THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
MONTSERRAT CIRCUIT
(CIVIL)
A.D. 2014

Claim No. MNIHCV2014/0024

Between:

DANTZLER INC.

Claimant

and

GALLOWAY HARDWARE & BUILDING MATERIALS LTD

Defendant

Before:
Master Fidela Corbin Lincoln

On Written Submissions:
Dustin Delany of counsel for the claimant
Jean Kelsick of counsel for the defendant

2014: 03 December

Arbitration- United States Arbitral Award – recognition and enforcement - The Arbitration (Foreign Awards) Act Cap 3:02- action to enforce award at common law – CPR Part 43.10

The International Arbitration Tribunal constituted in accordance with the rules of the American Arbitration Association awarded the claimant the sum of US$196,329.17 against the defendant. The claimant commenced the present claim against the defendant for the sum of US$196,329.17 plus interest and costs being the amount owed to the claimant in respect of an unsatisfied arbitral award by the International Arbitration Tribunal.

The defendant filed an application to strike out the claimant's claim on the grounds that the award of the International Arbitration Tribunal is not recognized and enforceable in this jurisdiction or, alternatively, if the award is enforceable it cannot be enforced by suing by way of a claim form but must instead be enforced pursuant to CPR Part 43.

HELD: Dismissing the application to strike out the claim and awarding costs of $1000.00 to the claimant:

1. The Arbitration (Foreign Awards) Act Cap. 3.02 provides for the enforcement of foreign arbitral awards.

2. An award of the International Arbitral Tribunal constituted in accordance with the rules of the American Arbitration Association United is not enforceable under the Arbitration (Foreign Awards) Act Cap. 3.02 but may be recognized and enforced at common law by way of an action founded upon the implied promise to satisfy the award.

   Norske Atlas Insurance Co. Ltd. v London General Insurance Co. Ltd (1927) 43 T.L.R 541.
   National Ability SA v Tinna Oils & Chemicals Limited [2009] EWCA Civ 1330.

3. CPR Part 43.10 applies to the enforcement of awards which are enforceable by statute and therefore does not apply to an award of the International Arbitral Tribunal which is enforceable at common law rather than by statute.

JUDGMENT

[1] Corbin Lincoln M [Ag]: This matter concerns an application by the defendant to strike out the claimant's claim on the ground that it discloses no reasonable grounds for bringing the claim.

Background

[2] The claimant's statement of claim avers that on 6th November 2012 the International Arbitration Tribunal constituted in accordance with the rules of the American Arbitration Association ("the IAT") awarded the claimant US$196,329.17 ('the award") against the defendant.

[3] A copy of the Final Award of the Arbitrator, annexed to the statement of claim, states that; (a) the arbitrator was designated in accordance with the arbitration agreement entered into by the claimant and the defendant on 11th December 2007 (the agreement is not attached nor are the terms of the agreement recited); (b) the claimant filed a demand against the defendant pursuant to the agreement of sale dated 11th December 2007; (c) pursuant to the agreement of sale the claimant alleges that it delivered goods valued at $109,348.94 to the defendant and the defendant failed to pay for same; and (d) that based upon the breach the claimant seeks to recover the principal balance for the goods, interest, attorney's fees and costs. The Final Award of the Arbitrator states further that the defendant was served with written notice of the proceedings but failed to take any part in the proceedings.

[4] On 17th June 2014 the claimant commenced the present claim against the defendant for US$196,329.17 plus interest and costs "being the amounts owed to the claimant in respect on an unsatisfied arbitral award by the International Arbitration Tribunal on 6th November 2012".

[5] Paragraph 5 of the statement of claim avers that 'There was an implied promise that the defendant would pay the sum awarded.'

[6] The defendant filed an application to strike out the claimant's statement of case on three (3) grounds:

(a) An award of the International Arbitration Tribunal constituted in accordance with the rules of the American Arbitration Association and the said tribunal itself are not recognized by the law of Montserrat.

(b) An award of the International Arbitration Tribunal is unenforceable in Montserrat and the claimant's claim form therefore discloses no cause of action.

