact. Thus when they came back before the arbitrator they would be limited to arguing points of law. The only way they could challenge a finding of fact is if it could be shown that the assessors made a finding that was not supported by the evidence or they made a finding that no reasonable assessor could so find on the evidence presented. This, therefore, is the Everest that Mr. George had to conquer.

The challenge

11. Mr. George filed an application for court orders dated December 13, 2005 which asked for the following:

1. an order restraining the Defendant from executing or taking any steps to execute, pending the determination of the claims set forth herein, the Award of Mr J. A. Leo-Rhynie Q.C.. of 5th September 2005 in In the Matter of an Arbitration between CFC Construction (Engineers) Limited and Runaway Bay Developments Limited;
2. an order that Claim No. 2005/HCV 3173, Claim No. 2005/HCV 5008 and Claim No. 2005/HCV 5009 be consolidated;
3. such further order(s) as the Honourable Court seems just

11b. The grounds of the application were that it would be just, fair and effective to do so. The affidavits filed in support were sworn by Mr. Winston Hepburn and Mr. Rex James. I have read these affidavits. I have also read the affidavits of Mr. Carvel Stewart filed in support of CFC's application. I refer to these affidavits but particularly those of Messieurs Hepburn and James to make the point that I am aware of the claims made in the actions referred to in paragraph 2 of RBDL's notice of application for court orders.

11. I shall briefly state what the other claims are about. Claim No 2005 HCV 3173 is exhibited to Mr. James' affidavit. It is a claim by RBDL against CFC for damages in the sum of $10,500,000 for breach contract; there is also a claim for interest as well as restitution. The particulars of claim are exhibited as well. I have read all the exhibits attached to Mr. James' affidavit. This restitution claim is connected to the judicially decided fact that RBDL made a wrong call under a performance bond. This issue arose because RBDL thought that the circumstances that would trigger the performance bond

had arisen. CFC refuted this. The parties decided to seek a judicial determination of that discrete issue. The value of the bond was $30,000,000. The understanding between the parties was that if it was determined that the call was wrong then RBDL would repay the $30,000,000 and if the case went against CFC then it would repay the said sum. Anderson J, decided in a written judgment, which has not been appealed, that RBDL made a wrong call and therefore liable to repay the $30,000,000 (see ***Finsac Ltd v CFC Construction Co. Ltd v Runaway Bay Development Ltd*** [Suit No. E 155 of 2000] (delivered June 18, 2002). The details are unimportant but the effect of the judgment was that RBDL was indebted to Finsac Ltd to the tune of $30,000,000. Finsac did not collect the debt in cash but instead took shares in a debt for equity swap. The practical consequence of this was that RBDL no longer had to pay $30,000,000. I say this to say that the issues raised in this claim have nothing to do with the arbitration award and therefore are irrelevant to the question of whether permission should be granted to enforce the award.

12. Claim No. 2005 HCV 5008 is CFC's current claim for permission to enforce the arbitration award and Claim No 2005 HCV 5009 which is exhibited to the affidavit of Mr. Carvel Stewart is a claim by CFC against RBDL to recover money retained under the contract during the defects period.

13. I should mention that there is also Claim No. 2005 HCV 05569. This is RBDL's action to set aside the award of the arbitrator.

14. The burden of Mr. James' affidavit was to show the current precarious financial position of CFC. According to Mr. James, should the award be enforced and RBDL is successful in setting aside the award later on, the sums paid could not be recovered. He places great reliance on the opinion of Mr. Hepburn that there are good grounds for challenging the award. He has unreserved confidence in his legal advisors who have also told him the same thing. This part of Mr. George's submissions was anchored to the case of ***Flowers, Foliage and Plants of Jamaica Ltd v Jamaica Citizens Bank*** (1997) 34 J.L.R. 447.

15. There are two comments I make about the ***Flowers, Foliage*** case. First, it never decided that merely to say, "I have an appeal", would be sufficient to move any court to grant a stay of execution. The Court of Appeal decided that there had to be some prospect of success. This is not inconsistent with what I said earlier that any opponent to an application to enforce an arbitration award must show a real prospect of success. Second, the court did not define what it meant by "some prospect of success" but I am of

the view that both the Court of Appeal and I mean something of actual substance arising from the material before the court as distinct from the ingenuity of counsel. I am sure that the Court of Appeal and I are not differing. The words used are different but the meaning is the same. The question of ruination does not arise for consideration unless the threshold requirements of which I spoke earlier have been crossed. The threat of ruination has no intrinsic power to stop the permission to enforce the award. It has a contingent existence, that is to say, contingent on crossing the threshold.

16. During the hearing of this matter Mr. George applied to put before me other material which I refused. That did not prevent him arguing points not foreshadowed in his two skeleton arguments. I am satisfied that RBDL was given every opportunity to advance its case opposing permission to enforce the award. The first set of skeleton arguments dealt with ruination of RBDL. The second dealt with errors of law on the face of the record. There was even a brief reference to estoppel.

