THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SAINT LUCIA

SLUHCV2012/0217

BETWEEN:

(1) PAUL LIMRICK
(2) THERESA LIMRICK

Claimant

and

CHRISTIAN BROWN (Estate of WAYNE BROWN)

Defendant

Appearances:
Shan Greer for the Claimant
Eghan Modeste for the Defendant

2018: March 9th
March 13th

JUDGMENT

[1] **Smith J:** Twelve years ago, the Limricks signed a building contract ("the contract"), dated 11th February 2006, with Mr. Wayne Brown for the construction of their home in the balmy, upscale neighborhood of Mount Hardy, Cap Estate. Construction commenced and things seemed to be going fine, but then Mr. Wayne Brown died on 4th February 2007. Construction was continued by his son, Christian Brown ("Mr. Brown"). Things did not go as well with the son. A dispute arose between the parties. The matter was referred to arbitration in 2009. The Arbitrator made her award on 15th December 2011; and on 5th March 2012 the

Limricks filed this claim seeking to have the arbitrator's award remitted or set aside.

[2] The trial of this claim commenced before Wilkinson J on 19th May 2015 and was adjourned to a date to be fixed by the court office. In the meantime, Wilkinson J was transferred to another jurisdiction. This matter came before me on 19th January 2018. At that hearing, the parties agreed that the matter should be heard afresh before this Court. All submissions were directed to be filed by 26th February 2018. The Court heard oral presentations on 9th March 2018.

Issues

[3] It is not in dispute that the matter was properly referred to arbitration so there is no need to revisit that aspect of the contract. The Limricks' claim is that the Arbitrator did not conduct the arbitration in a proper and fair manner and committed certain procedural irregularities, which constituted misconduct, namely: (1) failed to consider evidence and wrongly delegated her duty to determine factual issues to the jointly appointed expert; (2) determined issues in dispute based on legal authorities not argued by the parties; (3) exceeded the jurisdiction granted her by the parties; (4) failed to follow procedural rules agreed between the parties. These four grounds are therefore the specific issues this Court has to determine.

[4] It was also not in dispute between the parties that the Court may remit an award for reconsideration or set it aside for misconduct under the **Arbitration Act** which provides as follows:

> "**18. 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) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within 3 months after the date of the order.
>
> **19. Power to set aside award**
> (1) Where an arbitrator or umpire has misconducted himself or herself or the proceedings, the Court may remove him

or her. However, before making any such order the arbitrator or umpire may, if the Court so directs, be given an opportunity of showing cause against such order.

(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.

Test for Remission/Setting Aside

[5] In relation to the remission jurisdiction of the Court, Lord Donaldson in the House of Lords decision in **King v McKenna**[1] stated that:

> "In my judgment the remission jurisdiction extends beyond the four traditional grounds to any cases where, notwithstanding that the arbitrators have acted with complete propriety, due to mishap or misunderstanding, some aspect of the dispute which has been the subject of the reference has not been considered and adjudicated upon as fully or in a manner which the parties are entitled to expect and it would be inequitable to allow any award to take effect without some further consideration by the Arbitrator."

[6] In reviewing the Arbitrator's award, I therefore have to ask myself whether some aspect of the dispute referred to the Arbitrator was not considered or adjudicated upon as fully or in a manner which the parties were entitled to expect thereby making it inequitable to allow the award to take effect without some further consideration by the arbitrator.

[7] The litmus test is apparently whether the irregularity complained of may have caused a substantial miscarriage of justice sufficient to justify setting aside or remission of the award. In **Williams v Wallis and Cox**[2], "misconduct" was defined as follows:

> "With regard to the main question it appears to me that the deputy county court judge formed a misconception as to the meaning of 'misconduct'. That expression does not necessarily involve personal turpitude on the part of the arbitrator, and any such suggestion has been expressly disclaimed in this case. The term does not really amount to much more than such mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice."

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[1] [1991] 2 QB 480.
[2] [1914] 2 KB 478

I will therefore be asking myself whether the irregularity complained of is of such a nature that it amounts to a substantial miscarriage of justice or that it would be inequitable to allow it to stand.

Refusal of Evidence

[8] Mr. Brown's claim is for $164,215.50 for unpaid construction works under the contract. The Limricks counterclaimed a refund of certain sums paid, as well as losses arising from non-completion and defective works. Mr. Terrence St. Clair ("the Expert") was jointly appointed by the parties to quantify the value of the work done by Mr. Brown. After a site visit conducted on 24th September 2009, the Expert issued a report dated 30th June 2011. The Arbitrator did not participate in the site visit. At paragraph 3 of page 2 of the report, the Expert stated that:

> "The quantum and nature of works done by the Contractor after May 2007 was not readily discernible due to insufficient evidence from photographs and other records."