(c) Further or in the alternative, if the award is enforceable in Montserrat, it cannot be enforced by suing on it by way of a claim form but must instead be enforced pursuant to CPR Part 43.

The Defendant's Submissions

[7] Counsel for the defendant submits that: (a) an award of a foreign court or tribunal can only be enforced in Montserrat civil proceedings if there is domestic legislation that recognises such an award and permits its registration and enforcement locally; (b) such legislation would normally be found in Montserrat's Arbitration Act Cap. 3:02; and (c) the Arbitration Act Cap 3:02 is silent on the enforcement of a foreign arbitral award and no legislation exists in Montserrat for the registration and enforcement of an arbitration award including one made by the International Arbitral Tribunal.

[8] Alternatively, counsel submits that even if the award is enforceable, it must be enforced pursuant to CPR Part 43. Counsel cites the case of IPOC International Growth Fund Limited v LV Finance Group Limited[1] in support of his submission that the award must be enforced under CPR Part 43.

[9] Counsel submits further that the award cannot be enforced based on a breach of an implied promise to satisfy the award since the claimant has failed to exhibit a copy of the written contract that may exist and having failed to plead the terms of the contract the court cannot form a view on whether the doctrine of implied promise applies.

The Claimant's Submissions

[10] Counsel for the claimant submits that there are cases in the Commonwealth Caribbean where a foreign arbitral award was enforced at common law notwithstanding the absence of an enabling legislative framework. Counsel cited the case of Raffle America Inc v

[1] BVI Civil Appeal No. 30 of 2006

Kingsboro International Holding Co. Ltd and Another[2], where the Barbadian court held that a judgment of a New York court was recoverable since the defendants had contracted to submit themselves to the forum of the New York Court, the requisites of New York law had been complied with and the judgment was regular, final and conclusive. Counsel submits that it is evident from the judgment that the enforcement of the New York judgment was based on common law principles.

[11] Counsel submits that the claim is properly grounded on breach of an implied promise and refers to Halsbury's Laws of England[3] which states:

> "*Apart from statute, such a judgment will not be enforced directly by execution or any other process, but will be regarded, for procedural purposes, as creating a debt between the parties to it, the debtor's liability arising on an implied promise to pay the amount of the foreign judgment*"

[12] Counsel submits further that (a) the defendant's analysis of CPR Part 43.10 is incorrect as that rule only applies to awards which are enforceable by virtue of a statutory provision; and (b) that CPR Part 43.10 was applicable in the case of IPOC International Growth Fund Limited v LV Finance Group Limited because there was a statutory provision for the enforcement of foreign awards in that jurisdiction.

CPR.26.3- The Principles Governing Striking Out of a Statement of Case

[13] The Civil Procedure Rules ("CPR") Part 26.3(1) (b) states that :

> "In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that …the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim".

[2] (1993) 52 WIR 37 (Barbados)
[3] Volume 19 (2011) 5th edition, para 416

[14] Striking out of a claim is considered to be appropriate where the claim sets out no facts indicating what the claim is about, is incoherent and makes no sense or if the facts it states, even if true, do not disclose a legally recognisable claim against the defendant.[4]

[15] The circumstances identified as providing reasons for not striking out a claim include where the argument involves a substantial point of law which does not admit a plain and obvious answer, where the strength of the case may not be clear because it has not been fully investigated[5] or where the law is in a state of development.[6]

[16] It is well established that the power to strike out should be used sparingly. In Baldwin Spencer v The Attorney General of Antigua and Barbuda et al[7] Sir Byron J put it thus *"this summary procedure should only be used in clear and obvious cases, when it can be seen* ***on the face of it*** *(emphasis mine), that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court.".*

Grounds 1 and 2 of the Application

[17] Ground 1 of the application challenges the recognition of the award while ground 2 challenges the enforceability of the award.

Recognition vs Enforcement – Separate or Inseparable terms?