17. I now examine Mr. Hepburn's affidavit and Mr. George's submissions. Virtually all of Mr. Hepburn's affidavit raises questions of fact. I have read the arbitrator's reasons for award that runs to some one hundred and thirty nine (139) pages excluding the appendices. I have not seen a single instance where the arbitrator acted as a rubber stamp of the assessors' findings. What I see is a careful review of each point of claim, defence and point of counterclaim. The arbitrator then examines the evidence before the assessors and then looks to see if the evidence supports the conclusion of the assessors. At all times, he was mindful of the fact that when the assessors report came before him, his role was not to see if he would have come to a different conclusion on the evidence but to see whether the conclusions were supported by the evidence. There is no error of law in approaching the matter in this way. Mr. George did not seek to contend otherwise. As Mr. George developed his submissions, it turned out that this real concern was in relation to the arbitrator's ruling denying RBDL's claim for liquidated damages for late completion of the hotel and the corresponding award to CFC of a bonus for early completion. I will examine this area in detail to see if Mr. George's submission that there is an error of law in this part of the award is sustainable.

18. I remind myself that what I am looking for here is not whether I would differ from the arbitrator but rather whether the arbitrator came to a conclusion that is not supportable by the evidence and the law. The arbitrator sets out his reasons at paragraphs 3.01 – 3.39 of his reasons for award.

19. When the contract was signed the intended completion date was April 6, 1999. This

was pushed back to August 14, 1999. There was a further extension to September 17, 1999, and then finally, October 7, 1999. If CFC completed by the completion date, it would get an early completion bonus and conversely if it failed to complete it would be penalized in damages. Coming up to August/September 1999 it became apparent that the beach groyne and nude beach would not be completed by either August 14, or September 17, 1999 or even by October 7. CFC contends that it was agreed with RBDL that the groyne and nude beach would not be taken into account in order to determine whether there was early completion thus entitling CFC to an early completion bonus. RBDL contended otherwise. This therefore became a vital issue for the assessor and arbitrator.

20. Mr. George relied on the contractual terms to say that CFC did not apply for an extension of time utilizing the procedure set out in the contract and so there was in fact no extension of time. Mr. George's submissions, if I may say so respectfully, fell short of the target because it does not sufficiently appreciate what the assessors and the arbitrator were doing.

21. Mr. Morrison Q. C. directed my attention to page 138 of the arbitrator's reasons where the arbitrator states:

> *The Claimant's claim for Early Completion Bonus made under Paragraph 8 (50) of the Points of Claim and the Respondent's claim for Liquidated Damages made in its Set Off and Counterclaim are so inextricably connected that the Adjudicator, the Assessors and now the Arbitrator have had to address them concurrently. In paragraphs 3.01 to 3.39 above, I have dealt extensively with the Claimant's claim for Early Completion Bonus and substantively in paragraphs 3.29 to 3.39 with the Respondent's contention that "Bonus and Liquidated Damages are based on completion of the whole Works." This is the major premise on which the Respondent has built its defence to the Claimant's claim for Early Completion Bonus and its own claim for Liquidated Damages.* ***Pertinent to that was the issue of fact as to whether the Respondent represented or agreed that the additional Beach and Groyne works were to be treated as outside the contract date in the sense of not being subject to the Intended Completion Date.*** *I address that issue also in paragraphs 3.29 to 3.39 above.*
>
> *With respect to the Respondent's Counterclaim for Liquidated Damages, therefore, I refer to paragraphs 3.01 to 3.39 above and in particular paragraphs 3.29 to 3.39 above. It is apt to repeat here my conclusions:*
>
> > *3.38 I am not privy to all the evidence led and the submissions made with respect to this issue in the Assessment process but it has not been established by the Respondent that there was no evidence on the basis of which a reasonable tribunal could have concluded that the Respondent agreed or represented that completion of the additional beach works would not be*

subject to the contract completion date as extended. To the contrary, such an agreement or representation could reasonably be inferred from the extracts referred to above. The Assessors as the tribunal of fact having so found I have no authority or grounds on which to interfere with that finding which, given the Agreement Appointing the Assessors, binds the Parties. (my emphasis)

22. Was the arbitrator justified in saying that the issue of whether RBDL represented to CFC that the beach and groyne works were outside the completion date for the purposes of determining whether an early completion bonus was payable? To put the question another way, was it necessary to determine, as a matter of fact, whether RBDL waived strict enforcement of the contractual provisions? I conclude that he was correct because the way in which CFC presented its claim even the most careless of persons could not have failed to realise that CFC was asserting that RBDL had agreed that the completion of the beach and groyne works was not within the completion date for the purpose of determining whether an early completion bonus was payable.

23. Learned Queen's Counsel directed my attention to this passage of *Keating on Building Contracts (6th) (1995)(Sweet & Maxwell) page 286:*

Waiver is related to, if not a species of, estoppel. A party to a contract may act so as to show that he does not intend to enforce a contractual right or require performance of a contractual obligation. By so acting, he may by waiver lose the right or cease to be entitled to the performance either temporarily or permanently. "It is always open to a party to waive a condition which is inserted for his benefit." In building contracts, waiver is often asserted and sometimes upheld where contractual time limits are allowed to be exceeded or where requirements for written notices are not insisted on. A breach of contract may be waived, as may a right to effect a contractual determination or to accept a repudiation.

