IN THE EASTERN CARIBBEAN SUPREME COURT

ANGUILLA CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO AXAHCV2015/0032

In the Matter of the Determination of the Jurisdiction of the Arbitral Tribunal under sections 16, 18 and 32 of Arbitration Act 1996 RSA c.A105

BETWEEN;

SIMEON FLEMING

(In his capacity as Administrator of the Estates of Sarah Ann Connor aka Richardson and Catherine Fleming)

Applicant

And

JENNY LINDSAY dba JENNY LINDSAY AND ASSOCIATES

Respondent

Appearances:

Mr. Kerith Kentish for the Applicant

Ms. Jenny Lindsay for the Respondent

2015: June 6th; 9th;

Reissued 24th June 2015

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[1] **MATHURIN, J;** The Applicant, Mr. Fleming has, pursuant to section 32 of the Arbitration Act 1996 (the Act) applied for an Order that the appointment of Dr. Christopher Malcolm as Arbitrator, is in breach of Clause 14(c) of the retainer agreement between himself and Ms. Jenny Lindsay dba as Jenny Lindsay & Associates (hereafter Ms. Lindsay). Mr. Fleming also seeks Orders that Dr. Malcolm's appointment was in contravention of Section 16 and 18 of the Act and that as such his appointment as Arbitrator should be revoked. Ms. Lindsay opposes the application and states that

Dr. Malcolm was properly appointed in accordance with section 17 of the Act. Mr. Fleming has applied to the court for a determination of the substantive jurisdiction of the tribunal.

[2] After perusal of the application and evidence by the Court, the parties were asked to make further submissions as to whether Clause 14(c) was a valid arbitration clause and were also asked to make submissions given section 74 of the Eastern Caribbean Supreme Court (Anguilla) Act (hereafter "ECSC Act") which thereby incorporates the Solicitors Act 1974 of the UK and seemingly gives the Court the jurisdiction in matters between attorneys and clients. The parties were also given leave to file any additional evidence if necessary. The matter was set down for hearing the following week.

Jurisdiction of the Court

[3] Section 74 of the Eastern Caribbean Supreme Court (Anguilla) Act (ECSC Act) states;

"*Subject to modification by the rules of court, the law and practice relating to solicitors, and the taxation and recovery of costs in force in England shall extend to and be in force in Anguilla and shall apply to all persons lawfully practicing therein as solicitors of the Court."*

An analysis of CPR 2000 reveals that it contains no provision for taxation of costs between solicitor and client and therefore the Solicitor's Act 1974 of the UK applies to the duties of attorneys in Anguilla to their clients in relation to the recovery of costs. The practice in England in relation to taxation of costs between an attorney and his client was for the solicitor to wait one month after delivery of his bill of costs before commencing an action to recover his costs. During that month, the client had an absolute right under section 70 of the Solicitors Act to an order for taxation and to have any possible action against him stayed until taxation had been completed.

[4] Counsel for Mr. Fleming was of the view that this provision of the ECSC Act gives the Court inherent jurisdiction over Attorneys practicing in Anguilla and as such where there is disagreement in relation to fees the Court exercises the taxation process to ascertain the disputed fees.

[5] Ms Lindsay submits that the ECSC Act does not apply and that an agreement between parties can be sued upon as parties can agree to determine their own disputes even if it ousts the jurisdiction of the court.

[6] In my view, one of the original jurisdictions of the High Court in Anguilla is the power to intervene to protect a client whose attorney is alleged to have unfairly billed the client. An attorney is an officer of the court and is under the regulation and discipline of the court. The statutorily provided arbiter of the fairness of an attorney's bill to her client is the High Court. No doubt, this jurisdiction of the High Court can be ousted by agreement **but** it is not any and every agreement that will be accepted by the court. For one thing, the court must be satisfied that the attorney and the client were negotiating on an equal footing in the client agreeing to give up the protection of the court's supervision of the bill of costs of the attorney by ousting its jurisdiction.

Were parties on an equal footing?

[7] Mr. Kentish submits that an attorney is presumed to be a dominant party and wherever there is a dispute on the ouster clause, such clause should be resolved in favor of the client. He states that there is no evidence of an equal footing as nowhere in the retainer agreement refers to legal advice for the client.