[18] The terms recognition and enforcement are often used interchangeably but are distinct. Redfern and Hunter on International Arbitration[8] describes recognition as a shield and enforcement as a sword.[9] The learned authors state:

[4]Blackstones Civil Practice 2009, page 431
[5] Ibid page 432. The Caribbean Civil Court Practice 2008 , page 231
[6] D v East Berkshire Community Health NHS Trust [2005] 2 All E.R 443
[7] Civil Appeal No 20A of 1997
[8]Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter: Redfern and Hunter on International Arbitration (5thed, Oxford University Press, 2009)
[9] Ibid, page 628, paragraph 11.24

"Recognition on its own is generally a defensive process. It will usually arise when a court is asked to grant a remedy in respect of a dispute that has been the subject of previous arbitral proceedings. The party in whose favour the award was made will object that the dispute has already been determined. To prove this, he will seek to produce the award to the court and ask the court to recognize it as valid and binding upon the parties in respect of the issues with which it dealt…By contrast, where a court is asked to enforce an award, it is asked not merely to recognize the legal force and effect of the award, but also to ensure that it is carried out, by using such legal sanctions as are available. Enforcement goes a step further than recognition. A court that is prepared to enforce an award will do so because it recognizes the award as validly made and binding upon the parties to it and, therefore suitable for enforcement. In this context, the terms recognition and enforcement do run together. One is a necessary part of the other."

[19] An award may therefore be recognized without being enforced but cannot be enforced without been recognized and the learned authors state that the precise distinction is between 'recognition' and 'recognition and enforcement'.

[20] It is clear from the claimant's statement of case that the claimant is not merely seeking recognition of the award but 'recognition and enforcement' and therefore for the purposes of this judgment the terms will be used as inseparable terms and grounds 1 and 2 considered together.

Recognition & Enforcement of Foreign Arbitral Awards – The Statutory Framework

[21] Neither the Reciprocal Enforcement of Judgment Act Cap 2:15 of the Laws of Montserrat ("Cap: 2:15") nor The Arbitration Act Cap 3:02 of the laws of Montserrat ("Cap. 3:02") contain provisions for the enforcement of a foreign arbitral award.

[22] Cap 2:15 only applies to judgments or orders made by a court in civil proceedings. Cap 3:02 states that the UK Arbitration Act 1889 applies in this jurisdiction and the said Act only applies to arbitration under a statute.[10]

[23] However, neither counsel has referred to the fact that there is a legislative framework for the recognition and enforcement of foreign arbitral awards separate and distinct from the legislative framework for the recognition and enforcement of foreign judgments.

[24] The Arbitration (Foreign Awards) Act, Cap 3:02 of the Laws of Montserrat ("the Act") states that the United Kingdom Arbitration Clauses (Protocol) Act, 1924[11] ("the 1924 Act") and the United Kingdom Arbitration (Foreign Awards) Act, 1930[12] ("the 1930 Act") shall be in force in Montserrat.

[25] The 1924 Act gave effect to the Geneva Protocol on Arbitration Clauses, September 24, 1923 ("the 1923 Protocol") while the 1930 Act gave effect to the Geneva Convention for the Enforcement of Foreign Arbitral Awards 1927 ("the Geneva Convention").

[26] The 1923 Protocol is a convention providing for the compulsory recognition of arbitration agreements made between parties who are subject to the jurisdiction of different contracting states whether or not the arbitration takes place in a country to whose jurisdiction none of the parties is subject. It does not however apply to agreements between nationals of *the same contracting state for arbitration in some other contracting state*.[13]

[27] The Geneva Convention sought to widen the scope of the 1923 Protocol by providing for the recognition and enforcement of awards within the territory of the contracting state (and not merely within the territory of the state in which the award was made)[14] but only extends

[10]Section 24, The Arbitration Act, 1889 (52 &53 Vict. C.49).
[11]14 and 15 George 5, Chapter 39.
[12]20 George 5,Chapter 15.
[13]Geneva Protocol of 1923, Art 1; Lorenzen, Ernest G., "Commercial Arbitration -- Enforcement of Foreign Awards" (1935). *Faculty Scholarship Series.*Paper 4586;45 Yale L.J. 39 1935-1936; page 63.
[14]Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter: Redfern and Hunter on International

to agreements falling within the 1924 Protocol i.e. agreements between parties of *different contracting states*.[15]

[28] More significantly, the 1923 Protocol and the Geneva Convention only become operative between contracting states or where reciprocal provisions are made between the two states concerned.

