IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2008/0197

IN THE MATTER OF THE ARBITRATION ACT CAP 19 SECTIONS 18 &19

AND

IN THE MATTER OF AN ARBITRATION BETWEEN ONE CALL CONSTRUCTION COMPANY LIMITED (TRADING AS ONE CALL COLLECTION SERVICE) AND GRENADA SOLID WASTE MANAGEMENT AUTHORITY

BETWEEN:

ONE CALL CONSTRUCTION COMPANY LIMITED
(TRADING AS ONE CALL COLLECTION SERVICE)

Claimant

AND

GRENADA SOLID WASTE MANAGEMENT AUTHORITY

Defendant

Appearances:
Mr. James Bristol for the Claimant
Mrs. Daniella Williams Mitchell for the Defendant

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2012: November 6
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JUDGMENT

[1] HENRY, J.: By fixed date claim form filed on 28th March 2008, the claimant seeks an order that the award made by the Arbitrators on 27th February 2008 be remitted for reconsideration by the said Arbitrators or set aside on the following grounds namely:

(1) The evidence which was to be part of the record of the proceedings and upon which the Arbitrators and the parties were to rely was not fully and

accurately recorded and transcribed, as is admitted by the Arbitrators, resulting in unfairness to the claimant.

(2) The award is bad on the face of it because:

(a) Section 16(1) of the contract relieves both parties from liability for failing to perform due to force majure.

(b) There was a breach of clause 24 of the Agreement because the invocation of arbitration does not require an express refusal to agree to review of the contract price.

(c) The Arbitrators deliberately ignored the applicable principles of law such that no reasonable arbitrator would have come to such conclusions.

[2] Claimant advised in its written submission that it will no longer seek to rely on the ground that the award is bad on its face. It is left therefore for the court's consideration only ground 1 of the claim.

[3] The parties have agreed for the matter to be decided on the affidavits and written submissions.

## The Allegations

[4] In the affidavit of Stanford Simon filed in support of the claim, Mr. Simon sets out the details of the claim. He asserts that at the first hearing of the arbitration, it was agreed that the evidence would be recorded by tape recording and transcribed. He refers the court to a letter dated 12th June 2007 from Mr. Dickon Mitchell on behalf of the Arbitrators.

[5] Mr. Simon also refers the court to paragraph 9 of the Terms of Reference which provides that ". . . a party should refer only to evidence in the record . . ."

[6] According to Mr. Simon the arbitration hearing proceeded in reliance upon this procedure for recording evidence. He asserts, however, that none of the Arbitrators recorded the evidence at all, or if recorded did not do so accurately.

Further, that during the hearing, the tape recorder was intermittently in operation and, by letter dated 26th October 2007, Mr. Dickon Mitchell, on behalf of the Arbitrators admitted the defects in the recording process.

[7] Mr. Simon refers the court to a copy of the transcript and the copy of the cover letter which accompanied it. In the said letter Mr. Dickon Mitchell states:

> "Unfortunately, the tapes do not appear to have worked perfectly, for that I apologize. I trust nonetheless, that the transcript would be of some use in relation to your closing submissions."

[8] Mr. Simon states that it is highly likely that the transcript failed to record vital evidence. However, he asserts that it is not possible to ascertain which evidence is missing. By way of example he recalled that at the end of the cross-examination, Mr. Selby Dabreo of the defendant did state that the contract was terminated because of the several breaches by the claimant in October and November 2004. This evidence, he states, is not in the transcript although, according to him, it is reflected in his Counsel's handwritten notes.

[9] Mr. Simon concludes that due to the omissions in the transcript it is clear that the Arbitrators could not have fully and properly considered all the evidence adduced at the hearing, which, he states, is unfair to the claimant.

[10] Mr. Selby Dabreo, the General Manager of the defendant, submitted an affidavit on behalf of the defendant. He states that throughout the arbitration proceedings fairness prevailed: the defendant presented witness statements with supporting

documents. The claimant also presented witness statements with exhibits, including the Terms of Reference and the Contract. As agreed, the witness statements stood as evidence and the parties were questioned.

