EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: SLUHCV2012/0217

BETWEEN:

[1] PAUL LIMRICK
[2] THERESA LIMRICK (nee BALKARAN)

Claimants

and

CHRISTIAN BROWN representing the Estate of WAYNE BROWN

Defendant

Appearances:
Ms. Shan Greer for the Claimants
Mr. Eghan Modeste for the Defendant

2012: July 30;
August 22.

DECISION

[1] CENAC-PHULGENCE M [AG]: This decision concerns an application to strike out a claim form and statement of claim filed by the defendant on 4th April 2012. This application is supported by the affidavit of Mr. Christian Brown filed on even date. The application to strike out is opposed by the claimants. A brief background to this matter is set out below.

Background Summary

[2] The claimants filed a claim form and statement of claim on 5th March 2012 for an order to remit for consideration and/or set aside an arbitration award made by Mrs.

Cynthia Combie Martyr on 15th December 2011, pursuant to sections 18 and 19 of the Arbitration Act[1] ("the Act"), together with the costs thereof.

[3] The statement of claim alleges in summary that the parties agreed to refer a dispute which arose between them to arbitration pursuant to a Building Contract dated 11th February 2006. The appointed Arbitrator, Mrs. Cynthia Combie Martyr gave case management directions and proceeded to carry out the arbitration through a series of case management directions and scheduled hearings which took place between 2009 and 2011. The arbitrator's award was made on 15th December 2011. The statement of claim alleges at paragraph 18, page 5 that "in conducting the arbitration proceedings and making her awards, the Arbitrator misconducted herself" which I believe is the central point to the claimants' claim.

[4] The claimants proceeded to provide particulars of the alleged misconduct in the statement of claim under broad headings as follows:

(a) the Arbitrator wrongfully delegated her duty to determine the factual issues in this case to the appointed Expert;

(b) the Arbitrator determined the issues in dispute between the parties on legal authorities that were not argued by the parties. Further and/or additionally, the Arbitrator did not notify the parties that she intended to use the said authorities and/or inviting the parties to address her on the said authorities;

(c) the Arbitrator exceeded the jurisdiction granted to her by the parties in that she determined a sum due and owing to the defendant for works carried out following the finalising of the accounts when the defendant did not make any claim for that amount;

[1] Chap. 2.06, Revised Laws of Saint Lucia 2008.

(d) the Arbitrator failed to follow the London Court of International Arbitration Rules (LCIA Arbitration Rules).

[5] At paragraph 18, page 6, the statement of claim avers that as a result of the Arbitrator's misconduct, the award has been improperly procured.

[6] The defendant acknowledged service of the claim on 15th March 2012. There is no defence on record. It is important to note that by Order of the Arbitrator dated 12th February 2009, "the parties agreed that the Arbitrator's decision shall be final subject to appeal on a point of law."

Application to strike out

[7] By notice of application filed 4th April 2012, the defendant applied for the following orders: (a) that the claimant's claim be dismissed with costs; (b) that the court make a declaration that it has no jurisdiction to try the claim; (c) that judgment be entered for the defendant in terms of paragraph 3 of the Arbitration Award dated 15th December 2011 pursuant to section 20 of the Arbitration Act; (d) alternatively, that the defendant be granted an extension of time to file a defence should the application to strike not be considered favourably.

[8] I summarise the grounds for the application as follows:

(a) that the purported claim is not an appeal on a point of law;

(b) the Arbitrator's award was served on both parties and the LCIA Arbitration Rules do not make any provision for appeal and the Civil Procedure Rules (CPR) provide that a party may file an appeal within 42 days. The claimants did not file an appeal within 42 days and have in fact filed a purported claim and have failed to comply with the Order of the Arbitrator dated 12th February 2009 and the CPR; that the measure adopted by the claimants in filing a claim is procedurally improper and if aggrieved they ought to have filed an appeal;

(c) the purported claim is misguided and there is no legal provision which would permit its filing and it is therefore an abuse of the court process and cannot be entertained;

(d) sections 18 and 19 of the Arbitration Act pursuant to which the claimants have filed their claim will only apply if the court has referred a matter to arbitration. The matter was not referred to Arbitration by the Court and therefore the court cannot remit it to arbitration;

(e) There has been no finding that the Arbitrator misconducted herself despite these erroneous assertions by the claimants and no proper appeal or appeal at all has been filed within the period stipulated by the CPR.

