THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

HCVAP 2012/026

IN THE MATTER of an Interlocutory Appeal

and

IN THE MATTER of Part 62.10 of the Civil Procedure Rules

BETWEEN:

CHRISTIAN BROWN
(representing the Estate of WAYNE BROWN)

Appellant

and

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

Respondents

Before:
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

Appearances (on paper only):
Mr. Eghan L. K. Modeste of Michel & Company for the appellant
Ms. Shan Greer of Greer & Associates for the respondents

2013: January 31.

Interlocutory appeal – Parties dissatisfied with award made by arbitrator – Allegations of misconduct on part of arbitrator – Claim filed in High Court to set aside arbitral award pursuant to ss. 18 and 19 of the Arbitration Act – Application for High Court claim to be dismissed – Whether there were no reasonable grounds for making claim to High Court

A dispute arose between the appellant and respondents based on a building contract between them. The matter was referred to an arbitrator to be resolved. The respondents, who were dissatisfied with the award made by the arbitrator and alleged misconduct in the carrying out of her functions, filed a claim in the High Court, which claim the appellant

applied to have dismissed. The appellant's application was heard and dismissed by the master, who gave directions for the High Court matter to be listed for a first hearing before a judge of the High Court. The appellant appealed the master's decision.

Held: dismissing the appeal with costs to the Limricks assessed at $1,500.00, that:

1. The facts stated by the respondents in their statement of claim, if true, do constitute a recognisable claim against the appellant.

2. The master rightly held that the High Court should determine the question brought before it before the award made by the arbitrator is enforced.

   IPOC International Growth Fund Ltd. v LV Finance Group Ltd. British Virgin Islands High Court Civil Appeal No. 30 of 2006 (delivered 18th June 2007, unreported) distinguished.

3. No injustice is caused to the appellant in the master leaving the necessary directions related to the fixed date claim to be addressed by the High Court judge. The judge will, at this stage be perfectly positioned to direct the parties.

   Intrust Trustees (Nevis) Ltd. et al v Naomi Darren (also known as Naomi Darabaner) Saint Christopher and Nevis High Court Civil Appeal No. 1A of 2009 (delivered 9th June 2009, unreported) cited.

JUDGMENT

[1] MITCHELL JA [AG.]: Wayne Brown was a contractor who undertook to construct a building at Cap Estate in the Quarter of Gros Islet in Saint Lucia for Paul and Theresa Limrick ("the Limricks"). The contract contained what I may describe as the usual arbitration clause. When Wayne Brown died, the construction work was continued by agreement by his son, Christian Brown ("Mr. Brown"). A dispute arose between Mr. Brown and the Limricks, and they agreed to refer the dispute to an arbitrator. The parties settled on Mrs. Cynthia C. F. Combie Martyr, a prominent attorney of Castries, as their arbitrator ("the Arbitrator"). The Arbitrator gave directions and proceeded to hear the witnesses for the parties. In due course, she made her award ("the Award"). She found the Limricks were liable to pay an amount of EC$124,354.87 to Mr. Brown, and Mr.

Brown was obliged to refund an amount of EC$26,835.00, leaving a balance due to him of EC$97,519.87.

[2] Being dissatisfied with the Award, the Limricks issued a claim form supported by a statement of claim out of the High Court. The Limricks claimed an order to remit for consideration and/or set aside the Award pursuant to sections 18 and 19 of the Arbitration Act[1] ("the Act"). The claim was that in making the Award the Arbitrator misconducted herself. The statement of claim provided several particulars of alleged misconduct, such as the Arbitrator wrongfully delegated to the expert witness her duty to determine the factual issues; the Arbitrator determined the issues based on legal authorities that were not argued by the parties; the Arbitrator exceeded the jurisdiction granted to her in that she determined a sum due and owing to Mr. Brown for works carried out following the finalising of the accounts when Mr. Brown did not make any claim for that amount; and that the Arbitrator failed to follow the London Court of International Arbitration Arbitration Rules ("the LCIA Arbitration Rules").

[3] Mr. Brown applied to the High Court for the claim to be dismissed on a number of grounds, including that it disclosed no reasonable grounds for bringing the case. The application for dismissal was heard by Master Kimberly Cenac-Phulgence ("the Master"), who dismissed the application, gave directions for the claim form to be treated as a fixed date claim form, and remitted the matter to the High Court for it to be listed for a first hearing before a judge of the High Court. Mr. Brown has been given leave to appeal this order by the Master. This he has done by his Amended Notice of Appeal filed on 20th November 2012.

[4] The matters of law and fact in the Master's judgment that are challenged in the grounds of appeal can be summarised as: (i) at paragraph 4(c) of the judgment, the determination by the Master that the Limricks provided in their statement of

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

claim the particulars of the misconduct they allege against the Arbitrator; (ii) at paragraph 19, the finding that by the Order of 12th February 2012 the parties agreed that the decision of the Arbitrator would be final; (iii) at paragraph 24, the finding that there is no merit in the submission that section 18 of the Arbitration Act only applies to a reference made under an Order of the Court; (iv) the failure by the Master at paragraph 31 to address the claim for judgment to be entered in terms of paragraph 3 of the Award, and the finding that there is no doubt that a claim can be filed pursuant to sections 18 or 19 as was done in this case; and (v), (vi) and (vii), the failure of the Master at paragraphs 32 and 33 to give directions for the filing of a defence.