[29] In the circumstance neither the 1924 Act nor the 1930 Act provide a statutory framework for the recognition and enforcement of the award made by the IAT pursuant to an arbitration agreement made between the claimant and the defendant since (a) both parties are from the same contracting state; (b) the United States is not a party to the 1923 Protocol or the Geneva Convention; and (c) there are no reciprocal provisions between Montserrat and the United States for the enforcement of arbitral awards.

Can the award of the AIT be enforced in the absence of a statutory framework?

[30] In the case of Raffle America Inc. v Kingsboro International Holding Co. Ltd and Another[16] cited by counsel for the claimant, the Barbadian court was addressing enforcement of a foreign judgment rather than a foreign arbitral award and may well have been applying common law principles as submitted by counsel for the claimant. There are however some differences between recognition and enforcement of a foreign judgment and recognition and enforcement of an arbitral award.

[31] The right to enforce an arbitral award at common law has been recognized as far back as 1927 in Norske Atlas Insurance Co. Ltd. v London General Insurance Co. Ltd[17] where the claimant was able to bring a claim against the defendant at common law to enforce an arbitral award.

Arbitration (5thed, Oxford University Press, 2009) , page 68

[15]Lorenzen, Ernest G., "Commercial Arbitration -- Enforcement of Foreign Awards" (1935).*Faculty Scholarship Series.* Paper 4586;45 Yale LJ. 39 1935-1936; page 63.

[16](1993) 52 WIR 37 (Barbados).

[17](1927) 43 T.L.R 541.

[32] In National Ability SA v Tinna Oils & Chemicals Limited[18] the Court of Appeal, confirmed the two methods of enforcing arbitral awards, as:

1. Enforcement of an award by ordinary action brought in the High Court. The procedure is not subject to any statutory provision, but it has long been established at common law as an action founded upon the implied promise to pay the award.

2. The statutory process of enforcement of the award in the same manner as a judgment.

[33] The right to enforce an arbitral award at common law is therefore well established. Consequently, the application to strike out the claim on the basis that the award of the AIT is not recognized and cannot be enforced in this jurisdiction due to the absence of any relevant statutory provision must fail.

Ground 3 of the Application

[34] Counsel for the applicant submits that even if the award is enforceable, it can only be enforced by suing on it by way of a claim form but must instead be enforced pursuant to CPR 43.

[35] CPR Part 43 states that the scope of that part is the enforcement of judgments and orders. However, CPR 43.10 appears to extend the scope of the rule beyond only judgment and orders. CPR 43.10 is headed "Enforcement of awards, etc. made by outside bodies' and states:

" (1) This rule has effect as to the –

(a) enforcement of an award not made by the court but which is enforceable by virtue of a statutory provision as if it were an order of the court; and

(b) registration of such an award so that it may be enforceable as if it were an order of the court.

[18][2009] EWCA Civ 1330;

(2) In this rule –

"award" means the award, order or decision which it is sought to enforce;

And "outside body" means any authority other than the court."

[36] CPR 43.10 therefore deals with the enforcement of awards made by an authority 'other than the court' and in my view the words used are wide enough to encompass a foreign arbitral award being an award made by a body other than the court. CPR 43.10 expressly states however that for this rule to apply the award must be enforceable by virtue of a statutory provision.

[37] In the absence of any statutory provision in this jurisdiction for the recognition and enforcement of a United States arbitral award, CPR 43 would not apply to the enforcement of the award of the IAT.

[38] Having considered all of the grounds set out in the defendant's application and finding (a) that the award of the IAT can be enforced at common law by way of a claim founded on breach of an implied promise to satisfy the award; and (b) that CPR 43.10 has no application to the facts of this case, it is my view that the application has been determined and the application to strike out must fail.