[9] The defendant at paragraph 8 of the grounds seeks to address one of the particulars of misconduct alleged by the claimants.

[10] The application was supported by an affidavit of Christian Brown in which he deposes inter alia that "the effect of the claim if successful would be an appeal against the award of the Arbitrator"; "that the purported claim ... is not an appeal on a point of law"; "that the purported claim ... is misguided and there is no legal provision which would permit the filing of such a claim". The rest of the affidavit basically repeats the grounds as set out in the application. The defendant did not file submissions in support of the application.

[11] The claimants filed submissions in answer to the defendant's application to strike out on 18th July 2012 and the defendants filed submissions in reply on 27th July 2012.

Striking out principles

[12] Rule 26.3(1)(b) of the Civil Procedure Rules 2000 ("CPR") is the enabling rule which gives the court the power to strike out a statement of case if it appears to the court that the statement of case does not disclose any reasonable ground for bringing or defending a claim. Striking out of a statement of case is considered a draconian power and several cases have spoken to the need to exercise caution when exercising this power. In the case of Citco Global Custody NV v Y2K Finance Inc.,[2] Edwards JA discussed the principles which should guide the court when exercising the draconian power of striking out.

[13] At paragraphs 13 and 14 of Citco Edwards JA had this to say which I take as being applicable to this case:

> "[13] On hearing an application made pursuant to CPR 26.3(1)(b) the trial judge should assume that the facts alleged in the statement of case are true.[3] [*See Morgan Crucible Co. plc v Hill Samuel & Co. Ltd [1991] Ch 295 per Slade L.J .: " On an application to strike out a pleading under RSC, O 18, r 19(1)(a) [comparable to rule 26.3 (1) of our CPR 2000], no evidence is admissible and since it is only the pleading itself which is being examined, the court is required to assume that each and every one of the facts pleaded (unless manifestly incapable of proof) is true and will be capable of proof at the trial. In some instances the court may regard the assumption as somewhat unrealistic, but it nevertheless has to be made."]* "Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny."[4] *[See Bank of Credit and Commerce International (Overseas) Ltd (in liq.) & Ors v Price Waterhouse and another [1988] B.C.C. 617 at 620]*
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> "[14] Among the governing principles stated in Blackstone's Civil Practice 2009[5] *[At page 432 paragraphs 33.9 and 33.10]* the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development;[6] [*See also The Caribbean Civil Court Practice 2008 , page 231: " …a case should not be struck out where the claim is in an area of developing*

[2] Territory of the Virgin islands High Court Civil Appeal No. 22 of 2008 (delivered 19th October 2009 unreported).

> *jurisprudence and the facts need to be investigated before conclusions can be drawn about the law: Farah v British Airways plc and the Home Office (2000) Times, 26 January CA."*] or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination and cross–examination of witnesses often change the complexion of a case ..." (my emphasis)

[14] The court when exercising the power to strike out will have regard to the overriding objective and to its general powers of case management. On an application to strike out on the grounds that the statement of case does not disclose any reasonable ground for bringing the action, the court is concerned with the statement of case as pleaded. In the Barbadian case of M4 Investments Inc. v Clico Holdings (Barbados) Limited,[3] the court stated at paragraph 16 in relation to an application to strike out pursuant to the equivalent rule to CPR 26.3(1)(b) that:

> "The manner in which the evidence is to be used in a strike out application has been explained by Millett J. in the Lonrho case at page 965 as follows:
>
> > 'On an application to strike out a statement of claim under Ord 18, r 19(1)(a) on the ground that it discloses no reasonable cause of action, the truth of the allegations contained in the statement of claim is assumed and evidence to the contrary is inadmissible. This is because the court is invited to strike out the claim in limine on the ground that it is bound to fail even if all such allegations are proved. In such a case the court's function is limited to a scrutiny of the statement of claim. It tests the particulars which have been given of each averment to see whether they support it, and it examines the averments to see whether they are sufficient to establish the cause of action. It is not the court's function to examine the evidence to see whether the plaintiff can prove his case, or to assess its prospects of success.' " (my emphasis)

[3] Barbados Civil Appeal Nos. 2 and 4 of 2004, (delivered 27th February 2004, unreported).

