

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

**CCJ Appeal No. GYCV2014/002
GY Civil Appeal No. 28 of 2007**

BETWEEN

THE ATTORNEY GENERAL OF GUYANA

Appellant

AND

NH INTERNATIONAL LIMITED
in joint venture with
Emile Elias and Company Limited

Respondent

Before the Honourables **Mr Justice Nelson**
 Mr Justice Saunders
 Mr Justice Wit
 Mr Justice Anderson
 Mme Justice Rajnauth-Lee

Appearances

Mr Roysdale Forde for the Appellant

Mr. Edward Luckhoo SC, Mr Rex McKay SC, and Mr Robin Stoby SC for the Respondent

JUDGMENT

of

The Honourable Justices Nelson, Saunders, Wit, Anderson and Rajnauth-Lee

Delivered orally by

The Honourable Mr Justice Saunders

on the 21st day of April 2015

- [1] In 1995 the Respondent company, NH International Limited, entered into a contract with the Government of Guyana for the construction of a roadway. The agreement provided a process for the settlement of disputes arising out of the contract. This

process included the appointment of an Adjudicator and an Arbitrator who could hear appeals from the Adjudicator's decision.

- [2] Disputes arose between the parties and an Adjudicator was appointed. The adjudicator gave an award in favour of NH International for the sum of US\$11,719,717.02 and G\$411,302,140.59. The company, by way of an Originating Summons, then applied to a Judge in Chambers for leave to enforce the adjudication award. Such leave was granted by Singh J on 19 February 2007.
- [3] The Attorney General appealed the decision of the Judge to the Court of Appeal but, by way of a preliminary objection, the company claimed that the Court of Appeal did not have jurisdiction to hear the appeal.
- [4] These proceedings are solely concerned with the merits of this preliminary objection. The question for decision is this - Does the Attorney General have a direct or unfettered right of appeal *to the Court of Appeal* the order giving leave to enforce the Award of the Adjudicator?
- [5] The question turns on the construction of section 6(2)(a)(i) of the Court of Appeal Act and on the nature of the proceedings that were before the trial judge.
- [6] Section 6(2)(a)(i) of the Court of Appeal Act gives a right of appeal, *inter alia*, to orders that are final and that are *not* made in Chambers. The company submits that the order in question here was not a final order but it is unnecessary for this Court to decide that issue. The critical question is whether the proceedings before the judge should be considered proceedings "in Chambers". If they were, then the preliminary objection made by the company must be sustained because the Attorney General would not have had the direct right of appeal to the Court of Appeal that he chose to exercise and the preliminary objection would have been well made.

- [7] The Court of Appeal heard the preliminary objection and agreed with the company that these were indeed proceedings held in Chambers. The Attorney General argues before us that the Court of Appeal was wrong.
- [8] The written and oral submissions of the Attorney General proceed along the following lines: He claims that the expression “Chamber proceedings”, for the purpose of the rule in question, is defined not according to the physical space where proceedings are held but rather by the nature of the jurisdiction the judge embarks upon. The AG submits that an application to enforce an arbitral Award is not one that is considered to be a proceeding “in Chambers”. He notes that such an application is not listed among the references found in Order 43(1) of the Rules of the High Court which speak to business to be disposed of in Chambers. He says that such an application ought really to be made by Motion as suggested by Order 40. The AG therefore states that the trial judge was not entitled to hear the proceedings on an application commenced by Originating Summons and that although the present proceedings were commenced by Originating Summons and were physically heard in Chambers the jurisdiction they invoke is really one that should have been invoked by a Notice of Motion. The AG contends further that there is no absolute right to proceed by Originating Summons and, citing *Re Squire’s Settlement*¹, that an Applicant proceeding by way of Originating Summons must be prepared to show that its use is required or permitted by a rule or statute. Finally, the AG notes that section 13 of the Arbitration Act and Order 40 Rules 1 and 4 of the High Court Rules provide for the enforcement of an award by Motion. This he says covers the enforcement of an arbitration award. He submits that a Notice of Motion is the correct means to employ to enforce an arbitration award. The effect of the enforcement of an award by Notice of Motion, he explains, is that an appeal from such an Order would lie directly to the Court of Appeal and not to the Full Court.
- [9] There is a short answer to all of these submissions of the AG. Even if any of them has merit, the problem that confronts the AG is that when Singh J embarked upon

¹ *Re Squire’s Settlement* [1946] WN 11.

the proceedings in Chambers upon an originating Summons, none of these points was made to the judge. The AG was content then to allow the proceedings to be begun by Originating Summons and for the matter to be dealt with in Chambers. It is too late in the day now for a court to frustrate the proceedings on the basis of these technical submissions when the matter has already been heard on the merits. If a matter that ideally should have been begun by Originating Motion was, without objection, commenced and concluded at first instance by Originating Summons, it would be entirely inappropriate for a court 8 years later to rule those proceedings, in effect, a nullity. A court would take advantage of the provisions of Order 54 to treat the non-compliance or irregularity as having been waived. The ethic conveyed by Order 54 is that litigation is not a game where parties should be permitted, willy-nilly, to frustrate the hearing of a case on its merits because of some technical procedural flaw. In a deserving case (we do not suggest that this was one) Order 54 rule (1), which states that non-compliance with any of these rules shall be dealt with “in such manner and upon such terms as the Court or Judge shall think fit”, could conceivably serve as a legal basis for the Court of Appeal, in a case where the appeal should have gone to the Full Court, to refer the appeal to the Full court. That approach is of course not at all appropriate in this case in light of the huge delay.

- [10] Quite apart from the issue of waiver on the part of the Attorney General before Singh J, there is a substantive answer to the AG’s submissions. Section 13 of the Arbitration Act does not stipulate any particular procedure for enforcement of an award save that it may be enforced in the same manner as a judgment or order. We know from Order 41 rule 5(3) that where by any Act or rule it is provided that an application to the court shall be made by Originating Motion, “such application shall be made by ‘Originating Summons’... ” Nothing therefore precludes a judge from hearing an application for leave to enforce an arbitral award in Chambers. Such applications are often formal exercises eminently suitable for Chambers.
- [11] Before closing, the Court cannot but note that the question for determination in this case was a straightforward one and we are extremely disappointed that it has taken such a long time for the matter to be resolved. We have previously drawn attention

to the direct correlation between efficiency and expedition in the delivery of justice on the one hand and a country's economic development on the other. There was no good reason for this case to have meandered its way to this court some 8 years after it was heard by Justice Singh. This was a case involving the enforcement of an arbitral Award. Arbitration is a mode of dispute settlement that litigants often consciously choose in preference to litigation through the courts because of the convenience, finality and expedition of the arbitral route. Sadly, the treatment of this matter conflicted with the court's duty to promote and support arbitration.

- [12] In all the circumstances we hold that the preliminary objection must be upheld and the appeal dismissed with costs to be taxed fit for two senior counsel and a junior, if not agreed.

CERTIFICATE

I do hereby certify that this is a true transcript from the electronic sound recording of the Judgement delivered orally on the 21st April, 2015 by the Hon. Justice Adrian Saunders in **GYCV2014/002 THE ATTORNEY GENERAL OF GUYANA v. NH INTERNATIONAL LIMITED** in joint venture with Emile Elias and Company Limited

/s/ J. Graham
Jacqueline Graham
Registrar and Marshal
Caribbean Court of Justice