[9] The Limricks complain that at the site visit they attempted to provide the Expert with certain documentary evidence which, they say, proved the nature of the works carried out by Mr. Brown after May 2007. They state that counsel for Mr. Brown objected to this, so, following the site visit, they forwarded the information to the Expert by federal express who in turn sent it to the Arbitrator. The Arbitrator apparently returned the package unopened to counsel for the Limricks at the arbitration hearing. The irregularity complained of is that the Arbitrator made her decision without taking this evidence into account and without the benefit of a site visit.

[10] In reviewing the various documents and orders leading up to the award in the core bundles provided to this Court, the following documents shed some light on this issue. First, there is a case management order of the Arbitrator dated 5th August 2009 which sets out a timetable for a number of things including preparation of terms of reference for the Expert, relevant photographs and documents, various letters, estimates and statement of accounts. The terms of reference was to be

finalized by Friday 14th August 2009 and four complete bundles, presumably of all the agreed relevant documents, prepared jointly by the parties.

[11] Notably, that case management order at paragraph 13 also directed that:

> "Any other documents which have not been included in the aforementioned and which the parties consider relevant and essential to assist the Expert to be included by agreement between the parties."

[12] What I gather from all that is that four complete bundles comprising the terms of reference and all relevant supporting documents for each party was to have been prepared by 14th August 2009. Any other document not included in the bundle, which the parties considered relevant and essential to assist the Expert, could only be included by agreement between the parties. Following receipt of a letter dated 3rd September 2009 from then counsel for the Limricks, the Arbitrator, by letter dated 7th September 2009, informed counsel for the parties that the terms of reference of the expert and documents relating thereto would be submitted on Wednesday 9th September 2009. The deadline of 14th August was thereby extended to 9th September 2009.

[13] Second, the Court notes that the Expert's terms of reference required him to respond to a detailed and exhaustive list of fifty questions. It seemed like no aspect of the dispute was left unexamined by the Expert.

[14] Third, by letter dated 9th September 2009, the Arbitrator wrote to the Expert setting out his instructions. He was informed that:

> "In accordance with the aforementioned, attached please find Expert's Terms of Reference and all documents which the parties think necessary and will be of assistance to you in the preparation of the Report for the Arbitrator.
>
> However any other documents which you think necessary may by request to the Arbitrator, be provided to you."

[15] Fourth, as a general observation, having reviewed the entire core bundle of proceedings before the Arbitrator, I am of the view that the Arbitrator attempted to

conduct the arbitration in a scrupulously orderly and procedurally fair and sound manner in accordance with the **Civil Procedure Rules**. In her letter of 7th September 2009 to counsel for the parties informing them that the terms of reference for the expert would be submitted on 9th September 2009, the Arbitrator also informed the parties that:

> "Within one (1) week of receipt of the Expert's report, parties must inform the Arbitrator whether they wish to put written questions to the Expert or to question the Expert, for the purpose of clarification of the report. A date for hearing will be scheduled for that purpose only."

[16] I conclude that, based on the Arbitrator's case management order of 5th August 2009 and her letter to the Expert of 9th September 2009, a deadline of Friday 14th August (extended to 9th September) was set for the parties to submit essential documents they wished to rely on. If this date was missed, they could, by agreement, include other documents. For the Limricks to have sought to hand documents – relevant though they might have been – to the Expert was therefore contrary to the set rules. For them to have sent it by federal express to the Expert was equally impermissible. Absent any agreement between the parties as to the inclusion of those documents, the only reasonable and proper thing the Arbitrator could have done was to refuse to admit them into evidence outside of the agreed rules. The Limricks made no application to the Arbitrator at the arbitration hearing to be permitted to advice further evidence.

[17] Ms. Greer, counsel for the Limricks, relied on the following extract from **Russell on Arbitration** 12th edition at page 276:

> "The Arbitrator should hear all the evidence material to the question which the parties choose to lay before him as on a trial before a jury. It has been said that he may exercise some discretion as to the quantity of evidence he will hear, but declining to receive evidence on any matter is, in ordinary circumstances, a delicate step to take, for the refusal to receive proof where proof is necessary is fatal to an award."

