

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT**

**A.D. 2002
(CIVIL)**

**IN THE MATTER OF THE ARBITRATION ACT
CAP. A. 105 of The Revised Statutes of Anguilla 2000**

**AND IN THE MATTER OF AN ARBITRATION
ACT 1996 OF THE UNITED KINGDOM**

Claim No. 74 of 2001

Between

BRENKSTONE LIMITED

Appellant

AND

APEX CONSTRUCTION CO. LTD.

APEX CONSTRUCTION CO. INC.

Respondents

APPEARANCES: Mr. Elson Gaskin, Counsel for the Appellant
Mr. Keithley Lake and Mrs. Cora
Richardson Hodge; Counsel for Respondent

26th March 2002, 29th April 2002
17th July 2002

JUDGMENT

EDWARDS J.

1. Arbitration and Arbitral Proceedings in Anguilla are governed by the provisions of Parts I and Part IV of the Arbitration Act 1996 (U.K.) Chapter 23 which have

been incorporated into the Laws of Anguilla by virtue of the Arbitration Act Cap. 105 of the Revised Statues of Anguilla 2000.

2. The right to Appeal against an award made by a Tribunal in arbitral proceedings is given by Section 58 of The Arbitration Act 1996 (U.K.) Chapter 23 (the 1996 U.K. Act) which provides:-

“58-(1) Unless otherwise agreed by the parties, an award made by the Tribunal pursuant to an Arbitration Agreement is final and binding both on the parties and on any persons claiming through or under them.

(2) This does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Part. [Part I consists of Sections 1 to 84 of the 1996 U.K. Act] ”

3. This is an Appeal under Section 68 of the 1996 U.K. Act, against the award of the Arbitral Tribunal, concerning certain disputed issues between the parties arising from their interpretation of the scope of the work to be done by the Contractor under a Written Agreement for the Construction of a Residence at Barnes Bay in Anguilla.

SECTION 86 OF THE 1996 U.K. ACT

4. Section 68 States –

“ (1) A party to arbitral proceedings may (upon notice to the other parties and to the Tribunal) apply to the Court challenging an award in the proceedings on the ground of serious irregularity affecting the Tribunal, the proceedings or the award.....

(2) Serious irregularity means an irregularity of one or more of the following kinds which the Court considers has caused or will cause substantial injustice to the applicant-

- a) failure by the Tribunal to comply with Section 33 (general duty of Tribunal);

[Section 33 –

‘1) The Tribunal shall:-

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent; and

(b) adopt procedures suitable to the circumstances of the particular case avoiding unnecessary delay or expense so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The Tribunal shall comply with that general duty in conducting the Arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it’].

- (b) the Tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: See Section 67);
- (c) failure by the Tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) failure by the Tribunal to deal with all the issues that were put to it;
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

- (f) uncertainty or ambiguity as to the effect of the award;
 - (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
 - (h) failure to comply with the requirements as to the form of the award; or
 - (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the Tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
- (3) If there is shown to be serious irregularity affecting the Tribunal, the proceedings or the award, the Court may:-
- (a) remit the award to the Tribunal, in whole or in part, for reconsideration,
 - (b) set the award aside in whole or in part, or
 - (c) declare the award to be of no effect, in whole or in part.

The Court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the Tribunal for reconsideration....”

5. Section 105 of the 1996 U.K. Act defines “the Court” to mean “the High Court..”
6. PART 60 of the Civil Procedure Rules 2000 regulates the procedure for such appeals and PART 60.2 (1) stipulates that the Appeal should be made by issuing a Fixed Date Claim Form which must be annexed to the Grounds of Appeal.
7. The Fixed Date Claim Form and the Grounds of Appeal filed on the 18th December 2001 appeal against and challenge “the whole of the award of the Arbitration Tribunal Mr. Sanjay Amin as Arbiter and Mr. Claudel Romney and

Mr. Desmond Maynard as outside representatives for the Appellant and the Respondents respectively, published on the 4th day of December 2001 but communicated to the Appellant on the 5th day of December 2001.”

GROUND OF APPEAL

8. The Grounds on which the Appeal and challenge are made are that:-
- “1) The Arbitration Tribunal failed to comply with the requirements of Section 37 of the Arbitration Act 1996..... in that;
- (a) The Tribunal had improper ex-parte communication with the Respondents herein and or Witnesses on behalf of the Respondents without making the Appellant privy to said communications.
 - (b) The Tribunal improperly received evidence from the Respondents after the close of the hearing without notice to Appellant thereby denying the Appellant the opportunity to object to the admission of the said evidence; to cross-examine the Respondents’, Witnesses on the said evidence or to present rebuttal evidence in relation thereto.
 - (c) The Tribunal wrongfully withheld and or concealed an expert legal opinion despite written and verbal requests for same to be disclosed to the Appellant as a result of which the Appellant was denied the opportunity to comment on such legal -opinion as permitted by the Arbitration Act 1996..... the said opinion was favourable to the Appellant and the wrongful withholding thereof was arbitrary, capricious, and demonstrates bias on the part of the Tribunal.