This makes it clear that the court is not concerned with the evidence which will be required to prove a case or whether that evidence is indeed available at the time of consideration of the application to strike out.

The ambit and interpretation of sections 18, 19 and 27 of the Arbitration Act

[15] The claimants submit that sections 18 and 19 of the Arbitration Act do not only apply in cases where the court has referred a dispute to arbitration. They say that section 18(1) applies in 'all cases of reference to arbitration' with the term reference being defined in section 2 of the Act as "... a reference under an order made by the Court". However, when read in conjunction with section 27 of the Act which states that "The Court shall, in relation to references, have all powers which are by this Act conferred on the Court as to references by consent out of Court", the claimants contend that the effect is to extend the court's powers under section 18 to references made by consent out of court. Therefore, the court does have jurisdiction to remit the award. They submit further that section 19 of the Act does not place any limitations on the discretion of the court and consequently, the court has jurisdiction to set aside the Award.

[16] As to the defendant's ground that there is no legal provision that permits the filing of the claimants' claim, the claimants accept that by the Order of the Arbitrator dated 12th February 2009, it was agreed that the Arbitrator's decision was to be final subject to appeal on a point of law. However, the claimants say that this claim is not an appeal on a point of law but rather is a claim for an order to remit and/or set aside the award and is therefore legally valid. The claimants submit that the defendant's contention that the proper course of action to be adopted is to appeal under the relevant provisions of the CPR is misguided. The claimants' contend that their claim is not an appeal on a point of law but rather an application to the court seeking the exercise of its discretion under sections 18 and 19 of the Arbitration Act and should therefore not be struck out. The claimants rely on the

Court of Appeal case of One Call Construction Company Limited v Grenada Solid Waste Management Authority[4] in support of their submissions.

[17] In response to the claimants' submissions on the purport of sections 18, 19 and 27 of the Arbitration Act, the defendant submits that sections 18 and 19 will only apply where the court has referred a matter to arbitration. He bases this on the definition of 'reference' in section 2 of the Act which speaks to 'a reference under an order of the Court'. He says that there is no order of the court in these proceedings and so section 18 of the Act does not apply. In relation to section 27, the defendant contends that the section cannot be relied on by the claimants as it is concerned with the powers of a High Court or a judge thereof in relation to a reference made under an order made by the court. The award of the Arbitrator in this case is not a reference under an order made by the court and the word reference does not include 'agreements to resolve disputes by arbitration' which is what obtained in this case.

Analysis

[18] The relevant sections of the Arbitration Act are set out below. Section 18 states:

> "POWER TO REMIT AWARD FOR RECONSIDERATION
>
> (1) In all cases of reference to arbitration the Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.
>
> (2) ..."

Section 19 states:

> "POWER TO SET ASIDE AWARD
>
> (1) ...
>
> (2) Where an arbitrator or umpire has misconducted himself or herself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside."

Section 2 defines "reference" as "a reference under an order made by the Court."

[4] Grenada High Court Civil Appeal No. 14 of 2009 (delivered 8th September 2010, unreported).

Section 27 states as follows:

> "COURT TO HAVE POWERS AS IN REFERENCES BY CONSENT
>
> The Court shall, in relation to references, have all powers which are by this Act conferred on the Court as to references by consent out of Court."

[19] By the Order of 12th February 2012, the parties agreed that the decision of the Arbitrator would be 'final subject to appeal on a point of law' and that is accepted by the claimants. It is not in dispute that this gave a right of appeal but limited to appeals on a point of law. What is in issue is whether an application under section 18 or 19 of the Arbitration Act amounts to an appeal and whether the agreement that an award would be final and binding excludes the right to make application pursuant to these sections. In One Call Construction Company Limited v Grenada Solid Waste Management Authority,[5] the central issue on appeal was whether an application to the High Court for an order to remit the award of an Arbitration Tribunal for reconsideration is an appeal. Baptiste JA also considered the meaning of final and binding as regards arbitration awards. This is very instructive as relates to the submissions made on this point.

