GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2010/0310

IN THE MATTER OF THE ARBITRATION ACT CAP. 19 OF THE 1990 REVISED LAWS OF GRENADA

AND

IN THE MATTER OF AN ARBITRATION BETWEEN ANTHEA DE BELLOTTE v. MINISTER OF COMMUNICATION, WORKS AND THE ATTORNEY-GENERAL OF GRENADA

BETWEEN:

1. THE MINISTER OF COMMUNICATIONS, WORKS
2. THE ATTORNEY-GENERAL OF GRENADA

Claimants

AND

ANTHEA DE BELLOTTE

Defendant

Appearances:

Ms. K. Samuel for Claimant
Mr. D. Horsford holding for Mr. C. Hood for Defendant

2011: April 12, July 7

JUDGMENT

[1] **PRICE FINDLAY, J.:** This is an application by Anthea De Bellotte for the following relief:

> "The Claimants, the Minister of Communication, Works with offices at the Botanical Gardens, Tanteen in the parish of Saint George in the State of Grenada, and the Attorney-General, with Chambers at H. A. Blaize Street in the city and parish of Saint George aforesaid, apply to the Court for the following orders:

1. An order that the Defendant's submissions filed herein on the 19th day of November 2010 be disregarded in considering the Defendant's application filed herein on the 17th day of September 2010;

2. Alternatively, that directions be given in relation to the future conduct of the said application, and in particular, permission be granted to the Claimants to respond to the Defendant's submissions;

3. Further or other relief; and

4. That the costs of this application be provided for.

[2] The substantive application dated 9th July 2010 was made by the Attorney-General and the Minister of Communication and Works for the following relief:

> "The Claimants, the Minister of Communication, Works and the Attorney-General, both with offices in the city and parish of Saint George and State of Grenada, hereby apply against the Defendant Arithea De Bellotte of Golf Course in the parish of Saint George and State aforesaid, for the following orders:
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> 1. That the final award dated the 14th day of June 2010 ("the Final Award") made by Ambrose Phillip, the arbitrator in the abovementioned Arbitration ("the Tribunal") be set aside or remitted for the reconsideration of the Tribunal together with the Court's opinion on the question of the law the subject matter of this appeal on the ground that the Tribunal erred in law as follows:
>
>   (a) In its finding that the Defendant herein was a dependent contractor and therefore entitled to paid maternity leave although it found itself unable to determine the economic dependence of the Claimant (the Defendant herein) under

the terms of the Employment Act, No. 14 of 1999 (paragraph 4.3 of the Award);

(b) The Tribunal's finding on the one hand that "... there appears to be no ... abuse of a dominant bargaining position" is inconsistent with its later finding that "The Tribunal ... agrees that the Claimant (the Defendant herein) may have been in an unequal bargaining position (paragraph 4.4 of the Award);

(c) The Tribunal's finding that the issue of unconscionability of the contract lay without the scope of its duties and capabilities is perverse and inconsistent with its finding that nothing in clause 16 of the contract between the Claimants and the Defendant herein is inconsistent with the law of contracts (paragraph 4.4 of the Award);

(d) The Tribunal erred in law in finding that nothing in clause 16 of the said contract is inconsistent with the law of contracts even in light of its findings that the Defendant (the Claimant therein) is not entitled to gratuity for the full contract period and payment in lieu of vacation;

(e) The Tribunal erred in law in finding that nothing in clause 16 of the said contract is inconsistent with the law of contracts (paragraph 4.4 of the Award);

(f) The Tribunal erred in its construction of the law in relation to the estoppel created by "a course of dealing" as propounded by Lord Denning in Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. (paragraph 4.5);

(g) The Tribunal erred in law in finding that the Claimant (the Defendant herein) is only entitled to punitive damages if it is

found that the Defendants (the Claimants herein) are in breach of the contract (paragraph 4.7);

(h) The Tribunal erred in law in directing interest to be paid at the rate of 6% per annum without evidence being led by the Defendant (the Claimant therein) as to her pre-award losses (paragraph 5(iv));

(i) The Tribunal erred in law in ruling that the Defendant is entitled to travelling allowance for the period February 18th 2009 to June 30th 2011 (paragraph 5 (iv));

(j) The Tribunal erred in directing that legal costs are to be paid in accordance with the "OECS Courts Practice Direction" as the Claimants are not aware of the existence of such a practice direction (paragraph 5(vii)); and

(k) Further or alternatively, an Order that the Tribunal erred in law in applying the costs regime provided by CPR 65 as the appropriate basis upon which legal costs attendant upon alternative form of dispute resolution should be calculated.