[8] Ms Lindsay submits that there is no doubt that Mr. Fleming was on equal footing with her. She states that the agreement was clear and concise and that he understood the agreement. He had the opportunity to get legal advice and having signed the agreement, there is a presumption that he understood. No evidence was filed to support the submission that he had the opportunity to seek legal advice before signing the agreement.

[9] No parties filed any additional evidence although given leave to so do, although it would have given some clarity to this issue. I am of the view that generally an agreement to oust the jurisdiction of the court in a matter of taxation of costs will be narrowly construed by the court against the solicitor on the ground that the parties are not likely to be negotiating on an equal basis. In this situation, the court would want to be sure that the client was properly advised and instructed in the meaning and consequence of signing such an agreement. Nothing less than a clear and unambiguous agreement to oust the court's jurisdiction by a properly informed client is acceptable. The court would be inclined to rule that no such agreement would be upheld unless the client had been encouraged to obtain independent legal advice before signing it.

[10] For these reasons, I find that the parties were not on an equal footing when the agreement to oust the court's jurisdiction was signed.

Was Clause 14(3) of the retainer Agreement clear and unambiguous?

[11] Clause 14(3) states as follows;

"*This agreement shall be governed by and construed in accordance with the laws of the Island of Anguilla without giving effect to conflict of law considerations. Any question or difference which may arise concerning the construction meaning or effect of this Agreement or concerning the rights and liabilities of the parties hereunder or any other matter arising out of or in connection with this Agreement shall be referred to a single arbitrator or mediator in Anguilla to be agreed between the parties. The decision of such arbitrator or mediator shall be final and binding upon the parties. Any reference under this clause shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act R.S.A c A105."*

[12] From the evidence and submissions, it is apparent that Mr. Fleming preferred the option of mediation as opposed to arbitration, he was also of the view that such mediation would be done by a mediator on Anguilla. He also interpreted Clause 14.3 to mean that if there was to be arbitration, it would be done by an arbitrator on Anguilla. That seemingly was his interpretation of Clause 14.3 as evident from his email of the 1st March 2015 which states;

> *"Jenny, in response to your recent communications we DO NOT agree to Arbitration or the use of an Arbitrator you have deemed valid to select, without our consent, from overseas. On Anguilla there are Arbitrators and a Retired Judge that can conduct arbitration. There is absolutely no reason to go off island for this service.*
>
> *14.3 – Connection with this Agreement shall be referred to a Single Arbitrator or Mediator in Anguilla to be agreed between both parties"*

[13] The parties were also asked to address what the court considered an apparent non sequiter in the selection of mediator or arbitrator to determine a dispute. The clause states *"The decision of such arbitrator or mediator shall be final and binding upon the parties."*

[14] Ms Lindsay states that the type of mediation referred to in the agreement is connected to the Arbitration Act. She does not however, refer to any provision of the Act and neither am I aware of any such provision. "Mediation" however, is defined in the Civil Procedure Rules 2000 in Practice Direction 1 of 2003 which is enacted law, as "*a flexible dispute resolution procedure in which a mutual third party, the mediator' facilitates negotiations between the parties to help them settle their dispute."* A mediator is *"an individual engaged as a neutral third party to provide mediation services and whose name appears on the roster of Mediators for the Eastern Caribbean Supreme Court."* Additionally, whereas Webster's Dictionary defines a Mediation as an intervention in the disputes of others, with their consent, for the purpose of adjusting differences, the Dictionary defines Arbitration as submitting a dispute to or having a dispute settled by an arbitrator.

[15] An arbitrator settles the disputes whereas a mediator attempts to bring about reconciliation. An arbitrator determines the dispute whereas a mediator facilitates a settlement between parties. The clause does not set out any provision for mediation if chosen as an option.

[16] The BVI Arbitration Act sections 30 and 31, makes provisions which incorporate the use of mediators even to the extent whereby the person appointed as mediator can subsequently act as arbitrator but even in the BVI Act it is made clear that the arbitrator acts only if the mediation is successful and that arbitral proceedings are stayed to facilitate mediation proceedings. There is no such provision in the Act herein.