[11] He too accepts that from the beginning of the arbitration proceedings and throughout the entire two days, it appeared that the tape recording was not working properly. He states however, that when the deficiency in the tape recording was raised the Arbitrators, the parties and their legal representatives had no objection to proceeding despite the deficient tape. He notes specifically that at no time did the claimant during the proceedings make objections because of the malfunctioning tape. The parties, he asserts, decided to proceed since everyone was taking their own notes. Therefore, it was known on the first day early in the proceedings that the transcript could not be relied upon.

[12] According to his evidence, it was very evident throughout the proceeding that the legal representatives of the parties and the Arbitrators were making their own notes; that the Arbitrators at different stages asked independent questions relying on personal notes made and observations from documents presented and not based on the transcript. Mr. Dabreo states that the Arbitrators were all attentive throughout the proceedings and there is no basis for the statement in Mr. Simon's affidavit that the Arbitrators recorded the evidence inaccurately or not at all. These allegations, he asserts, are unsupported by evidence and are unsubstantiated and erroneous.

[13] Mr. Dabreo's further evidence is that at the end of the examination, the cross examination and re-examination, it was agreed that written closing submissions would be submitted by both sides by 12th November 2007. He accepts that the Arbitrator, Mr. Mitchell delivered the transcript under cover letter dated 26th October 2007. He asserts that even at this stage in October 2007, neither Mr. Simon nor this Attorney made mention of or any objections to the alleged

omissions in the transcript. The claimant, he asserts only raised objection after the ruling of the arbitration panel was delivered.

[14] Finally, Mr. Dabreo states that there is no evidence to support the claimant's assertion that the Arbitrators could not have fully and properly considered the evidence which was adduced at the hearing. He concludes that the entire proceedings were fair and the claim and supporting affidavit discloses no reasonable ground to remit. He therefore requests that the claim be struck out.

Submissions

[15] In essence, the claimant submits that there has been misconduct on the part of the Arbitrator in the handling of the arbitration as to amount to substantial miscarriage of justice. The claimant refers the court to the judgment of Lord Diplock in Margulies Brothers Ltd. v Dafnis Thomaides & Co. (UK)[1] where it was stated that misconduct of an arbitrator includes any failure to comply with the terms, express or implied, of the arbitration agreement. He further submits that the shutting out of evidence which should have been admitted is misconduct, and may result in the award being remitted or set aside. Accordingly, claimant submits that the exclusion of evidence by a defect in the recording of the proceedings is likewise misconduct resulting in unfairness to both parties.

[16] The claimant further submits that the failure to properly record the evidence also amounts to an admitted mistake which resulted in the award being made in favour of the defendant.

[17] In addition, claimant asserts that the failure to record the evidence fully is a procedural mishap resulting in the reference not being considered and adjudicated

[1] [1958] All ER 777 at 781

upon as fully as or in a manner which the parties were entitled to expect and it would be inequitable to allow the award to stand.

[18] Finally, claimant submits that the court has wide discretion whether to order the setting aside of the award or to remit same. However, the clamant asserts that a full rehearing will have to take place as all the evidence will have to be taken once more; that it would not be fair, in the circumstance, to require or in any event to be sure that the Arbitrators will clear their minds of the views already formed and fully revisit the matter on the totality of the evidence. It is therefore submitted that the court should order that the award be set aside and the reference resubmitted to a new tribunal.

[19] The defendant submits that there is no admitted error on the part of the Arbitrators. It was evident to all parties that the tapes were not working, the parties decided to proceed. The Arbitrators took their own notes and asked questions and were present and alert throughout the entire proceedings. The claimants have not indicated what the omissions were and how they resulted in unfairness, especially since the transcript was not the only evidence relied upon by the Arbitrators.

[20] Even if the malfunction of the tapes amounted to an irregularity, it did not pass the test of causing a substantial injustice as set out in The Petro Ranger case[2].

[21] Further, that there has been no breach of the rules of natural justice. Neither was there prejudice done to the parties nor any miscarriage of justice. Defendants refer the court to the case of Cecil Ayer Ltd. v Evidence (T'dad) Ltd.[3].