[39] I note however that the defendant has raised other issues in submissions which were not stated as grounds of the application. Specifically, the defendant submits that a copy of "any written contract which may exist should be exhibited or its terms pleaded for the court to form the view whether the doctrine of implied promise applies." (emphasis supplied)

[40] It is well established that an applicant is required to state the grounds of the application in the application, not in the affidavit (and most certainly not in submissions) and that failure to do same could attract condign consequences.[19] In my view the consequence of failing to include this submission as a ground of the application is that the submission should not be considered as forming part of the application.

[19]Beach Properties Barbuda Limited et al v Laurus Master Fund Limited et al , Antigua and Barbuda Civil Appeal No. 2 of 2007

[41] However in the event that I am wrong, I have below considered this submission as one of the grounds of the application.

Is it necessary for the enforcement of an arbitral award at common law to attach a copy of the written contract or plead its terms?

[42] While there are cases where arbitration agreements can be entered into after a dispute arises (submission agreement), most arbitration clauses are contained within the contract between the parties. The agreement to arbitrate, although contained within the contract, is considered a separate and distinct agreement from the main contract and (a) is not affected by claims of invalidity of the main contract; and (b) survives the termination of the contract.[20]

[43] Counsel for the claimant submits that it is unnecessary to exhibit a copy of the underlying contract since the purpose of the proceedings is not the re-litigation of the original claim and the court is only expected to satisfy itself that the judgment was final.

[44] CPR 8.7 (1) and 8.7 (3) require a claimant to include in the claim form or in the statement of claim a statement of all the facts on which he relies but does not make it mandatory for a claimant to annex a copy of any documents upon which he relies.

[45] Whether it is necessary for the claimant to plead the terms of the arbitration agreement or only the award would depend on the essential elements of a claim for breach of an implied promise to satisfy an award.

[46] The limited authorities available on claims at common law to enforce arbitral awards mainly address the issues of time limits for bringing claims to enforce awards and the grounds for challenging enforcement. The cases nonetheless in my view provide useful guidance on the essential elements of a claim at common law.

[20]Margaret Moses: The Principles and Practice of International Commercial Arbitration (2nded, Cambridge University Press, 2012) page 19. Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter: Redfern and Hunter on International Arbitration (5thed, Oxford University Press, 2009) page 117.

[47] In Agromet Motoimport Ltd. v Maulden Engineering[21] the court was considering whether the action to enforce an award is an independent cause of action separate and distinct from the original contract or its breach for the purposes of determining the time limits for commencing a claim to enforce the award. Ottor J in the course of the judgment, considered passages contained in Mustill and Boyd Commercial Arbitration (1982) and stated:

"*…later in the same work, there appears the following passage (at pp 367-369)…:*

> *1 Action on the award*
>
> *Parties to an arbitration agreement impliedly promise to perform a valid award. If the award is not performed the successful claimant can proceed by action in the ordinary courts for breach of this implied promise and obtain a judgment giving effect to the award. The court may give judgment for the amount of the award, or damages for failure to perform the award. It may also in appropriate cases, decree specific performance of the award, grant an injunction preventing the losing party from disobeying the award, or make a declaration that the award is valid, or as to its construction and effect. The action is commonly described as an "action on the award", and indeed it has been suggested that an action may lie on an implied promise contained in the award itself without the necessity of pleading an arbitration agreement. [There is then reference to Bremer Oeltransport GmbH v Drewry [1933] 1 KB 753 at 758-765, [1933] All ER Rep 851 at 854-857 in a footnote which reads: 'Slesser LJ ... discussed the problem at length and eventually left it undecided (sic).' The text continues:] We submit that the better view is that the plaintiff must plead and prove both the arbitration agreement and the award; both are essential elements of his cause of action. It has sometimes been necessary to decide whether the action is "grounded upon a contract" or is*

