TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2007/030

BETWEEN:

OCEAN CONVERSION LIMITED

Appellant

and

THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde. Ola Mae Edwards	Justice of Appeal [Ag.]
The Hon. Mde. Indra Hariprashad-Charles	Justice of Appeal [Ag.]

Appearances:

Mr. Sydney Bennett, QC, with him Ms. Anthea Smith for the Appellant
Mr. Baba Aziz, Principal Crown Counsel, with him Ms. Vareen Vanterpool, Crown Counsel, for the Respondent

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2008: October 28;
2009: January 12.

Arbitration agreement – application to stay proceedings pending arbitration – whether the judge erred in finding that one issue in the claim is properly within the scope of the agreement while the other is not – whether in any event the judge erred in refusing to stay the proceedings – s. 6(1) of the Arbitration Act Cap. 6 of the 1990 Revised Laws of the Virgin Islands

The Government of the Virgin Islands, the respondent, and Ocean Conversion, by assignment from Reliable Water Company Limited, were parties to a written principal agreement of 1991 and 2 written supplemental agreements of 1992 (collectively referred herein as "the agreement"). Under the agreement, the companies were to construct a desalination plant at Baugher's Bay, Tortola, Virgin Islands, and to supply water to the government at agreed prices. Clause 6.7.1 of the agreement is an arbitration clause by which the parties agreed to submit disputes that arise under the agreement to arbitration.

Clause 5.2 of the agreement provided, among other things, that the government could take sole ownership of the plant on the expiration of the agreement. The agreement expired on 31st May 2006. The government, purporting to act under clause 5.2 gave notice to Ocean Conversion that the plant vested in it (the government) as the sole owner. The government purported to vest the plant in itself in September 2006. Ocean Conversion has refused to give up possession of the plant. According to the government, Ocean Conversion seeks compensation for improvements which the company said that it made to the plant during the subsistence of the agreement, says that it is entitled to an equitable interest in the plant on account of the improvements and has refused to give up possession of the plant. The government states that Ocean Conversion is not entitled to an equitable interest in the plant. It filed a claim in the High Court seeking declarations that it (the government) is the sole owner, as well as possession of the plant.

Ocean Conversion applied for an order staying the claim pending arbitration. A High Court judge dismissed the application. In so doing, she found the issue whether the government became entitled to the sole ownership of the plant after the agreement expired is properly a matter to be referred to arbitration under the agreement. The judge found that the other 2 issues raised by the claim, which relate to Ocean Conversion's entitlement to an equitable or restitutionary right and compensation were not properly within the scope of arbitration under the agreement. The judge refused to grant the stay on the ground that inasmuch as an arbitrator will have no jurisdiction to hear 2 of the 3 issues in the claim, it would be more convenient, just and economical for the dispute to be determined by the court.

Ocean Conversion appealed.

Held: dismissing the appeal with costs to be paid to the Government by Ocean Conversion:-

1. The judge properly exercised her discretion when she found that the issues, which relate to Ocean Conversion's entitlement to an equitable or restitutionary right and compensation were not properly within the scope of arbitration under the agreement.

   Government of Gibraltar v Kenney, [1956] 2 QB 410 distinguished.

2. The judge properly exercised her discretion when she refused to grant the stay on the ground that it would be more convenient, just and economical for the dispute to be determined by the court.

   Statement by Pearson LJ in Taunton-Collins v Cromie and Another, [1964] 2 All ER 332, at page 334J-335A adopted.

JUDGMENT

[1] RAWLINS, C.J.: The central issue which arises for determination on this appeal is whether the trial judge erred when she refused to stay a claim by the government for declaratory orders with respect to a dispute between it (the government) and the appellant, Ocean Conversion, over the ownership of a desalination plant. The issue would be better appreciated against a brief background to the case.

Background

[2] The government of the Virgin Islands entered into a written principal agreement with Reliable Water Company on 9th May 1990. The principal agreement was modified by 2 written supplemental agreements in March 1991 and January 1992, respectively. Reliable Water Company subsequently assigned its rights and obligations under these agreements to Ocean Conversion Limited.

[3] Under the principal agreement Reliable Water Company covenanted to construct a reverse osmosis desalination plant at Baugher's Bay, Tortola, with a design production capability of 300,000 imperial gallons of volumetric measure of water per day. In the first supplemental agreement the parties agreed to expand this capacity to 360,000 imperial gallons of volumetric measure of water per day and to 510,000 imperial gallons per day in the second supplemental agreement. Clause 6.7.1 of the principal agreement is an arbitration clause by which the parties agreed to submit to arbitration disputes that arise under the agreement.