"In order to constitute a waiver there must be conduct which leads the other party reasonably to believe that the strict legal rights will not be insisted upon. The whole essence of waiver is that there must be conduct which evinces an intention to affect the legal relations of the parties. If that cannot properly be inferred, there is no waiver."

24. At pages 249 - 250 of the same text the point is made that waiver by the employer may be express or implied. It adds that waiver may be implied from the circumstances. This makes it abundantly clear that the arbitrator was absolutely correct to say that the determination of the issue rested upon whether there was an agreement to place the beach and groyne works outside the completion date. What the assessors determined was that the parties agreed, whether express or implied, that the beach and groyne works were outside the completion date. These are findings of fact. All the arbitrator was saying was that the assessors were justified in finding that the completion date did not

contemplate that the beach and groyne works would be included for the purposes of early completion bonus. There is, therefore, no demonstrable error of law on the face of the record.

25. To reinforce my conclusion, if that were needed, I shall set out my understanding of paragraphs 3.01 – 3.39 of the arbitrator's reasons for award. At paragraph 3.37 the arbitrator sets out the finding of the assessors. A question was posed to Mr. Winston Hepburn by Mr. Morrison QC and the answer was that Mr. Hepburn accepted that the assessors had decided as a matter of fact that the beach works (i.e groyne and nude beach) would be outside the contract completion date. The back drop of this finding by the assessors is that RBDL had changed the scope of the beach works. The change required that some of the material had to be sourced outside of Jamaica. The adjudicator had decided, based on the evidence before him, that given the change in the scope of the beach works the project manager had agreed that the works were to be done on the basis that they could not be completed before the completion date of August 14, 1999. This decision by the project manager was consistent with the power given to him under clause 28.1 of the contract to extend the completion date. The evidence before the assessors and arbitrator showed that the project manager had suggested August 31, 1999, as the date for the beach works to be completed. The upshot of this was that the extension to August 31, 1999, for completion of the beach works meant that the right to liquidated damages for non-completion of the beach works by the completion date for all the works, namely August 14, 1999, was waived. The date for completion of the beach works was set back to a later date because the material to complete the works had not arrived in Jamaica.

26. The conclusion that the project manager must have said that the August 14, 1999 date did not apply to the beach works is supported by this letter dated November 3, 1999 written by the project manager to the claimants. It says

> *The additional scope of works on the beach i.e the decks over the groynes were given on the condition that they would be accepted outside the contract time i.e August 31, 1999, in time for the opening of the property.*

27. This is in the context that August 14, 1999, was the intended completion date. This letter from the project manager could only mean that the additional scope of works would be outside the completion date by as many as 17 days. The inference can only be that RBDL was not insisting on claiming liquidated damages. RBDL could not help but waive the liquidated damages because the change in scope to the beach works was issued in June 1999. This change in scope necessitated sourcing material from the United States

of America. The construction in response to the change in the scope of the works began in July 1999 and it was well known that all the material had not arrived. This was known to the project manager. Then in July 1999 the design of the beach works were changed yet again. This further variation was known to the project manager because he was part of the discussion concerning the change in design. When this latest variation in the works was issued, with full knowledge and participation of the project manager, some of the material was still in the United States. This was known to all parties. It does not take special genius to appreciate that even when the completion date for all the works was pushed back to September 17, 1999, the beach works would be incomplete.

28. It should come as little surprise to any one that the assessors found that the completion date for the purposes of paying the early bonus excluded the date of completion of the beach works. This is what I have gleaned from simply reading the arbitrator's reasons where he summarized the findings of the assessors. The conclusion was inevitable.

29. These are purely factual matters of which there was more than ample evidence. It is horn book law that the courts take an objective view to the interpretation of contracts, waiver and such like. Only the uninitiated would fail to understand the arbitrator's reference to the law at paragraph 3.26 of his reasons. What he was doing there was identifying the law that would guide his legal conclusion in light of the assessors' findings. The law as stated by him is correct and so was its application to the facts. The best that can be said for Mr. George is that the assessors did not use legal language. The assessors were not required to do that.

Conclusion

30. There is no error of law on the face of the record and neither is there any erroneous analysis of law or fact that led to erroneous conclusions. There is no real prospect of success of setting aside the award. The submissions based on the possibility of being ruined do not arise for further consideration.

31. Permission is granted to the applicant, CFC, to enforce the arbitration award in terms of paragraphs one and two of its notice of application for court orders dated October 31, 2005. Paragraph one of RBDL's notice of application for court orders dated December 13, 2005, is dismissed. Paragraphs two and three of RBDL's application to be considered by another Judge of the Supreme Court. Leave to appeal refused. Application for stay of execution refused.

32. I further order that in respect of this matter RBDL should pay the costs of this application not later than March 20, 2006. Costs to be taxed not later than February 28, 2006 if not agree by February 20, 2006.