[21][1933] All ER Rep 851

> *brought "to enforce a contract". [There is then a further reference to Bremer Oeltransport GmbH v Drewry. The text continues:] These problems of classification necessarily give greater weight to one or other element of the cause of action, depending on the circumstances, but they should not be allowed to obscure the fact that both elements must be present before the plaintiff can sue.…[*my emphasis]
>
> *I have considered these submissions with great care and, as I have already indicated, I have found it a difficult decision to make. I have perused the judgment of Slesser LJ in Bremer Oeltransport GmbH v Drewry [1933] 1 KB 753, [1933] All ER Rep 851 with great care... I am satisfied that I can and should adopt the approach of Mustill and Boyd. In my judgment, the action on the award and the action to enforce an award is an independent cause of action. It is distinct from and in no way entangled with the original contract or the breach occurring from it, as reflected in the award. I have come to the conclusion that there is nothing repugnant in implying such a term into the contract. Indeed, in argument counsel for the defendants conceded that such an implied term could be read into such a contract. In my view, therefore, there is such an implied term that an award will be honoured when it is made. That implied term is, of course, in the original agreement of 2 September 1972, and the implied term continues, that if the award is not honoured there is then a breach of that implied term."* (my emphasis)

[48] The view of the learned authors Mustill and Boyd, approved by the court in the above case, is that the implied term to honour the award is contained in the agreement to submit to arbitration and therefore both the terms of the arbitration agreement and the award must be pleaded.

[49] In Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd and others[22], the court was not prepared to go behind the facts and reasons as they appeared from the award to determine whether the contract should not be enforced on grounds of illegality and public policy. This is not in my view authority for the proposition that a claimant seeking to enforce an award at common law on the basis of breach of an implied promise was not required to plead the terms of the arbitration agreement.

[22] [1998] 2 Lloyd's Rep 111, 112

[50] In Norske Atlas Insurance Co. Ltd. v London General Insurance Co. Ltd[23], even though the court, like in Westacre, held that the claimant was 'suing on the award' the court appeared to recognize the need to refer to the arbitration agreement to establish the claim when it stated:

> *"The plaintiffs here are suing on the award. In order to sue on an award, it is, I think, necessary for the plaintiffs to prove, first,* ***that there was a submission;*** *secondly,* ***that the arbitration was conducted in pursuance of the submission****; and,* ***thirdly, that the award is a valid award, made pursuant to the provisions of the submission,...****"* [emphasis mine]

[51] The power and jurisdiction of an arbitrator are derived solely from the arbitration agreement. A claimant could only prove that the arbitration was conducted in pursuance of the agreement and that the award was valid and made pursuant to the provisions of the agreement if the terms of the arbitration agreement are pleaded.

[52] Further, under general principles of contract law, the implication of a term is a matter of law and court will be prepared to imply a term in a contract if it arises from the language of the contract itself.[24] The contract must be before the court for the court to consider the language of the contract.

[53] The pleading of the agreement is not in my view for the purpose of engaging in a re-litigation of the issues but rather for the court to be satisfied that there was an agreement to arbitrate, that the agreement was valid and that the arbitrators had jurisdiction i.e. that the award did not exceed the matters which the contract for arbitration permitted to be submitted to arbitration.

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[23](1927) 28 Li.L.R 104

[24]Chitty on Contracts (31st ed, Volume 1, Sweet & Maxwell, 2012) page 985-986

[54] Taking all the above matters into consideration, I find that a claimant seeking to enforce an arbitral award at common law on the ground of breach of an implied promise to satisfy the award must plead the terms of the arbitration agreement in addition to the award as the agreement forms part of the matters he must prove to establish his claim.

[55] If the defendant's submission on this issue had formed part of the grounds, notwithstanding my finding that a claimant must plead the terms of the arbitration agreement, having regard to the overriding objective of dealing with cases justly, I would have held that the justice of the case militates against using the 'nuclear option' of striking out the claim and would instead have given the claimant leave to amend the claim.

Conclusion

[56] For the reasons outlined above I find that the statement of case discloses a legally recognizable cause of action against the defendant, being a claim against the defendant at common law for amounts owed to the claimant in respect, on an unsatisfied arbitral award.

[57] The defendant's application to strike out the claim as disclosing no reasonable ground for bringing a claim is consequently dismissed and costs of $1000.00 are awarded to the claimant.

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Fidela Corbin Lincoln
Master (Ag.)