[4] Clause 6.7.1 states as follows:

> "Every question, dispute, or difference arising, none excluded, between the parties with regard to the rights, duties, or liabilities of the parties hereunder that cannot be settled amicably shall be submitted to arbitration, within ten (10) days of written demand by either party upon the other for arbitration under this Section."

[5] After the agreement expired in May 2006, the government, purporting to act under clause 5.2 of the agreement, gave notice to Ocean Conversion that the plant

vested in it (the government). Ocean Conversion disputed the government's claim and sought compensation for improvements which the company claimed it made to the plant during the subsistence of the agreement. The government disputes that claim for compensation and filed proceedings in the High Court in November 2007, to litigate the dispute.

[6] The government's claim asserts that the desalination plant became its property by virtue of clause 5.2 of the agreement, which the government contends gave it (the government) total ownership of the plant in 2006. According to the government, Ocean Conversion refuses to deliver up possession of the plant on the ground that it invested over $4 million to expand the plant and is thereupon claiming both a legal and equitable interest in the plant. The government took steps in September 2006, by which it purported to vest the plant in itself, insisting that Ocean Conversion undertook the expansion of the plant of its own volition and without any encouragement from the government. The government further states that Ocean Conversion has no proper claim to any legal or equitable interest in the plant because any expansion that the company may have effected was done in the company's own commercial interest and the company profited therefrom.

[7] In its claim, the government seeks a declaration that on a true interpretation of the agreement between them, the government became vested with the absolute proprietary interest in the desalination plant from 1st June 2006. The government claims a further declaration that even if it were assumed that the expansion work done by Ocean Conversion on the plant constituted an equity in the plant, that equity was extinguished by the profits and benefits that Ocean Conversion obtained from the sale of an increased volume of water to the government from the time of the expansion to 31st May 2006. The government also prays for an order that Ocean Conversion should deliver to it possession of the plant.

[8] Ocean Conversion applied to stay the government's claim on the ground that the issues raised in the claim are within the scope of the arbitration agreement and

accordingly are matters properly for arbitration.[1] A judge of the High Court dismissed the company's application for the stay. Ocean Conversion appealed and applied to stay the judgment of the High Court. In April 2008, a single judge of this court stayed the judgment of the High Court. In doing so, the single judge directed that Ocean Conversion would file a defence to the claim only upon the dismissal of this appeal within the time prescribed by rule 10.3(4) of CPR 2000. The single judge also directed that the costs in the application for that stay should be costs in the appeal.

The judgment

[9] In the High Court, the judge found that the 3 statements in the government's formulation of the issues that arise on the claim reflected the declaratory relief sought in the claim. The judge stated these issues as follows:[2]

> (1) "whether on the true construction of the Contract, the claimant became vested, effective from the 1st day of June 2006, following the expiration of the Contract on 31st May 2006, with the absolute proprietary interest in the Baughers Bay desalination plant, which is the subject matter of the Contract";
>
> (2) "whether the voluntary expenditure incurred by Ocean Conversion in expanding the Baughers Bay desalination plant without any contractual agreement with the Claimant entitled Ocean Conversion to any equitable or restitutionary right";
>
> (3) "whether any equitable or restitutionary right that may have been acquired by Ocean Conversion by virtue of the voluntary expenditure incurred in expanding the plant beyond the capacity contracted for is not thereby exhausted or extinguished by several years of benefit derived by Ocean Conversion from the operation of the plant".

This finding is not disputed and properly so because they in fact reasonably reflect the issues that arise in the claim.

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[1] See paragraphs 3-5 of the affidavit of Glenn Harrigan, a director of Ocean Conversion.
[2] At paragraph 14 of the judgment.

[10] In the judgment, the judge held that issue 1 is properly within the scope of the arbitration, but not issues 2 and 3. She refused to stay the proceedings for reasons that she stated as follows:[3]

> "[43] The law is clear. If disputes fall within the scope of an arbitration clause then the court would uphold the parties' contract to arbitrate and refer the matter unless good reason is shown by the opposing party why it should not do so. Here we have a somewhat anomalous situation as I have found that only one of the three issues fall within the scope of the clause. I accept the submissions of counsel for Ocean Conversion that issue 1 is a question of mixed law and fact (the factual matters always fell to be considered in construing contractual provisions) and that in any event simply because an issue raises questions of law only that by itself is not usually sufficient ground not to refer a matter.
> [44] And, I also accept that the fact that the matter might come back to court on an issue of law is also not by itself sufficient reason not to refer a matter when the parties have agreed to refer the matter. That would be unjustified interference with the parties rights to determine what matters to agree to refer to arbitration.
> [45] However, it strikes me as inimical to the parties' interests that they should be called upon to have their disputes determined by two different tribunals as would be the case if I referred issue 1 to arbitration and allowed the Government to litigate issues 2 and 3 before the courts as I have held that these do not fall within the scope of the arbitration which means that an arbitrator will have no jurisdiction to hear them. The court can address all the matters of dispute between the parties in these proceedings unlike the arbitrator and therefore, in my judgment, it is proper that in these circumstances a stay should not be granted. This strikes me as a more convenient, just and economical course."