[20] At paragraph 6 of the said judgment, the learned judge refers to the case of Shell Egypt West Manzala GmbH & Anor v Dana Gas Egypt Ltd (Comm)[6] and the dicta of Mrs. Justice Gloster at paragraph 38 where she says:

> "The expression final and binding in the context of arbitration and arbitration agreements has long been used to state the well-recognised rule in relation to arbitration, namely that an award is final and binding in the traditional sense and creates a res judicata between the parties. ... the finality and binding nature of an award does not exclude the possibility of challenging an award, by any available arbitral process of appeal or review or otherwise in accordance with part of the 1996 Act."

[21] At paragraph 14 of the One Call Construction case, Baptiste JA went on to say:

> "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

[5] Supra, n.4.
[6] [2009] EWHC 2097.

> presume an appeal where no appeal is given by these sections. Further, in the absence of express words conferring an appeal, I am of the view that neither the language, substance [n]or meaning of sections 18 and 19 gives an appeal. Where the Arbitration Act intended to confer a right of appeal it did so expressly." (my emphasis)

[22] In a subsequent case, The Minister of Communications, Works et al v Anthea De Bellotte,[7] the High Court found that the claim in that case was not an appeal but an application pursuant to sections 18 and 19 of the Arbitration Act. The finding of the judge was upheld on appeal.[8] The issue of whether section 18 only referred to references as defined in section 2 of the Act i.e. referred to by the court or whether it also included references to arbitration such as in the case at bar was canvassed but was not decided by the High Court judge.

[23] It is quite clear from the case law that the defendant's contention that the claimants' claim is an appeal cannot be upheld. The claimants' claim is made pursuant to sections 18 and 19 of the Act and is not in the nature of an appeal. As explained these sections carry their own life apart from the appeal process which must be specifically provided for either in the legislation or in the agreement between the parties.

[24] As to the defendant's submission that section 18 only applies to cases where the court has referred a matter to arbitration, I do not agree. When one examines the Arbitration Act, one will see that the heading which precedes sections 3-23 is "References by Consent out of court". Sections 18 and 19 form part of this section. The heading which precedes sections 24-28 reads "References under Order of the Court." It appears that what section 27 which is found under the latter heading attempts to do is to apply all the powers specified in sections 3-23 (which relate to references by consent out of court) to references under an Order of the Court. So I can find no merit in the defendant's submission that section 18 only applies to a reference made under an order of the Court. That is in direct contradiction to what the Act sets out. The claimants' contention that section 27

[7] Grenada High Court Claim No. GDAHCV2010/0310 (delivered 7th July 2011, unreported).
[8] Grenada High Court Civil Appeal No. 17 of 2011 (delivered 22nd November 2011, unreported)

operates to extend section 18 to references made out of court by consent is also flawed since I have explained that it operates in the reverse. There is therefore no doubt that a claim can be filed pursuant to section 18 or 19 as was done in this case.

The concept of misconduct in relation to arbitration proceedings

[25] In the One Call Construction case, Baptiste JA explained at paragraph 12 that the expression "misconduct" in section 19 of the Grenada Act which is similar to the Saint Lucia provision, does not necessarily refer to dishonesty or breach of business morality on the part of the arbitrator or umpire. It would also apply to procedural errors or omissions by arbitrators.

[26] The defendant submits that the claimants are misguided in their interpretation of the word misconduct and that the word is not defined in the Arbitration Act and accordingly it must be given its ordinary and proper meaning, that is, to have acted immorally or unethically. Further, the defendant says that there is neither an accusation that the Arbitrator acted immorally or unethically nor is there a finding to that effect.

[27] The defendant in his submissions says that for section 19 of the Act to operate, there must be a finding of misconduct and there has been no such finding. Paragraphs 13, 14 and 15 of the defendant's submissions go into some of the alleged acts of misconduct and seek to address and provide evidence to counter those allegations but that is a matter of evidence which cannot now be looked at on an application to strike out a statement of case.