[Section 37 of the 1996 U. K. Act empowers the Tribunal to appoint experts or legal advisers to report to it and the parties, and also to appoint

assessors to assist it on technical matters. This Section further permits such an expert, Legal Adviser or Assessor to attend the proceedings and ‘the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person].

- 2) The Tribunal exceeded its power under the Agreement to arbitrate in that the Tribunal:
 - a) Failed to publish its award in the time limited for it to do
 - b) Made an award with respect to a Claim which was not pursued before the Tribunal.

- 3) The Tribunal failed to conduct the hearing in accordance with the procedure agreed by the parties in that it was agreed that the Appellant’s and the Respondents’ outside Representatives would decide the issues and the Arbitrator (Mr. Sanjay Amin) would decide only such matters as were in dispute between the outside Representatives. Contrary to this Agreement the Arbitrator assumed to himself the full power to decide all the issues in dispute between the parties.

- 4) The Tribunal failed to decide the issues that were placed before it by the Appellant for determination in that the Tribunal failed to deal with the following questions namely:
 - a) was the Contractor required to plaster the walls and ceilings as indicated by the Contract Drawings?
 - b) was the Contractor required to construct soffits as indicated by the Contract Drawings?
 - c) Did the Contract require the steel to be wrapped in plaster in accordance with a detail to be furnished by the Architect to the Contractor and/or as indicated on the Contract Drawings?

- d) If the Contractor failed to supply sufficiently skilled labour, was the Contractor liable to the Owner for the additional labour costs associated with the construction of the arches and the installation of window trim and cornices as indicated on the Contract Drawings?
- e) Did the Contract require the installation of all veneer stone as shown on the Contract Drawings, including the cornices and window trims?
- f) Was it the Contractor's responsibility to estimate the quantity of materials and labour required for the completion of the work; and more particularly the square footage of the stone to be installed?
- g) In the absence of a prior Agreement by the Owner as to cost, can the Contractor undertake work not included in the Contract or work which it claims is not included in the Contract, and subsequently attempt to impose a charge for the same which has not been agreed to?

5) The Award on its face is ambiguous and uncertain and fails to deal with the question as to whether certain work was performed in its entirety.

6) The Tribunal failed to comply with the Statutory Requirements as to the form of the award in that:

- a) The Award was not signed by all the members of the Tribunal;
- b) The Tribunal failed to give a Reasoned Award pursuant to the Arbitration Act 1996 of the United Kingdom the parties not having agreed to dispense with the requirement for a reasoned Award,
- c) The award failed to state the seat of the Award on that it was governed by the Laws of Anguilla.

7) There was an admitted irregularity by the Arbiter Mr. Sanjay Amin with respect to the ex-parte communication aforementioned and the with holding of the expert legal opinion but the Arbiter has denied that this irregularity affected the proceedings in anyway”.

9. The Affidavit of Service of Glen K Curtis sworn to on the 21st of February, 2002 and filed on the 11th March 2002 establishes that Desmond Maynard who is described in the Grounds of Appeal as the outside Representative for the Respondents at the Arbitral proceedings, was served with the Fixed Date Claim Form and Grounds of Appeal on the 20th February, 2002 in St. Thomas, U.S. Virgin Islands.
10. Michael George Pringle in his Affidavit sworn to on the 6th February, 2002 and filed on the 11th March 2002, gives evidence of having served the Arbiter Mr. Sanjay Amin with The Fixed Date Claim Form and the Grounds of Appeal on the 1st February, 2002 in Tortola, British Virgin Islands.
11. There is no evidence on the record that the other “outside Representative Mr. Claudel Romney of Anguilla was served with the Fixed Date Claim and Grounds of Appeal. Section 68 (1) of the 1966 U.K. Act requires that he be served as it appears that he was a member of the Arbitral Tribunal.
12. The Respondents were served with the relevant documents on the 23rd January, 2002 and thereafter the date for the First Hearing of the Fixed Date Claim which was scheduled for the 26th February, 2002 had to be rescheduled for the 26th March, 2002 as the Resident Judge was then in St. Lucia.
13. PART 60.7 (1) of the CPR2000 requires the Appellant to file a signed copy of the notes taken at the Arbitral proceedings by the Arbiter at least 7 days before the First Hearing. No such notes have been filed by the Appellant.