The appeal

[11] In its appeal, Ocean Conversion seeks an order setting aside the judgment of the High Court judge, and a consequential order staying the claim pending arbitration. The parties do not challenge the judge's finding that issue 1 is clearly a dispute within the scope of the arbitration agreement. It is my view that the judge was quite correct in that finding because that issue revolves around the ownership of the plant on the expiration of the agreement for which event clause 5.2 of the agreement provides. Neither do the parties challenge the judge's finding that although the agreement has expired, the arbitration clause is still available and

[3] In paragraphs 43-45 of the judgment.

valid for the purpose of resolving a dispute that arises under the terms of the agreement.[4]

[12] I think that it would be helpful to paraphrase the 4 grounds of appeal at this juncture. They state:

> "(1) The learned judge erred in finding that issues 2 and 3 were not addressed in the agreement between the parties so that the arbitration clause does not apply to the resolution of those issues.
>
> (2) The judge erred in acting on the premise that all of the issues identified in the claim fall equally to be considered by the decision maker because the only concrete issue in dispute on the claim is whether the entire proprietary interest in the plant is vested in the government. The other issues mirrored in the claim are merely potential issues, which might only arise to be determined if the arbitrator does not determine the issue of the proprietary interest against the government.
>
> (3) The judge failed to appreciate that the claim was brought by the government, with the result that she erred in acting on the premise that if the parties were to have the proprietary interest issue determined by arbitration, the government would still litigate the other issues in the claim.
>
> (4) The judge erred in finding that the enforcement of the arbitration clause might result in inconvenient and undesirable consequences because she attached inappropriate weight to this consideration."

The appeal in context

[13] In order to put this appeal into perspective it is important to note the trite principle that whether the High Court stays a claim to permit the parties to proceed to arbitration is within the discretion of the judge. This is by virtue of statute and common law principle. Section 6(1) of the Arbitration Act[5] provides that where an applicant relies on an arbitration clause in an agreement to obtain a stay, the court "may" grant the stay if the court is satisfied that there is sufficient reason why the matter should be referred to arbitration in accordance with the agreement. It

[4] In paragraphs 32-38 of the judgment.
[5] Chapter 6 of the 1990 Revised Edition of the Laws of the Virgin Islands.

follows, of course, that a court should not grant a stay if the matter in issue between the parties does not fall within the terms of the arbitration clause. It would have been noted that the learned judge found that while the issue of the ownership of the plant was within the terms of the arbitration clause, issues 2 and 3 which relate to issues of legal and/or equitable ownership by Ocean Conversion do not fall within the terms of the clause.

[14] For the statutory contextual completeness, section 6(1) of the Arbitration Act states as follows:

> "6. (1) If any party to a domestic arbitration agreement, or any person claiming through or under him commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

[15] In its common law context, it is noteworthy that the courts have often stated that although there is a residual discretion not to grant a stay, in the ordinary case, where an applicant has complied with the relevant requirements, a court in exercising its discretion judicially has no option but to grant a stay to permit parties to proceed to arbitration. The court would therefore, be required to exercise its discretion in favour of granting a stay in order to cause the parties to abide by their agreement to resolve their disputes by the agreed alternative method.[6]

[16] It is from the foregoing context, then, that I shall first determine whether the learned judge erred in finding that issues 2 and 3 of the claim do not fall within the terms of the arbitration clause. This is ground 1 of the appeal. If it is found that she erred in this regard, this court would have no recourse but to allow the appeal

[6] See, for example, per Lord Mustill in Channel Tunnel Group Ltd. and Another v Balfour Beatty Construction Ltd. and Others [1993] AC 334, at page 352E-G; and per Woolf LJ in Etri Fans Ltd. v N.M.B. (UK) Ltd. [1987] 1 WLR 1110, at page 1112E.

and stay the claim pending the referral of the dispute to arbitration for determination. This follows because all of the issues in the claim would fall within the terms of the arbitration clause and the court would give effect to the agreement of the parties in that clause. If, on the other hand, it is found that the judge was correct in finding that issues 2 and 3 do not fall within the terms of the arbitration clause, this court would then be required to determine whether in any event the learned judge erred in exercising her discretion by refusing to grant the stay. This is subsumed under grounds 2-4 of the appeal.