2. An Order that the time for appealing against the Interim Award made the 13th day of November 2009 and formalized by written order dated the 7th day of December 2009 of the Tribunal in the abovementioned Arbitration ("the Interim Order") be extended and that the claim herein in relation to the Interim Order be deemed to be regularly filed, and for relief from sanctions;

3. An Order that the Interim Order be set aside or remitted for consideration of the Tribunal together with the Court's opinion on the question of law, on the following issue, namely:

   Whether the Defendant was an employee within the meaning of her contract and the said Employment Act thereby entitling her to maternity leave pursuant thereto

on the ground that the Tribunal erred in law in making the said award without, at the date of the Interim Award, having made a determination that the Defendant is such a person to whom the Employment Act applies;

4. An order that all further proceedings in relation to the Interim Award be stayed pending the determination of the relief sought herein on the ground that the determination as to whether or not the Defendant is entitled to paid maternity leave is inextricably linked to a final determination of the issue detailed at paragraph 1(a) hereof, which issue was not, but should have been determined before making an award under the said Employment Act;

5. An order that the Final Award be stayed pending the determination of the relief sought herein;

6. Such further or other relief; and

7. Costs.

[3] This Fixed Date Claim Form was amended on 22nd July 2011 as follows:

"The Claimants, the Minister of Communication, Works and the Attorney-General, both with offices in the city and parish of Saint George and State of Grenada, hereby apply against the Defendant Anthea De Bellotte of Golf Course in the parish of Saint George and State aforesaid, for the following orders:

1. That the final award dated the 14th day of June 2010 ("the Final Award") made by Ambrose Phillip, the arbitrator in the abovementioned Arbitration ("the Tribunal") be set aside or remitted for the reconsideration of the Tribunal together with the Court's opinion on the question of law the subject matter of this appeal on the ground that the Tribunal erred in law as follows:

(a) In its finding that the Defendant herein was a dependent contractor and therefore entitled to paid maternity leave although it found itself unable to determine the economic dependence of the Claimant (the Defendant herein) under the terms of the Employment Act, No. 14 of 1999 (paragraph 4.3 of the Award);

(b) The Tribunal's finding on the one hand that "... there appears to be ... no abuse of a dominant bargaining position" is inconsistent with the inference left to be drawn by the later finding that "The Tribunal ... agrees that the Claimant (the Defendant herein) may have been in an unequal bargaining position (paragraph 4.4 of the Award);

(c) The Tribunal took into account an irrelevant consideration in finding that "At the material time the fulcrum of power, Cabinet was seized of a notable legal advisor, who had publicly boasted of success at the level of the Privy Council" (paragraph 4.4 of the Award);

(d) The Tribunal's finding that the issue of unconscionability of the contract lay without the scope of its duties and capabilities is perverse and inconsistent with its finding that nothing in clause 16 of the contract between the Claimants and the Defendant herein is inconsistent with the law of contracts (paragraph 4.4 of the Award);

(f) The Tribunal erred in law in finding that nothing in clause 16 of the said contract is inconsistent with the law of contracts (paragraph 4.4 of the Award);

(g) The Tribunal erred in its construction of the law in relation to the estoppel created by "a course of dealing" as propounded by Lord Denning in Amalgamated Investment

& Property Co. Ltd. v. Texas Commerce International Bank Ltd. (paragraph 4.5);

(h) The Tribunal erred in law in finding that the Claimant (the Defendant herein) is only entitled to punitive damages if it is found that the Defendants (the Claimants herein) are in the breach of the contract (paragraph 4.7);

(i) The Tribunal erred in law in directing interest to be paid at the rate of 6% per annum without evidence being led by the Defendant (the Claimant therein) as to her pre-award losses (paragraph 5(iv));

(j) The Tribunal erred in law in ruling that the Defendant is entitled to travelling allowance for the period February 18th 2009 to June 30th 2011 (paragraph 5 (iv));

(k) The Tribunal erred in directing that legal costs are to be paid in accordance with the "OECS Courts Practice Direction" as the Claimants are not aware of the existence of such a practice direction (paragraph 5 (vii)); and

(l) Further or alternatively, an Order that the Tribunal erred in law in applying the costs regime provided by CPR 65 as the appropriate basis upon which legal costs attendant upon an alternative form of dispute resolution should be calculated.

2. An Order that the time for appealing against the Interim Award made the 13th day of November 2009 and formalized by written order dated the 7th day of December 2009 of the Tribunal in the abovementioned Arbitration ("the Interim Order") be extended and that the claim herein in relation to the Interim Order be deemed to be regularly filed, and for relief from sanctions;

3. An Order that the Interim Order be set aside or remitted for consideration of the Tribunal together with the Court's opinion on the question of law on the following issue, namely:

   Whether the Defendant was an employee within the meaning of her contract and the said Employment Act thereby entitling her to maternity leave pursuant thereto

   on the ground that the Tribunal erred in law in making the said award without, at the date of the Interim Award, having made a determination that the Defendant is such a person to whom the Employment Act applies;

4. An order that all further proceedings in relation to the Interim Award be stayed pending the determination of the relief sough herein on the ground that the determination as to whether or not the Defendant is entitled to paid maternity leave is inextricably linked to a final determination of the issue detailed at paragraph 1(a) hereof, which issue was not, but should have been determined before making an award under the said Employment Act;

5. An order that the Final Award be stayed pending the determination of the relief sought herein;

6. Such further or other relief; and

7. Costs.

[4] The Defendant/Applicant asserts that the Claimant/Respondent has appealed against the decision of the Arbitrator and that they seek the Court's opinion on matters of law arising out of the Arbitrator's award.