[2] [2001] 2 Lloyd's Rep. 348
[3] TT 1987 HC 86 per the decision of Davis, J.

[22] In addition, defendant submits that the claimant accepted the omission in the tape recording by not objecting at any stage until the ruling of the Arbitrators was delivered.

The Law

[23] The court's power to remit matters for reconsideration by the Arbitrator is set out in section 18 (1) of the Arbitration Act and its power to set aside an award is found in section 19 (2).

Sections 18 (1) and 19(2) of the Arbitration Act, Cap. 19 provide 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.
>
> 19. (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."

[24] Although the court's jurisdiction to remit under section 18 (1) appears to be unlimited, courts have recognized at least four grounds. They include: (1) that the award is bad on the face of it; (2) that there has been misconduct on the part of the Arbitrator; (3) that there has been an admitted mistake and the arbitrator asks that the matter be remitted; and (4) where additional evidence has been discovered after the making of the award[4].

[25] In addition the court may set aside the award on a finding of misconduct under section 19 (2).

[4] Re Montgomery, Jones & Co. and Liebenthal & Co. (1898) L.T. 406; Margulies Brothers, Ltd. v Dafnis Thomaides & Co. [1958] 1 Lloyd's Rep. 250.

## Misconduct

[26] Misconduct refers to a wide range of errors on the part of an Arbitrator. Atkins L.J. in Williams v Wallis & Cox[5] explained misconduct as follows:

> "That expression does not necessarily involve personal turpitude on the part of the Arbitrator . . . The term does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice."

[27] One instance of such misconduct is where the Arbitrator refuses to hear evidence upon a material issue. Another instance was given by Lush J. in the Wi lliams case.

> "If an Arbitrator for some reason which he thinks good declines to adjudicate upon a real issue before him, or rejects evidence which, if he had rightly appreciated it, would have been seen by him to be vital, that is within the meaning of the expression 'misconduct' in the hearing of the matter."[6]

[28] According to the learning in Halsbury's Laws of England[7], irregularities in procedure may amount to misconduct. It is noted however, that not every irregularity in procedure amounts to misconduct. Included among those irregularities held to be misconduct is where the arbitrator refused to hear the evidence of a material witness.

[29] In the case of E. Rotheray & Sons Ltd. v Carlo Bedarida & Co.,[8] a dispute between applicant, an English company and respondent, an Italian company, as to whether a contract had been concluded between them was referred to arbitration. The case for the respondent included 31 documents of which 20 were in Italian.

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[5] Williams v Wallis & Cox [1914] 2 KB 478
[6] Ibid, p. 484
[7] Halsbury's Laws of England 4th Edition volume 2, paragraph 622
[8] [1961] 1 Lloyd's Rep. 220

Translation of all the documents were not supplied to the Arbitrators, one of whom (T) did not read or understand Italian. A motion was made that the award of the Arbitrators should be set aside or remitted on the ground that T misconducted himself or proceedings, in that although it was stated in the award that all the written statements and evidence had been considered, T was unable to read or understand Italian.

[30] It was held that in considering trade usages and whether a contract had been concluded, a clear appreciation of the documents was essential. Therefore, the irregularity was one which might have caused a substantial miscarriage of justice; and the award was set aside.

[31] The misconduct alleged by the claimant involves the alleged failure on the part of the Arbitrators to properly record the proceedings, this as a result of the malfunction of the tape recording. This, claimant asserts, resulted in a failure by the Arbitrators to properly consider all the evidence which ultimately resulted in injustice to the claimant.

[32] The court has examined the transcript of the proceedings. There are indeed blank spaces signifying omitted evidence. In fact there is hardly a page of the transcript that is free of blank spaces. The blank spaces are indicated by three or more dots.