[28] The case law is very clear as to the meaning of misconduct in the context of arbitration proceedings and so the defendant's submission that the word misconduct must mean that the arbitrator acted immorally or unethically is untenable.[9] The defendant's submission that there must be a finding of

[9] See also the following case on the meaning of 'misconduct'-The Tobago House of Assembly v Ronald Nurse and another, Claim Number Claim No. CV 00603 of 2006 at pp. 10-11.

misconduct for section 19 of the Act to operate is correct in principle. However, a finding of misconduct at this stage of the proceedings, at case management would be premature. It is for the claimants having alleged certain acts of misconduct to prove those to a judge. This can only be done by looking at the evidence presented. The court is not concerned on an application to strike out to assess the strength or merits of evidence.[10] That is for the trial of the claim. I think it is well said by Barrow JA in the case of East Caribbean Flour Mills Limited v Omiston Ken Boyea[11] where he says:

> "...The position, as gathered from the observations of both their Lordships, is that the pleader makes allegations of facts in his pleadings. Those alleged facts are the case of the party. The "pleadings should make clear the general nature of the case," in Lord Woolf's words, which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand to mean pleadings with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader's case."

The manner of filing an application pursuant to sections 18 and 19 of the Arbitration Act

[29] When this matter came up for hearing the Court raised the question as to the manner in which an application under sections 18 and 19 should be made. The claim as filed was filed as an ordinary claim. The claimants during the course of the hearing conceded that the claim ought to have been filed as a fixed date claim form and urged the court to treat the claim form filed as such and made an oral application pursuant to CPR 26.9(3) under which the court has power to put things right. Counsel for the defendant suggested that this could not be done because the claim not having been filed as a fixed date claim is fatal and cannot be remedied in the manner suggested by the claimants.

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[10] See paragraph 12 and 13 above.

[11] Saint Vincent and the Grenadines High Court Civil Appeal No. 12 of 2006 at paragraph 43 (delivered 16th July 2007, unreported).

[30] The posture of the defendant cannot be correct in light of the tenor of CPR. In InTrust Trustees (Nevis) Limited et al v Naomi Darren,[12] George-Creque JA said "to sacrifice substance by way of slavish adherence to form for the purpose of defeating a genuine claim defeats the overriding objective of CPR rather than gives effect to it" and I adopt this statement. It is clear that an application pursuant to sections 18 and 19 would have been made by originating summons prior to CPR and therefore ought to be made by way of fixed date claim form. In light of this, I treat the claim filed as a fixed date claim form.

Right to enforce award pursuant to section 20

[31] Section 20 of the Act states:

> "An award or an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect and in such case judgment may be entered in terms of the award."

This section is a summary procedure for enforcing the Arbitrator's award. I do not think it necessary to discuss the ambit of the section or whether it applies in this case as its consideration would only have arisen if the application to strike out were to be successful.

Extension of time to file defence

[32] The defendant in his application to strike out made application in the alternative that the defendant be granted an extension of time to file a defence. The defendant in his application does not address the grounds in support of this extension of time. In light of how fixed date claims are to be dealt with, I think it would be prudent for me to allow the matter to be listed for a first hearing before a judge and permit the court to exercise its case management powers at that hearing. The defendant may wish to formalise his application for extension of time in the meantime.

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[12] Saint Christopher and Nevis High Court Civil Appeal No. 1A of 2009, (delivered 9th June 2009, unreported).

Order

[33] In light of the foregoing, I make the following order:

(1) The application to strike out the claim no. SLUHCV2012/0217 as disclosing no reasonable grounds for bringing the claim is dismissed.

(2) The Court declares that it has jurisdiction to try to claim as filed pursuant to sections 18 and 19 of the Arbitration Act of Saint Lucia.

(3) That the defendant pays costs in the sum of $1,500.00 to the claimants on this application to be paid on or before 31st October 2012.

(4) That the claim form filed on 5th March 2012 is treated as a fixed date claim form and the matter is remitted for listing for a first hearing before a judge of the High Court on a date to be notified to the parties by the Court Office.

Kimberly Cenac-Phulgence
Master [Ag.]