Ground 1 – issues 2 and 3 of the claim

[17] The learned judge considered issues 2 and 3 together. She noted, correctly, that the onus was on the government to show that the dispute is not one which falls within the terms of the arbitration clause, and, further, even if it were covered, there are sufficient reasons not to have it so referred.[7] The learned judge then adopted the approach to the question that Lord Macmillan suggested in Heyman and Another v Darwins Limited,[8] which states:

> "…the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause, and the clause having being found to be still effective, there remains for the court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration."

[18] The judge identified the nature of the dispute in relation to issues 2 and 3 as raising the question whether in the circumstances of the case Ocean Conversion acquired any equitable or restitutionary rights by virtue of its voluntary expenditure of money to expand the plant to a capacity of some 1,360,000 Igals per day when the parties had agreed to a capacity of 510,000 Igals per day.[9] The judge then

[7] In paragraph 11 of the judgment.
[8] [1942] AC 356, at page 370.
[9] In paragraph 17 of the judgment.

construed the arbitration clause in order to determine whether the issues fell within its terms.[10] In doing so she accepted the statement in Russell on Arbitration[11] that such clauses are to be construed liberally. The judge then noted[12] the submissions by Mr. Bennett, QC, first, that these issues arise out of the agreement as they are matters closely connected to the agreement and are inextricably bound up with the issue of the ownership of the plant, and in the second place, even if the equitable and restitutionary issues are not claims in the agreement they can be treated as incidental to a claim of ownership arising under the agreement having regard to the expansive nature of the arbitration clause. Mr. Bennett relied in particular on Government of Gibraltar v Kenney and Another[13] as authority that incidental claims are within the scope of arbitration clauses.

[19] The learned judge noted the submissions by Mr. Aziz, on the other hand, that the voluntary expansion of the plant by Ocean Conversion to the capacity in excess of 1.3 million Igal per day did not arise from any contractual obligations contained in any agreement and therefore, issues 2 and 3 do not concern disputes about matters under the agreement. Further, that on the authorities of Westdeusche Landesbank Girozentrale v Islington London Borough Council[14] and Crabb v Arun District Council,[15] claims in equity or for restitution are not contractual claims. The judge correctly did not put much store in this last submission, neither will this court.[16]

[20] Very importantly, however, the judge agreed with Mr. Aziz that Government of Gibraltar is distinguishable from the present case because the arbitration clause which fell to be construed in Government of Gibraltar was wider than the clause in the present case. The critical words contained in the agreement in Government of Gibraltar provided that "any thing or matter arising out of or under

[10] From paragraph 19 of the judgment.
[11] 21st Edn. Para. 2-006, at page 31.
[12] At paragraph 25 of the judgment.
[13] [1956] 2 QB 410.
[14] [1996] AC 669.
[15] [1976] 1 Ch D 179.
[16] See paragraph 26 of the judgment.

this agreement" would be the subject of arbitration. The court held in Government of Gibraltar that such a formulation extended to an incidental claim such as a *quantum meruit* claim because it was a claim "arising out of the agreement" within the meaning of the arbitration clause. In the present case the arbitration clause provided that disputes "under the contract" were subject to arbitration. In making this distinction, the judge and Mr. Aziz adopted the analysis and finding of Sellers J in Government of Gibraltar that the formulation in the arbitration clause in that case was more widely encompassing than a formulation which provided for the arbitration of disputes that arise "under the contract".[17]

[21] The learned judge therefore concluded as follows,[18] quite correctly in my view:

> "… although its [the clause] scope is wide in that it includes every matter under the contract, it does not speak to 'matters arising' out of the contract as well and is not broad enough to include purely incidental matters. The expansion of the Baugher's Bay Plant's capacity by Ocean Conversion outside of its contractual obligations are not matters addressed in the Contract and therefore those issues although they may raise questions of compensation by Government in the event that it becomes entitled to absolute ownership of the plant under the Contract and in a way can be said to be related to the question of ownership are not themselves covered by the arbitration clause".