[33] The court accepts the evidence that there was a malfunction of the tape recorder which resulted in omissions of parts of the evidence from the transcript. The court also accepts that the malfunction was discovered early in the proceedings. The evidence of Mr. Selby Dabreo, which I accept, is that on the first day of the proceedings, Mr. Mitchell the Arbitrator played back the tape and realized that a portion was blank and nothing had been recorded; that the parties decided to proceed since the Arbitrators and Counsel were taking their own notes. Even

though the defective tape continued to be used, it has to be inferred that the parties accepted that the transcript produced from the tape recording would indeed contain omissions or gaps in the evidence and that the intention of the parties was that the notes taken would be used to supplement the defective recording. Reliance was no longer being placed solely on the tape recording.

[34] While the letter of 12th June 2007 made provision for a transcript to be produced from the recording, there was nothing in the Terms of Reference for Conduct of the Arbitration that prevented the parties from taking this course, once the emergency arose.

[35] Unlike the Rotheray case there is no specific part of the evidence tendered that has been shown not to have been considered by the Arbitrators. All evidence tendered by both parties was admitted and heard. Claimant is asking the court to infer that because the transcript contains gaps in the evidence due to the malfunction of the recorder, that the omitted evidence on the transcript might also have been omitted from consideration by the Arbitrators in arriving at their ruling. However, the unchallenged evidence is that the Arbitrators took their own notes to supplement the defective recorder.

[36] Only one piece of evidence has been pointed out by the claimant as missing from the transcript. However, it has not been shown that this piece of evidence was not recorded by the Arbitrators or that it was not considered by them in arriving at their decision.

[37] Under the circumstances set out, there is no basis to doubt the adequacy of the Arbitrators' notes. And certainly, no reasonable inference can be drawn that the Arbitrators failed to consider all the evidence.

[38] Even if the malfunction of the tape recording can be considered an irregularity, under the circumstances of this case, it has not been shown that it was likely to or that it did amount to substantial miscarriage of justice to the claimant.

[39] Further, I find that the claimant has failed to prove that there has been either a rejection or an exclusion of evidence by the Arbitrators. The defect in the tape recording is not an exclusion of evidence. All evidence tendered was admitted and heard. The Arbitrators were all present when all the evidence was taken and capable of understanding same. There is no evidence that the Arbitrators did not receive all the evidence tendered.

[40] There has been no shutting out of evidence amounting to misconduct on the part of the Arbitrators.

[41] I find no violation of the claimant's right to put forward its case. The claimant has made reference to a sentence found in paragraph 9 of the Terms of Reference. That paragraph deals with closing statements and provides:

> "Closing statements may be presented and consist generally of final arguments by the parties and brief summations of the testimony and other evidence introduced at the hearing. A party should refer only to evidence already in the record and not use the closing statement as an opportunity to present new evidence. A party may waive a closing statement."

[42] I note that there has been no assertion that claimant's Counsel was hampered in any way in presenting full closing submissions. Certainly no objection was taken, nor any request made for access to the Arbitrators' notes.

## Mistake

[43] The claimant puts forward a further ground for remission, that of an admitted mistake made by the Arbitrator. The claimant urges that the failure to properly record the evidence is such a mistake.

[44] The claimant refers the court to the case of Mutual Shipping Corp. of New York v Bayshore Shipping Co. of Monrovia, The Montan[9] and the cases cited therein. In that case, the Arbitrator accidentally attributed evidence to the wrong parties thereby awarding the wrong figure as the final sum due in his award. The Arbitrator admitted the slip in communications to the parties. The issue was whether there were grounds for remission.

[45] Here there has been no admitted error or mistake in the Arbitrators' award. There was a malfunction in the equipment being used to record the evidence, which was brought to the attention of all the parties. They decided to proceed notwithstanding the defect. The Arbitrators took their own notes and rendered an award. The Arbitrators have admitted no error or mistake in the said award. Therefore the Montan case is distinguishable.

## Conclusion

[46] The court finds that the claimant has failed to prove any of the alleged grounds for the court to remit the award for reconsideration pursuant to section 18 (1) of the Arbitration Act or for setting aside the award for misconduct pursuant to section 19 (2) of the said Act.

[9] [1985] 1 All ER 520

[47] Accordingly, the claim is dismissed with costs to the defendant to be agreed between the parties. If not agreed, written submission on cost to be filed within seven (7) days.

Clare Henry
High Court Judge