[18] That extract from **Russell** cannot be taken to mean that the Arbitrator should hear all the evidence placed before him regardless of whether that evidence is tendered outside of the agreed rules. I do not think that the time and manner in which the

Limricks attempted to adduce further evidence are the "ordinary circumstances" that the learned authors of **Russell** had in mind when they cautioned against an Arbitrator's refusal to receive proof. To be considered by the Arbitrator, the evidence must be submitted in accordance with the agreed deadlines set by case management order, or, if outside the fixed deadline, then by agreement of both sides. Finally, there could have been an application at the arbitration hearing to the Arbitrator to consider permitting the Limricks to produce evidence if they considered it of vital importance.

[19] Reliance on the case of **Gray v Wilson**[3] is, with respect, equally misplaced. That case held that a master cannot properly refuse to receive the evidence of any witness the parties may choose to call. Those facts are conspicuously different from circumstances where an Arbitrator refuses to accept documents outside of the deadline, which the parties have not agreed to. The Arbitrator in the case at bar did not refuse to hear the evidence of any witness.

[20] In any event, if I am wrong in concluding that the Arbitrator properly excluded the documents, I think that the depth and sweep of the fifty questions that the Expert was required to respond to, the opportunity given to the parties to attend at the site visit and point out things to the Expert, as well as the opportunity to put questions to the Expert within one week after he submitted his report, taken in the round, militate against any finding that there might have been a substantial miscarriage of justice. If there was an irregularity, given these circumstances, it did not approximate to a substantial miscarriage of justice. Nor is it of such a nature that it would be inequitable to allow it to take effect.

[21] Finally, on this point, the site visit was fundamentally to assist the Expert in answering the questions put to him, in addition to all the other material supplied to him. I do not see how the absence of the Arbitrator at the site visit could amount to an irregularity rising to the level of a substantial miscarriage of justice.

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[3] (1865) LR 50 at pg 51.

Wrongful Delegation of Duty?

[22] The Limricks contend that the refusal to accept the documents into evidence was exacerbated by the fact that the Arbitrator wrongly delegated her judicial function to the expert in three instances. The first complaint is that:

> "At paragraph 8.14 of the Award, the Arbitrator referred to additional works or variations (termed 'Extras' by the Arbitrator) carried out by the Defendant and determined that this issue would be 'addressed by the report of Expert and final accounting (see clause 30 and 32 of Experts report)'. No decision was made by the Arbitrator as to whether the Extras were due and owing, nor did the Arbitrator give any reasons as to why this determination was delegated to the Expert."

[23] The arbitrator deals extensively with additional works or variations termed 'extras' at paragraph 8 of the award. She sets out Mr. Brown's case that payments made on 29th May and 13th August 2007 were payments for extras and the Limrick's response that those payments were in respect to certificate No. 7 and not for extras. She then analyses the evidence and makes a finding at paragraph 8.8 that:

> "Accordingly, payment of $82,448.22 on the 29th May 2007 (CB2) and $23,353.41 on 13th August 2007 to the Claimant, cannot be construed as being payment towards Extras, as there was not at that material time certificated payment for Extras in the sum of $105,801.63 due and payable by the Respondents..."

[24] It was not in dispute that Mr. Brown had undertaken the additional works ("extras"), the question was what was the value of those extras and whether he had been paid for them. The Arbitrator, having concluded that the payments could not be construed as being payment towards extras, it stands to reason that a sum would be due and owing for those additional works. The Arbitrator, quite properly in my view, relied on the Expert's calculation of what that sum should be by stating at paragraph 8.14 of her award that: "as regards the sums due for Extras completed by the Claimant at the date of departure from the site this issue will be addressed by the report of the Expert and final accounting..." There was no therefore no delegation of the duty of deciding whether payment was due for additional works.

[25] The Limricks further allege that the second instance of the Arbitrator wrongfully delegating her duty to decide to the Expert was where:

> "At paragraph 6.1.9, the Arbitrator identified the following issue as one which she was to determine namely, 'whether any payment was due following the finalizing of account.' However, at paragraph 13.1, the Arbitrator noted that her final award was 'based on the final accounting shown in Appendix A pages 1-10 of the Expert's Report'. The Arbitrator gave no reasons as to why the Award was based solely on the Expert Report or whether she had considered any of the other evidence submitted by the parties. Further the Arbitrator did not make any determination as to what was due and owing."

[26] I find this allegation to be devoid of merit. A close reading of the Arbitrator's award will reveal it to be a careful exercise in which the respective party's cases are set out, the evidence analyzed and the issues examined. Each party's claim for sums due and owing to him or them was carefully set out and analyzed and a conclusion reached. As regards the Limricks claim for refund for items purchased by them, the Arbitrator stated at paragraph 13.1 of her award that: "All amounts paid by the Respondents for items purchased were duly considered in the final accounting of the Expert. My final award as regards this issue is based on the final accounting shown in the Appendix at pages 1-10 to the Expert's Report." Having come to a conclusion that sums were due and owing to the Limricks, the Arbitrator was entitled to rely on the Expert's calculation. That is why he was jointly appointed as an Expert with fifty questions put to him for his response.