[22] Simply put, when the parties in the present case agreed to have disputes that arise "under the agreement" determined by an arbitrator appointed in accordance with that agreement, they intended to confer jurisdiction upon such an arbitrator to determine disputes that are specifically covered by or provided for in their agreement. However, the question of the entitlement of Ocean Conversion to compensation for its expansion of the capacity of the plant over and above the capacity agreed between the parties and stated in the agreement does not arise "under the agreement" and is not therefore a matter for arbitration within the terms of the agreement. In the premises, the learned judge properly exercised her discretion when she held that issues 2 and 3 were not matters that are within the

[17] [1956] 2 QB 410, at page 421.
[18] At paragraph 31 of the judgment.

scope of the arbitration clause. I would therefore, dismiss the appeal on this ground.

Grounds 2,3 and 4 - Did the judge err in not granting the stay?

[23] Where all of the issues that arise upon a claim are properly the subject of arbitration and the relevant requirements are met, the court would usually stay the proceedings on the application of a party to permit the parties to pursue the resolution of their dispute by arbitration. The learned judge referred to the fact that she found that issue 1 was properly the subject of arbitration while issues 2 and 3 were not, as anomalous.[19] She proceeded to determine whether in all of the circumstances she should nevertheless have stayed the claim. In so doing she accepted the submissions by Mr. Aziz that it would be expeditious and economical to have the court determine the 3 issues rather than to refer issue 1 to arbitration and issues 2 and 3 determined by separate hearing by the court.[20] She stated her reasons for refusing to grant the stay in paragraph 45 of her judgment, which is reproduced in paragraph 10 of this judgment.

[24] Mr. Bennett, QC, submitted that the learned judge erred in that she acted on the premise that all of the issues identified in the claim fall equally to be considered by the decision maker. He insisted that the only concrete issue in dispute on the claim is whether the entire proprietary interest in the plant is vested in the government. He said that the other issues in the claim are merely potential issues, which might only arise to be determined if the arbitrator determines the issue of the proprietary interest in favour of the government. Mr. Bennett submitted, further, that the judge erred in that she failed to appreciate that the claim was brought by the government and in the result acted on the premise that if the parties were to have the proprietary interest issue determined by arbitration, the government could still litigate the other issues in the claim. He insisted that the learned judge erred in finding that the enforcement of the arbitration clause might

[19] In paragraphs 43 of the judgment.
[20] In paragraphs 40 and 41 of the judgment.

result in inconvenient and undesirable consequences because she attached inappropriate weight to this consideration. With respect, I do not agree with these submissions.

[25] I think that the learned judge properly exercised her discretion to refuse to stay the claim in the circumstances of this case. In my view, the 3 issues that arise on the claim are each discrete but critical issues which must all be determined for the proper resolution of the dispute between the parties. Even if an arbitrator were to determine the issue of sole ownership of the plant in favour of the government, that would not necessarily put an end to the impasse between the parties. Ocean Conversion is not claiming right of ownership of the plant, but an equitable right to compensation for its expenditure on the expansion of the plant. It is on this basis that the company has remained in possession of the plant while the government thinks that its claim to sole ownership means that it (the government) should be in possession. The resolution of the issue of government's ownership would still leave unresolved the issues which form the bases for Ocean Conversion's refusal to give up possession of the plant, and these issues are not within the jurisdiction of the arbitrator. It is in these circumstances that I think that the learned judge properly exercised her discretion when she found that it would be more just, convenient and economical to have the matter determined by the court. In this regard, I think that the words of Pearson LJ in Taunton-Collins v Cromie and Another[21] that there are very strong reasons based on the principle of avoiding a multiplicity of proceedings are very apt. In the premises, I would also dismiss the appeal on grounds 2,3 and 4 of the appeal.

Costs

[26] The learned judge ordered each party to meet their costs in the High Court because each party was successful on some important issues argued in that court. The government prevailed in this appeal but did not appeal that costs order. That order will therefore stand. There is no reason, however, why the government

[21] [1964] 2 All ER 332, at page 334J-335A.

should not be awarded its costs in this court. Accordingly, Ocean Conversion shall meet the costs of the government to be assessed under rule 65.11 and 65.13 of CPR 2000, if not agreed.

The order

[27] In summary then, the following is the order and directions on this appeal:

1. The appeal by Ocean Conversion is dismissed with assessed costs under rule 65.11 and 65.13 of CPR 2000 to be paid by the appellant to the government, if not agreed.
2. Ocean Conversion shall file a defence to the claim within the time prescribed by rule 10.3(4) of CPR 2000 from the date of this judgment as the single judge of this court ordered in April 2008.
3. Ocean Conversion shall also pay to the government the costs that were reserved by the single judge, if not agreed pending the outcome of this appeal in her order of April 2008.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]

I concur.

Indra Hariprashad-Charles
Justice of Appeal [Ag.]