[17] The point is however, that arbitration and mediation are two vastly different methods of dispute resolution; the mediation proceedings are recognized as settlement proceedings the outcome of which depends on the parties whereas the arbitration makes a determination of the dispute which by law is final and binding. Even where mediation is referred to in an Arbitration Act, the two processes are separate and distinct, the arbitration dependent on whether the mediation is successful or not. The mediator, by definition under the laws of Anguilla cannot make a final binding decision as stipulated in clause 14.3.

[18] The clause as drafted is ambiguous and unclear. The clear evidence is that the parties each had a different view of what it was saying with reference to arbitration or mediation. Any ambiguity in the clause is required by the rules of interpretation to be read *contra-preferentem* as against the interests of the attorney who drafted it.

Clause 14.3

[19] This is the Clause by which Ms. Lindsay purported to commence Arbitration proceedings and to which Mr. Fleming objects. I have outlined the chronology of events that preceded the appointment of Dr. Malcolm as they relate specifically to the appointment of Dr. Malcolm as sole arbitrator.

[20] **1)** By letter dated **12th February 2015**, Ms. Lindsay wrote to Mr. Fleming and others stating that clause 14.3 referred any disputes to arbitration under the Act, and that the agreement required that the parties agree to a single arbitrator. Ms. Lindsay also stated that usually a former retired judge would act as arbitrator and that there were no retired judges in Anguilla and a number of attorneys are mediators only. Ms Lindsay added that she had been referred to Dr. Malcolm and she attached his Curriculum Vitae and draft arbitration agreement for consideration by Mr. Fleming. She further added that she would be obliged to hear from Mr. Fleming within 14 days after which she would proceed to make the appointment of the arbitrator in default of an agreement.

2) On **27th February 2015,** 15 days later, Ms. Lindsay forwarded to Mr. Fleming a notice that she proposed to appoint Dr. Malcolm to act as sole arbitrator pursuant to section 17(2) of the Act and that any award made by Dr. Malcolm would be binding on them as if he had been appointed by agreement.

3) On **1st March 2015** Mariette Fleming responded on behalf of Mr. Fleming that he did not agree to Arbitration or the use of Dr. Malcolm selected from overseas and that there were Arbitrators and a retired judge that could conduct an Arbitration on Anguilla.

4) On **3rd March 2015** Ms. Lindsay responded that the appointment had been made according to the Notice and the Act and would continue, unless an amicable agreement was reached and outstanding invoices settled.

5) On **6th March 2015** Ms. Fleming responded that there are Arbitrators and a Retired Judge in Anguilla and there was no reason to go off island for that service and quoted "*connection with this Agreement shall be referred to a Single Arbitrator or Mediator in Anguilla to be agreed between both parties."*

6) On **6th March 2015** Ms Lindsay responded that the time for objections had passed, that there were no retired judges on Anguilla and that the failure by them to provide details of that person was a clear indication that there is no such person. Ms. Lindsay added that the appointment was already made and would not be retracted and the arbitration could only be stopped on payment of the outstanding invoices and that even then any agreement reached would be recorded in a consent order by the Arbitrator.

7) On **27th March 2015** Keithley Lake & Associates wrote to Ms. Lindsay referring her to section 16(3) of the Act which states that;

"If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so."

The letter also asserted that her comment that time for objections had passed had no legal basis and in any event that in the absence of an agreement, section 18 of the Act sets out the appropriate procedure. It was also pointed out that nothing in Clause 14.3 required the arbitrator to be a retired judge or attorney and there was no justifiable reason for appointing an overseas arbitrator at additional cost to Mr. Fleming. It was also pointed out that the reference to mediators in clause 14.3 was ignored and that would be a more cost effective way forward.

8) On **13th April 2015** Ms. Lindsay responded that Mr. Fleming's objections were out of time and that she was not willing to stay the arbitration proceedings as there was no reason to do so.

[21] Dissatisfied with Ms. Lindsay's responses, Mr. Fleming wrote directly to Dr. Malcolm, who after various exchanges concluded on the 21st April 2015 that in accordance with the power under the Act that permits an arbitrator to determine his own jurisdiction, he was properly appointed and had jurisdiction over the matter stating that insofar as the agreement provided that the arbitrator shall

be in Anguilla, it does not support any contention that the arbitrator must be Anguillan or must reside in Anguilla.