[27] The third instance of alleged wrongful delegation of duty was:

> "At paragraph 2 of the Memorandum No. 1, the Arbitrator determined that the mobilization fund in the sum of $61,242.03 was due but was already taken into account by the Expert in his final computation. The Arbitrator did not herself make any determination on this issue, relying solely on the determination of the Expert."

[28] Similarly, I find no merit in this assertion. The Arbitrator did in fact make a determination on this issue. What the Arbitrator said in Memorandum No. 1 was the following:

> "I accept the evidence of Ronald Gardner that the balance on the mobilization fund in the sum of $61,242.03 is due and owing by the Claimant to the Respondents. However this amount has been taken into account by the Expert in the Final Account (see clause 20 of the Expert's report and item 3.1 of the Schedule of Payments made by the Employer/received by the Contractor as at 13.08.2007) and in the final computation of the Arbitrator under clause 13.2 below." (Emphasis mine)

Legal Authorities not Submitted by Parties

[29] The Limricks contend that the Arbitrator determined the issues in dispute between the parties in reliance on the following, none of which was submitted by the parties:

(1) Article 1592 and 1593 of the **Civil Code** in determining that the Limricks accepted Mr. Brown as competent to continue the works under the contract;

(2) Article 1008 and 1685 of the **Civil Code** in determining that interest at the rate of 6% per annum was due and owing to the Mr. Brown;

(3) Article 1595 of the **Civil Code** to support the determination that Mr. Brown was entitled to be paid for all extra work carried out on a *quantum meruit* basis;

(4) **Percy Bilton Limited v Greater London Council**, **Jacob & Young Inc v Kent**, **Darlington BC v Wiltshier Northern Limited** and Article 1005 of the **Civil Code.**

[30] Ms. Greer submitted that these cases were referenced based on the Arbitrator's specialist knowledge as a legal practitioner; the Arbitrator was not entitled to do so since this was in wanton disregard of her role as impartial arbitrator; if the Arbitrator wished to rely on those cases, the proper course of action would have been to bring them to the parties' attention and permit them an opportunity to address her in relation to their relevance to the arbitration.

[31] While it is true that Articles 1592 and 1593 of the **Civil Code** do not appear to have been submitted by the parties to the Arbitrator (article 1590 was), the Limricks suffered no prejudice by this. The Arbitrator made the following finding:

> "Whilst there is no evidence of written consent by Respondents to the assignment of the Contract or subletting any portion of the Works for which written consent of the Respondents would have been required in accordance with Clause (B) (7) of the Contract, I am satisfied on the evidence at the hearing which dates back to an email from Paul Limrick dated 18th September 2005 (PL1A), evidence of John Jn Baptiste and Sharina Goodridge-Lamontagne and the conduct of Respondents in continuing to communicate with Christian Brown in respect of construction, that the Respondents accepted Christian Brown, son of Wayne Brown as competent to continue as Contractor under the Building Contract to complete the Works, under the same terms and conditions.."

[32] From that finding, it is clear that the Arbitrator was satisfied on the evidence that the Limricks accepted Mr. Brown to continue as contractor. This was a finding of fact independent of any reliance on the **Civil Code**. Even if the matter were remitted to the Arbitrator to allow the parties to address the referenced articles of the **Civil Code**, it would not alter that finding of fact. No substantial miscarriage of justice can conceivably be said to arise from referencing articles 1592 and 1593 of the **Civil Code.**

[33] I also find that even if the Arbitrator's reference to the **Civil Code** to determine the rate of interest was an irregularity, it is *de minimis* and cannot amount to a substantial miscarriage of justice.

[34] The Arbitrator found as a finding of fact that:

> "…the Claimant's departure from the site evinced a clear intention not to proceed to complete the Works. Consequently, the amounts due to the Claimant for Works done under the contract including Extras is payable on a quantum meruit basis for the part of the Works completed up to his departure from the site in August 2007."

[35] After making this finding of fact, the Arbitrator went on to state that that finding was supported by article 1595 and 1590 of the **Civil Code**. The Arbitrator did not have

to reference those articles of the **Civil Code** to reach the conclusion that Mr. Brown was entitled to payment on a *quantum meruit* basis. Hearing the parties on these articles of the **Civil Code** would not have made any difference whatsoever to the outcome of the award.