14. Counsel for the Respondents on the 22nd March 2002 filed the Affidavit of Denswell Hodge sworn to on the said date in support of Setting Aside the Arbitration Award. Mr. Hodge who is the Vice-President of the 1st and 2nd Respondent Companies, referred to the Agreement for the Construction of the residence EX “DH1”, the 1996 U.K. Act, the Judgment of the Arbitrator Ex. “D.H.3” and other documents which have all been exhibited along with the Affidavit.
15. In the Affidavit reference was made to another pending Claim between the parties which is irrelevant to the present deliberations of the Court in this Appeal under PART 60.8 of the CPR2000.
16. At paragraph 22, Mr. Hodge urged the Court to consider the following Ground as a further basis to set aside the Award:-
 - “a) The Arbitrator has failed to conduct the proceedings in accordance with the procedure agreed by the parties. Particularly, the Arbitrator failed to follow his terms of reference as delineated in Clause 13.2 of the “Terms and Conditions” of the Agreement by not choosing the position of one party over the other without compromise.”
17. This Affidavit did not provide the Court with any evidence concerning the issues that were put to the Arbitral Tribunal by their outside Representative for decision, or what actually took place at the Arbitral proceedings.
18. The only evidence before the Court as to the issue that may have been considered by the Arbitral Tribunal is to be found in the opinion of Mr. Gerald I. Katz of the Law Firm Katz & Stone dated 24th August 2001 which was apparently requested by the Arbitrator Mr. Sanjay Amin – See Ex. “D.H.3”. In this document addressed to Mr. Amin, Mr Katz writes-

“Dear Mr. Amin

Per your request, the following is our opinion letter regarding the issue on which you have requested our advice.

Is the application of plaster to the ceilings of the Project at issue in the above-captioned Arbitration among the Contractor’s performance obligations under its Agreement with the Owner, or is it extra work for which the Contractor is entitled to additional compensation.”

This is the Expert Opinion which the Appellant referred to in its Grounds of Appeal Paragraph 1 (c) [See paragraph 7 of this Judgment].

19. There were two (2) Affidavits filed in support of the Appellant’s Appeal. These were the Affidavit of Robert Friedman sworn to and filed on the 29th April 2002 and the Supplemental Affidavit of Tanya Phillip sworn to and filed on the 30th April 2002. These Affidavits referred to other issues between the parties which are irrelevant for the purposes of this Appeal. None of the Affidavits provide any evidence of facts relevant to the Arbitral proceedings in question.
20. Consequently, the Court has no evidence or Record before it to substantiate the Grounds of Appeal 1(a); 1(b); 1(c); 2(b); 3; 4; 5; and no notes made by Mr. Amin concerning the Arbitral Proceedings have been filed.
21. In the Affidavit of Denzil Hodge filed on the 22nd March 2002 the Respondents pray at paragraph 27:-

- “a) That the Award of Mr. Sanjay Amin be set aside.
- b) That the matter be referred to a new Tribunal to be consolidated with all Claims arising out of this Agreement for Trial de novo.
- c) That the Court set a date by which the Arbitration should commence.
- d) Any other terms that this Honourable Court deems just.”

THE HEARING

22. On the 26th March 2002 at the First Hearing, it was evident from the Oral Submissions of Counsel, Mr. Gaskin that the Appellant was opposed to any decision by the Court to Remit the Award to the Tribunal in whole or in part for further reconsideration. It was common ground between both parties that the Award should be set aside and not sent back to the Arbiter Mr. Sanjay Amin since he had failed to deal with all the issues that were submitted by the parties, had failed to conduct the proceedings in accordance with the procedure agreed on by the parties, and there had been serious irregularities affecting the Tribunal.

23. Counsel Mr. Gaskin questioned whether the Court had Jurisdiction to refer the matter to a new Tribunal. Mr. Gaskin further stated that since the filing of the Fixed Date Claim, new information had disclosed that at the time of the formation of the Construction Agreement between the parties, the first Respondent Apex Construction C. Ltd. had been struck off from the Register of Companies in Anguilla and was not validly existing under the Laws of Anguilla when it entered into the Agreement with the Appellants on the 1st July 1999. Mr. Gaskin requested time to address this issue and prepare submissions for the Court to consider.

24. Mr. Lake did not oppose the application for an adjournment made by Mr. Gaskin. Both Counsel proposed and agreed that the issues for the Court were:-
 - a) Whether or not the High Court can retain Jurisdiction in this matter

 - b) Whether the Court has Jurisdiction to remit the matter to the Old Tribunal or a New Reconstituted Tribunal.

 - c) The issue of the capacity of the First Respondent by virtue of Section 204 (8) of the Companies Act Chapter 1 Revised Laws of Anguilla.

d) Whether the parties should seek their own Remedy in law.