[22] On the 28th April 2015, Dr. Malcolm further wrote to Mr. Kentish, the current Attorney for Mr. Fleming stating that "*If, for whatever reason, you disagree with my decision, you may, as is provided for under the relevant law, challenge my ruling in a court of law.*"

[23] It is against this background that this application finds itself before the Court. Section 32 of the Act states as follows;

"*Determination of preliminary point of jurisdiction*

(1) The Court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.
A party may lose his right to object (See section 73)
(2) An application under this section shall not be considered unless –
(a) It is made with the agreement in writing of all the other parties to the proceedings, or
(b) It is made with the permission of the tribunal and the court is satisfied –
(i) That the determination of the question is likely to produce substantial savings in costs,
(ii) That the application was made without delay, and
(iii) That there is good reason why the matter should be decided by the court."

[24] Mr. Fleming asserts that these criteria have been met in that permission from the tribunal was obtained in the letter of the 28th April 2015. He says that substantial savings in costs would be met by the alternative dispute resolution of mediation vis a vis arbitration by Dr. Malcolm whose travel expenses alone would exceed the normal rate of a mediation in Anguilla. Ms. Lindsay states that Dr. Malcolm's rates at US$200 per hour which is higher than the rate of a mediator, which is EC$350 for 3 hours and $100 per hour thereafter. Coupled with the fact that the parties would also be responsible for travel and accommodation expenses, if it is determined that the arbitrator does not have the substantive jurisdiction in this matter, I am of the view that it would likely result in substantial savings. Additionally in my view, had the process by which a bill of costs under the Solicitor's Act been engaged, the client would have had the right to

have it taxed by the Registrar of the High Court a month after presentation, a process which would have determined an appropriate bill of costs.

[25] Mr. Fleming also asserts the application was without delay, permission having been obtained on the 28th April 2015 after Dr. Malcolm refused to decline jurisdiction. Ms. Lindsay responds that she did not give her consent to the application, was never put on notice that the application was made and never had an opportunity to respond to it. I am satisfied that section 32 permits the application with the permission of the tribunal and that the application having been served on Ms. Lindsay as she states, on the 12th May 2015, ought to have put her on notice as required. I also disagree with Ms. Lindsay that the application was delayed as Mr. Fleming knew of her appointment since the 1st and 6th March 2015. The relevant date would obviously have to be after Dr. Malcolm had determined his jurisdiction and given permission for the application to be made to the Court. I am also satisfied that the application was made without delay, a mere 8 days after receiving that permission.

[26] I am also of the view that there are several good reasons why the matter should be decided by the court as there are issues which purport to oust the Court's jurisdiction, it was an agreement between solicitor and client and that the procedure outlined by the Act was not followed.

Sections 16 to 18 of the Act

[27] Issues raised by the Applicant relate to the procedure of the appointment of Dr. Malcolm. The relevant parts of Section 16 of the Act state as follows;

"(1) The parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or empire.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.

(4) If a tribunal is to consist of two arbitrators, each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so."

[28] Mr. Fleming contends that Ms. Lindsay is in breach of this provision which permits the joint appointment within 28 days. He states that Ms. Lindsay's letter of 12th February 2015 (see para 20 above) gave him 14 days to respond and that Dr. Malcolm was not jointly appointed. He states that the appropriate procedure where there is no joint agreement would be under section 18 of the Act which states as follows;

> *"(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal. There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.*
>
> *(2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section,*
>
> *(3) Those powers are –*
>
> *a. To give directions as to the making of any necessary appointments*
> *b. To direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made*
> *c. To revoke any appointments already made*
> *d. To make any necessary appointments itself*
>
> *(4) An appointment made by the court under this section has effect as if made with the agreement of the parties*
>
> *(5) The leave of the court is required from any appeal from a decision of the court under this section."*

[29] Ms. Lindsay in response states that the appointment of Dr. Malcolm is pursuant to the provisions of and the procedure stated in section 17 of the Act. Indeed the Notice sent to Mr. Fleming states;