[5] The Applicant does not dispute that CPR 60 applies to appeals to the High Court from decisions of tribunals. The Rule sets out the procedure to be followed in the circumstances. In particular, the Rule states that the appellant must state the enactment enabling the appeal to be made to the Court.

[6] The Applicant asserts that the only sections of the Arbitration Act which are capable of allowing for an appeal to the High Court are sections 18, 19 and 31.

[7] Section 18 of the Arbitration Act states as follows:

> "18(1) In all cases where there has been a reference to arbitration the Court may, by order, remit for reconsideration by the arbitrator or umpire any or every matter contained in the reference.
>
> (2) Where the Court has ordered that an award be remitted for reconsideration, the award must, unless the Court otherwise directs, be made within three months from the date of the order."

[8] Section 19 of the Arbitration Act states as follows:

> "19(1) Where an arbitrator or umpire has misconducted himself or the proceedings the Court has power to order his removal but, before making the order, the Court may if it thinks fit direct that the arbitrator or umpire be given the opportunity to show cause why the order should not be made."
>
> (2) Where an arbitrator or umpire has misconducted himself or the proceedings, and where an arbitration or award has been improperly procured, the Court may set aside the award.

[9] Section 31 of the Arbitration Act states as follows:

> "(1) An arbitrator or umpire may, and shall if so directed by the Court, state in the form of a special case for determination by the Court –
>
> (a) any question of law arising in the course of a reference;
>
> (b) an award or any part of an award.

(2) A special case concerning an interim award or a question of law arising in the course of a reference may, and shall if so directed by the Court, be stated notwithstanding that proceedings under the reference are still pending.

(3) An appeal lies to the Court of Appeal from any decision of the Court under this section, but no appeal lies against the decision on a case stated pursuant to subsection (1)(a) except with the leave of the Court or the Court of Appeal.

[10] The Applicant's position is that neither of the sections contains the word "appeal" and they cannot be reasonably interpreted to refer to an appeal.

[11] Their position is borne out by the judgment of Baptiste JA in the matter of **One Call Construction Company Ltd. v Grenada Solid Waste Management Authority.** The learned Justice of Appeal stated:

> "It is clear to me that what was before the Court was not an appeal but an application to remit pursuant to the Act. To found an appeal by virtue of the nature of the orders the High Court is authorized to give in sections 18 and 19 of the Arbitration Act is effectively to pressure an appeal where no appeal is given by these sections."

[12] They submit that as a result the Court does not have jurisdiction to entertain the Claimant/Respondent's Fixed Date Claim Form, which they say is in essence an appeal.

[13] The Claimant/Respondent submits that the substantive action is brought pursuant to section 18 of the Arbitration Act and the proper way to approach the Court is by way of Fixed Date Claim Form, as this is the method prescribed by the CPR.

[14] This is the type of claim which under the previous rules would have had to be brought by way of originating motion, and under the CPR where claims by

enactment are commenced, the proceedings must be commenced by Fixed Date Claim Form.

[15] Even though the Applicants in their application make reference to the words "appeal" and "appealing", it is clear from paragraph 1 that the purport of the application is a request "to remit or set aside" the final award of the arbitrator. Further, in paragraph 3, they again request either remittance or setting aside of the award.

[16] This places the application squarely within the requirements of sections 18 and 19 of the Arbitration Act. This is the power and the jurisdiction with which the Court is clothed under the Arbitration Act.

[17] It is set out clearly in Halsbury's Laws 4th Edition, Vol. 2 at para 616, the procedure to be followed in making a request to remit or set aside the award of an arbitrator.

[18] "An application to remit or set aside an award must be made by an originating motion within six weeks after the award has been made or published to the parties. The notice of motion must state in general terms the grounds of the application, and, where the motion is founded on affidavit evidence ..."

[19] I therefore find that this is not an appeal to be governed by CPR part 60 but an application challenging the award made by the arbitrator. Under the old rules this application would have been made by originating motion and is now made by way of Fixed Date Claim Form.

[20] Even though the Claimants/Respondents have approached the Court by way of CPR Part 60, I find that this is not an appeal but an application to remit or set aside the award of the arbitrator.

[21] I will treat the Fixed Date Claim Form as an application, and I find that the Court does have jurisdiction to hear the applications; however, as the application applies to the questions of law, I find that the Court has no jurisdiction to hear and

determine those matters, as under section 31(1) of the Act, it is for the arbitrator or umpire to state a case for the determination by the Court on questions of law.

[22] I do not find that the applicant has *locus standi* to bring to this Court questions of law pursuant to the Arbitration Act.

[23] In the circumstances, I find that the Court has jurisdiction to hear the matter and will exercise its discretion to do so.

[24] The matter is hereby set down for hearing on a date to be fixed by the Court Administrator.

[25] There is no order as to costs.

Margaret Price Findlay
High Court Judge