The Court made an Order for both Counsel to file and serve their Submissions and Legal Authorities by Monday the 29th April 2002 on these four issues.

25. Despite the fact that the Court made no Order for the parties to file any further Affidavits, both Counsel filed Affidavits without the leave of the Court. These Affidavits merely recite the legal submissions of Counsel and refer to documents which have been exhibited in order to establish that there are additional issues and claims to be determined by the parties under the Construction Agreement. The documents also establish that the First Respondent had been struck off the Registrar of Companies in Anguilla on the 3rd October, 1997 was not revived until the 22nd January 2002, and was not licensed to carry on business as a building contractor in Anguilla except for the period 9th April 2001 to 31st December 2001.

THE SUBMISSIONS OF COUNSEL

26. It is evident from the Written Submissions of Counsel, Mr. Lake, that the Respondents are now urging the Court to remit the matter to the same Arbitral Tribunal for reconsideration of the matters which from the basis of the challenges to the award contrary to what was prayed by the Respondents in the Affidavit of Denzil Hodge file on the 22nd March 2002. [See paragraph 20 of this Judgment] Counsel Mr. Lake arrived at this position after a comprehensive analysis of the provisions of the 1996 U.K. Act, the Origin of the Act, and the intention of the Legislators.
27. Counsel Mr. Gaskin has argued most strenuously against the matter being remitted to the Arbiter Mr. Amin. Mr. Gaskin has urged the Court to set aside or declare that the Award is of no effect, and also to order by virtue of Section 71 (4) of the 1996 U.K. Act that Arbitration is not a condition precedent to the

commencement of legal action in respect of any matter to which the Arbitration Agreement between the parties applies. Such an order is necessary, submits Mr. Gaskin, so that the Appellant can commence legal proceedings concerning all of the issues between the parties, including those mentioned at paragraph 24 of this Judgment.

28. It is clear from the Judgment of the Arbitrator – Exhibit D.H. 3 that the Irregularities complained about in paragraphs 2 (a); 5; 6(a); 6 (b); 6(c) of the Grounds of Appeal are in fact irregularities which fall under Sections 68 (2) (a) and 33 (1) (b); Section 68 (2) (f); and Section 68 (2) (h) respectively of the 1996 U.K. Act.
29. The Court is unable to make any pronouncements on the other Irregularities complained about in the Grounds of Appeal because there is no signed Record of the Arbitral Proceedings before the Court, or any evidence as to the issues that were referred to the Tribunal, or the submissions that were made from which the Court could conclude that there were Serious Irregularities which have resulted in substantial injustice to the Appellant.

RESTRICTIONS ON THE RIGHT TO APPEAL

30. Although Section 70 (4) of the 1996 U.K. Act empowers the Court to Order the Tribunal to state the Reasons for its Award in sufficient detail so as to enable the Court to consider the Appeal, the Court has to heed the provisions of Section 70 (1) and (2), Section 57, and Section 1 (c) of the Act which restrict the right of Appeal and intervention by the Court.
31. Sections 70 (1) and (2) require that the Appellant must first exhaust any available Arbitral process of Appeal or review as well as any available recourse under Section 57 in a timely manner before bringing an Appeal to the Court.

Section 57 provides:-

“(1) The parties are free to agree on the powers of the Tribunal to correct an Award or make an additional Award.

(2) If or to the extent there is no such Agreement, the following provisions apply.

(3) The Tribunal may on its own initiative or on the application of a party:-

(a) correct an Award so as to renounce any clerical mistake or error arising from an accidental slip or omission or

clarify or remove any ambiguity in the Award, or

(b) make an additional Award in respect of any claim (including a claim for interest on costs) which was presented to the Tribunal but was not dealt with in the Award.

These powers shall not be exercised without first affording the other parties a reasonable opportunity to make Representations to the Tribunal.

4) Any application for the exercise of these powers must be made within 28 days of the date of the Award or such longer period as the parties may agree.

5) Any correction of an Award shall be made within 28 days of the date the application was received by the Tribunal or where the correction is made on its own initiative; within 28 days of the date of the Award or, in either case, such longer period as the parties may agree.

6) Any additional Award shall be made within 56 days of the date of the original Award or such longer period as the parties may agree.

7) Any correction of the Award shall form part of the Award.”

- 32. Section 1 (c) of the Act forbids the Court to intervene except as provided by PART I in matters under PART I of the 1996 U.K. Act.

- 33. The existence of these provisions in the Act compels the conclusion that this Appeal is premature since the Appellant has not exhausted the available Arbitral Process for Review under Section 57 and the Court must therefore dismiss the Appeal.

- 33. The Court will make no order as to costs in light of the fact that the Respondent had supported the Appeal initially.

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Ola Mae Edwards
HIGH COURT JUDGE