> *"Take Notice that on behalf of **Jenny Lindsay dba Jenny Lindsay & Associates** we propose to appoint Dr. Christopher Malcolm to act as sole arbitrator pursuant to section 17(2) of the Arbitration Act 1996…)"*

Section 17 of the Act states;

"17 (1) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") refuses to do so, or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

(2) If the party in default does not within 7 clear days of that notice being given –

(a) make the required appointment, and

(b) notify the other party that he has done so,

The other party may appoint his arbitrator as sole arbitrator whose award shall be binding on both parties as if he had been so appointed by agreement."

[30] With respect, I do not think that section 17 applies where the parties have agreed to a sole arbitrator. **Each** of the parties here did not agree to appoint an arbitrator. This was an instance where the parties were to jointly appoint one arbitrator. I am fortified by para 2-139 of **Handbook of Arbitration Practice;** Sweet & Maxwell in conjunction with The Chartered Institute of Arbitrators; London 1998; which states;

"Where an arbitrator has not been nominated in the arbitration agreement and the parties do not or are not able to reach an informal agreement on a suitable person, a formal procedure is necessary. The parties are free to agree on the procedure, even to the point of drawing a name out of a hat. If they do not have an agreed procedure, the 1996 Act provides for joint appointment by the parties not later than 28 days after service of a request in writing by one party to the other to do so. ***If there is no agreement within the 28 days recourse must be had to the court under section 18,*** *unless the parties have agreed on a fall-back procedure to cover this event."(Emphasis mine)*

[31] Further in **Arbitration Act 1996;** 5th edition at page 73 Notes;

"The right of a party to have its appointed arbitrator treated as sole arbitrator in the case of default by the other party ***does not apply*** *where the arbitration agreement provides, either by agreement or under the default presumption in 15(3), that there is to be a sole*

arbitrator. In such a case, if the agreement does not specify the time for agreeing the appointment, the only applicable provision is section 16(3), and, in case of a failure to appoint in time, the appropriate mechanism for a default appointment is under section 18, not section 17."

[32] I also considered the authority of Mr. Fleming **Mylcrist Builders Ltd v Buck** (2008) EWCH 2172, which is on all fours with this matter with respect to this point wherein Ramsey J stated as follows;

"Accordingly, in my judgment, the provisions of s.17 of the 1996 Act do not apply in this case and Mr. Hannet was not properly appointed as arbitrator. He was not jointly appointed as arbitrator and cannot be treated as sole arbitrator by reason of the provisions of s. 17 of the 1996 Act. On that ground, the tribunal lacked substantive jurisdiction to make the Award…"

[33] I am therefore of the view that the proper procedure for the appointment of a sole arbitrator is either by joint appointment within 28 days or failing that, application to the court to exercise its powers under section 18.

[34] Finally, Ms Lindsay submits that despite any irregularities in the appointment of the Arbitrator, the ethos of the Act suggests that the Court should allow the appointment of Dr. Malcolm to continue as it is what the parties agreed to. She also submits that the Court should bear in mind that her costs have been outstanding for a while and that the parties have made no attempt to settle. It is difficult to see how, in the face of several irregularities, I can do this. To do so would be to ignore the specific wording of the same Act which governs arbitration.

[35] Having carefully read the written submissions and authorities of the parties together with the evidence and oral submissions, I cannot but come to the following conclusions

1) Clause 14.3 is an invalid clause inasmuch as it purports to oust the jurisdiction of the court.

2) Clause 14.3 is an invalid arbitration agreement in that Mr. Fleming was not independently advised as to its effect and consequences before signing the agreement.

3) Clause 14.3 is ambiguous and unclear and is to be interpreted contra-preferentem to the interests of Ms. Lindsay

4) The appointment of Dr. Malcolm was not in accordance with the procedural provisions of the Act and as such is null and void.

[36] I accordingly order that the purported appointment of Dr. Malcolm be revoked with immediate effect and all costs of the arbitration thus far are to be met by Ms. Lindsay. Costs of the application are assessed in the sum of US$2,500.00 to the applicant.

Cheryl Mathurin

High Court Judge