SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SUIT NO. 190 OF 1998

IN THE MATTER of an application by the Heirs of Stanley Malaykhan (The Applicants for an Order to set aside the arbitration proceedings and/or the Judgment / Award of the Arbitrator, Neville Trim Esquire, dated the 3rd day of March 1997.

AND IN THE MATTER of the Arbitration Ordinance Chapter 1.

AND IN THE MATTER of Thomas Walcott and Stanley Malaykhan.

Appearances:

Mr. Kenneth A.H. Foster, QC and Ms. Isabella Shillingford for the Applicants.
Mr. Alvin St. Clair for the Respondent.

2001: September 28
November 26

JUDGMENT

[1] HARIPRASHAD-CHARLES J: By an agreement in writing dated 14th day of September 1992, Mr. Thomas Walcott, a Structural Engineer agreed to construct a four-storey reinforced concrete building on Micoud Street in the City of Castries for Mr. Stanley Malaykhan [hereinafter called "The Deceased"] for a contract price of $900,000.00.

[2] By variation of the said agreement, it was agreed between the parties that Mr. Walcott would proceed along the lines of a main contract of $750,000.00 and a supplementary contract of $100,000.00.

[3] Mr. Walcott then proceeded to construct the building and on 27th and 28th day of September 1994, he submitted his claim for a practical completion, plus extras in the aggregate of $47,675.00.

[4] The evidence revealed that ”The Deceased” failed to pay the amount claimed and by way of letter dated 7th day of November, 1994 from his then solicitor, Mr. Leonard Riviere, he purported to terminate the agreement without observing a clause in the said agreement which stipulated that any dispute shall be settled by arbitration.

[5] Consequent to the purported breach, the matter was referred to arbitration and by letter dated 16th day of November, 1994 “The Deceased” through his solicitor nominated Mr. Neville Trim to be the Chairman of the arbitration proceedings. Mr. Walcott acquiesced to the said nomination and this was confirmed by letter of even date to Mr. Riviere.

[6] After many months of delay, a meeting was eventually convened on 6th day of September 1995 at the Chambers of Mr. Leonard Riviere, solicitor for ”The Deceased”. The parties and their respective Solicitors were present at that meeting. It was agreed that Mr. Walcott would serve his Statement of Claim within seven days of the date of the meeting upon Mr. Riviere. It was further agreed that upon receipt of the said Statement of Claim, “The Deceased” would serve his Defence within seven days.

[7] On 13th day of September 1995, Mr. Thomas Walcott presented his Statement of Claim to Mr. Trim and a copy of the said Statement of Claim was delivered to Mr. Riviere. On his own volition, Mr. Trim took the precautionary measure of conveying a copy of the Statement of Claim by cover letter dated 31st day of October 1995 and therein reminded Mr. Riviere that no Defence had been received from “The Deceased.”

[8] By letter dated 16th day of April 1996, Mr. Walcott’s then Solicitor, Mr. Mario Michel wrote to Mr. Trim in respect of the blatant disregard by “The Deceased” in complying with the decision of the arbitrator.

[9] In a subsequent letter to the arbitrator, Mr. Michel requested that in accordance with the procedural rules laid down on the 6th day of September 1995, that an award should be made in favour of his client, Mr. Thomas Walcott as no Defence was received from "The Deceased."

[10] On the 3rd day of March 1997, some seventeen months thereafter, Mr. Neville Trim, the arbitrator made an award based on the Statement of Claim of Mr. Thomas Walcott. The very next day after the award was made, Mr. Neville Trim personally handed a copy of the award and his bill to Mr. Leonard Riviere.

[11] On 5th day of September 1997, some six months after the award was made "The Deceased" tragically departed the terrestrial globe.

[12] On 24th day of February 1998 the Heirs of "The Deceased" [hereinafter referred to as "The Applicants"] filed a Notice of Motion to set aside the arbitration proceedings and/or the award of the arbitrator on the grounds that the proceedings are null, void and of no effect. In attacking the arbitrator's decision, four main submissions were advanced on behalf of the Applicants namely:

(i) The Applicants were never duly served with these proceedings.

(ii) No default judgment was entered and/or served.

(i) The Applicants were never served with the date for delivery of the judgment.

(ii) There is a triable issue as appears in the Applicants' affidavit filed on 24th day of February 1998.

[13] Learned Queen's Counsel placed great emphasis on the conduct of the arbitration proceedings. He submitted that the said proceedings were held cagily by the arbitrator and that no evidence was taken on oath. He next submitted that the arbitrator made an award without notifying "The Deceased" of his intention to do so.

[14] At paragraph 592 of Halsbury's Laws of England, Fourth Edition, Volume 2: Arbitration, it is stated:

> "In the conduct of the proceedings in his capacity as arbitral tribunal the arbitrator or umpire must conform to any directions which may be contained in the agreement of reference itself. Subject to any such directions, he should observe, so far as may be practicable, the rules which prevail at the trial of an action in court, including rules as to issue estoppel, but he may deviate from those rules provided in so doing he does not disregard the substance of justice."

[15] The arbitrator or umpire should not close the hearing and proceed to make his award without notifying the parties: Re Maunder (1883) 49 LT 535.

[16] Counsel next submitted that the arbitrator misconducted himself and as a consequence, the award should be set aside. At paragraph 622 of Halsbury's Laws of England, it is stated:

> " But misconduct occurs, for example:
>
> (4) if there has been irregularity in the proceedings as, for example, where the arbitrator failed to give the parties notice of the time and place of meeting…
>
> (5) if the arbitrator or umpire has failed to act fairly towards both parties, as for example , by hearing one party but refusing to hear the other, ***or by deciding in default of defence without clear warning…."*** [My emphasis].