[5] On the first ground of appeal, the determination by the Master at paragraph 4(c) of her judgment that the Limricks had provided particulars of the alleged misconduct on the part of the Arbitrator, Mr. Brown submits that no such particular of misconduct under any such broad heading as stated by the Master was given. He submits that the parties had agreed that the report of the Arbitrator would be final subject to an appeal on a point of law, and that neither of them could appeal the Award except as provided in the contract. However, I have examined the statement of claim, and the particulars of misconduct alleged by the Limricks are clearly set out. The words used by the Master to summarise the several heads of misconduct are not the words actually used by the Limricks, but the Master appears to have been attempting to summarise the several grounds, and there is no merit in any criticism of her failure to summarise them with total accuracy. The point that is important is that section 19 of the Act permits an action in the High Court to be brought by an aggrieved party to an arbitration where he alleges that the arbitrator has misconducted himself or herself in the proceedings. However, the Master appears to have concluded with good reason that this 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 Act. The principles which guide a court in exercising its power to strike out are well established. Striking out is

appropriate, among other things, if the facts it states, even if true, do not disclose a legally recognisable claim against the defendant.[2] Here, the facts stated by the Limricks in the statement of claim, if true, do constitute a recognisable claim against Mr. Brown. I find no merit in this ground of appeal.

[6] The second ground of appeal complains against a typing error in which the Master refers in paragraph 19 of her judgment to an order of 12th February 2012. The Limricks concede that the order was really made in the year 2009, and I agree with their submission that nothing turns on this typing error. There is no merit in this ground of appeal.

[7] The third ground of appeal is that the Master erred at paragraph 24 of her judgment when she found that section 18 of the Act did not only apply to a reference to arbitration made under an order of the court. The Master set out her reasons for so finding at paragraphs 15 to 24 of her judgment, she based her finding on authority,[3] and I see no merit in this ground of appeal.

[8] The fourth ground of appeal is that the Master failed entirely at paragraph 31 of her judgment to address the order sought by Mr. Brown that judgment be entered in terms of paragraph 3 of the Award, and erred in finding that it is not necessary to discuss the ambit of section 20 of the Act as, in her view, section 20 would only have arisen if the application to strike out were to be successful. Mr. Brown urges that the award is extremely precise and ought to be enforced pending any making of an order that the Award be set aside. He relies on paragraphs 55, 56, 57 and 67 of the judgment of Rawlins JA (as he then was) in IPOC International Growth Fund Ltd. v LV Finance Group Ltd.[4] That case however, dealt with an ex-parte

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[2] Citco Global Custody NV v Y2K Finance Inc., Territory of the Virgin Islands High Court Civil Appeal No. 22 of 2008 (delivered 19th October 2009, unreported).

[3] In particular, One Call Construction Co Ltd (trading as One Call Collection Service) v Grenada Solid Waste Management Authority, Grenada High Court Civil Appeal No. 14 of 2009 (delivered 8th September 2010, unreported); and Anthea De Bellotte v The Minister of Communications, Works et al, Grenada High Court Civil Appeal No. 17 of 2011 (delivered 22nd November 2011, unreported).

[4] British Virgin Islands High Court Civil Appeal No. 30 of 2006 (delivered 18th June 2007, unreported).

application to enforce in the Virgin Islands a Convention Award made by an arbitrator in Switzerland. The High Court judge recognised the Convention Award and gave leave to enforce the award by entering a declaratory judgment. IPOC applied for an order setting aside that ex-parte order. The judge dismissed the application. IPOC appealed to the Court of Appeal on five grounds including that the awards were unenforceable because they are declaratory in nature and on account of public policy on the basis that they were tainted by illegality since the arbitration tribunal had found that there was illegal conduct by both parties. Rawlins JA found that the judge was right to grant an order to enforce the Convention Award, as a court in the Territory may only refuse to do so if a requirement of the relevant provision of the Act was not met. This decision does not relate to the situation in our case and can be distinguished. Here, there is a pending fixed date claim form before the High Court for determination of the conduct of the Arbitrator. If the judge finds, as urged by the Limricks, that there was misconduct on the part of the Arbitrator in the making of her Award, then, if the Award had meanwhile been enforced, there would be great inconvenience and increased costs incurred by both parties. It appears to me to be entirely proper and appropriate that the High Court should determine the question brought before it before the Award is enforced. There is no merit in this ground of appeal.

[9] The fifth, sixth and seventh grounds of appeal take issue with the Master's decision to treat the claim form as a fixed date claim form and her alleged mistake in not giving directions for the period for Mr. Brown's filing a defence. Instead, she invited the Defendant to formalise his application for an extension of time before the High Court judge, and she sent the matter to come up for a first hearing before a judge of the High Court. In the case of Intrust Trustees (Nevis) Ltd. et al v Naomi Darren (also known as Naomi Darabaner),[5] George-Creque JA (as she then was) encouraged courts to take just this action, and not to strike out the claim form, in holding that '[t]o sacrifice substance by way of slavish adherence to form

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

for the purpose of defeating a genuine claim defeats the overriding objective of CPR rather than gives effect to it.' Indeed, the Master could have given the necessary fixed date claim form directions. The Limricks concede this. However, I see no hardship or injustice caused to Mr. Brown in the course chosen by the Master of leaving the necessary directions to be given in the High Court. The High Court judge will be fully seized of all the issues on which directions are to be given for the progress of the suit, and will be perfectly positioned to give all necessary directions. I see no merit in these grounds of appeal.

[10] In the circumstances, the appeal is dismissed with costs to the Limricks assessed at $1,500.00.

Don Mitchell
Justice of Appeal [Ag.]