[17] In Myron (Owners) v Tradax Export S.A. Panama City R.P. [1969] 2 All ER 1263, Donaldson J. at page 1267 explained:

> "I now turn to the second point, namely, the duty of the arbitrators to make sure that a party does not wish to put his case before them and is content that they shall proceed in default of defence. Taking full account of the initial inertia of the owners, Tradax nevertheless behaved in the most unbusinesslike and, indeed, discourteous manner. It is tempting to say that they deserve to suffer the consequences in the shape of the award which has been made against them, but the issue of principle is somewhat more important than the education of Tradax. In successive paragraphs of his affidavit, Mr. Chesterman says that normally if a party does not produce any papers "warning [is given] that an award will be made without them unless they are produced quickly" and notice is given "that if none are produced the arbitration will proceed anyway." If that had been done in clear terms in the present case, there would have been no ground whatsoever for interfering."

[18] The Respondent's submission, stripped to its bare essentials, is simple. Counsel for the Respondent argued that "The Deceased" was reminded of the necessity to put in his defence and that amounted to a clear warning that an award will be made unless the defence is produced quickly. Counsel contended that the arbitrator proceeded to make the award seventeen months thereafter, when no defence was forthcoming. He hastily added that "The Deceased" was solely responsible for the delay.

[19] Despite the attractive and tenacious arguments of Counsel, it is clear from the authorities quoted that Mr. Trim should have given a warning to "The Deceased" that an award will be made against him unless the Defence is produced quickly, failing which his case would go by default. I do not think that the letter dated 31st day of October 1995 reminding Mr. Riviere that no Defence had been received was sufficiently clear and definite to convey unequivocally to "The Deceased" that, if he did not submit his defence by a fixed date, his case would go by default.

[20] The Respondent next contended that the motion to set aside the award of the arbitrator was filed in excess of eleven months after an award was made and therefore the Court should not entertain such tardy application. Order 59 Rule 4(1)(b) of the Rules of the Supreme Court 1970 states:

> 4. (1) "An application to the Court –
>
> (b) to set aside an award under section 11 (2) of the Arbitration Act, or Section 19(2) of the Arbitration Ordinance, or section 355 of the Code or otherwise,
>
> may be made at any time within 6 weeks after the award has been made and published to the parties."

[21] The Court has a discretionary power whether to entertain applications that are not made within the time frame as laid down. On the facts presented, it is manifestly clear that there was protracted delay in bringing this motion before the Court. The Applicants advanced no plausible reason for their delay. Indeed, Learned Queen's Counsel was content to submit

that since the entire arbitration proceeding was a nullity, it should be set aside and further, that time does not run in respect of a proceeding which is a nullity: See: Craig v Kanseen (1943) 1 All ER 108.

[22] The insuperable difficulty with which the Respondent is confronted is whether the arbitration proceeding was a nullity or a mere irregularity. In Craig v Kanseen, the facts, relatively similar to the instant case are as follows: The judgment in an action was dated Jan. 12, 1937, and on Jan. 18, 1940, an order was made giving the respondent, who was the successful plaintiff in the action, leave to appeal. The summons upon which this order was made was not served upon the appellant. The affidavit in support of the summons stated that a copy was posted to the appellant's place of business and residence, but that was not the address for service given in the action. It was held that the failure to serve the summons upon which the order in the present case was made was not a mere irregularity, but a defect which made the order a nullity, and therefore, the order must be set aside.

[23] I am therefore in agreement with Learned Queen's Counsel that the arbitration proceeding was a nullity and should be set aside *ex debito justitiae.* Be that as it may, it cannot be denied that "The Deceased" flagrantly disregarded the rules of procedure laid down by the arbitrator. He behaved in the most unbusinesslike and unprofessional manner. He procrastinated. He was discourteous and he acted in the most despicable manner. It is tempting to say that he ought to be punished and he should suffer the consequences in the shape of the award which has been made against him. But, as I intimated earlier, a " clear warning" by the arbitrator that an award will be made unless the defence is produced quickly and notice that if none is produced the arbitration will proceed anyway should have been given. This was not done. In the circumstances, the award cannot stand.

[24] The Applicants submitted that the arbitrator has misconducted himself and as a result, the award should be set aside as being null, void and of no effect. I am in agreement with this submission. However, there are grounds on which the award may be remitted to the consideration of the arbitrator or umpire. One such ground is where there has been misconduct on the part of the arbitrator, as in the instant case. No express suggestion was

made to the Court in respect of remission of the award to the arbitrator. But such suggestion could be implied from the Applicant's own affidavit. At paragraph 3, she alleges that there are serious issues to be tried and enumerated nine of them.

[25] The award will, therefore, be remitted to Mr. Trim to enable him to give further consideration to the dispute in the light of any or any further evidence or arguments which either party may wish to submit. At the hearing, It was agreed by both Counsel that the Court would make no order as to Costs. But I am mindful of the protracted delay by the Applicants in putting an end to this matter. As such, I will order that the Applicants pay costs to the Respondent in the sum of $2,500.00 to be paid no later than 31st day of December 2001.

[26] On a final note, it is of paramount importance that this dispute be speedily resolved. The delay is inordinate, to say the least. We can no longer afford to show the same indulgence towards the conduct of litigation as was perhaps possible in a more leisured age.

INDRA HARIPRASHAD-CHARLES
High Court Judge