[36] In relation to the legal authorities which Ms. Greer says they were not given an opportunity to respond to, Mr. Modeste rejoins that the cases being complained about were actually cited in **Ruxley Electronics and Construction Ltd. v Forsyth** 1995 2 All ER 268, a case provided to the Arbitrator by the Limricks. While I have not been able to find the cases put before the Arbitrator in the Core Bundles provided to this Court, I note that **Ruxley** is indeed a case referenced by the Limrick's initial counsel at that time. A quick perusal of **Ruxley** online indicates that it indeed cites at least two of the three cases being complained about. I therefore agree with Mr. Modeste when he submits that the Arbitrator, having been referred to **Ruxley** by the Limricks, was properly conducting matters when she extracted from the case relevant and applicable reasoning from other cases which were cited therein. **Ruxley**, having cited those other cases, it was fair game for the Arbitrator to delve into those other cases. The Arbitrator was demonstrating commendable thoroughness and analysis.

[37] In any event, there is no complaint that in applying the cases the Arbitrator came to a wrong conclusion on the applicable measure of damages which, had the Limricks had the opportunity to respond to those cases, could have been avoided. I am therefore left to conclude that the Limricks, having put **Ruxley** before the Arbitrator, had nothing to complain about when the Arbitrator explored other cases cited in **Ruxley,** and could not have suffered any substantial miscarriage of justice sufficient to justify the setting aside or remission of the award.

Exceeding Jurisdiction

[38] Under this head, the contention of the Limricks is that the amount claimed by Mr. Brown, in his claim for works not forming part of Certificate 7 was $58, 413.87.

Consequently, any award of money over and beyond this amount is outside of the dispute referred to the Arbitrator under the contract. Consequently, in awarding the sum of $123,005.39, the Arbitrator exceeded her jurisdiction and misconducted herself.

[39] I agree with Mr. Modeste that it is the parties who agreed that as works had been undertaken beyond the issuing of Certificate #7, it was necessary to cause a certificate No. 8 to be prepared. In this regard, the Court notes paragraph (3) of the case management order of the Arbitrator dated 5th August 2009 which states that: "In respect to the preparation of the final Certificate No. 8 for works done by the Claimant, the parties will provide…" This is supported by question 50 of the terms of reference for the Expert, which asked: "What amount if any is due and owing to the Employer and the Contractor following preparation of a Final Statement of Accounts." The Arbitrator did not exceed her jurisdiction in relation to this matter.

Failed to Follow Procedural Rules

[40] It is not in dispute that the Arbitrator determined that the applicable rules were the **LCIA Rules** and the **Civil Procedure Rules**. Article 7.1 of the **LCIA Arbitration Rules** provides that:

> "The parties may choose the place of arbitration. Failing such choice, the place of arbitration shall be London unless the Tribunal determined in view of all the circumstances of the case that another place is more appropriate."

[41] It is alleged that, in case at bar, the parties did not choose the place of arbitration and, more importantly, the Arbitrator failed to determine if another place, other than London, was appropriate. Consequently, say the Limricks, London is the seat of the arbitration and the award was not one which is subject to the jurisdiction of the courts of Saint Lucia.

[42] In **C v D**[4], Longmore LJ stated:

> "an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration."

[43] Ms. Greer submitted that the parties did not choose the place of arbitration. But, apart from this bare assertion, there is nothing in the core bundles provided to this Court that indicates that the parties did not agree that the seat of the arbitration should be Saint Lucia.

Paragraph 1.8 of the Arbitrator's award is as follows:

"Procedure and Rules Adopted for the Reference".

1. The Arbitration Act Cap 2.06 Revised Laws 2001.
2. To the extent that these rules are applicable, the London Court of International Arbitration Rules (adopted to take effect January 1985) shall be adopted and Civil Procedure Rules 2000 (CPR) shall govern the proceedings of the Arbitration and for the presentation and submission of documents to be used in the reference. (Order of the Arbitrator dated 12th February 2009).
3. Applicable law shall be the Laws of Saint Lucia."

[44] The face of the award does not say that the "seat of the arbitration" or place of the arbitration was agreed to be Saint Lucia. I am nevertheless prepared to accept that the statement that the "applicable law shall be the law of Saint Lucia" on the face of the award is sufficient to denote that the parties chose Saint Lucia as the seat of arbitration. The Court notes that after the delivery of the award, the Limricks, in accordance with Clause 17 of the **LCIA Arbitration Rules**, requested the Arbitrator to correct clerical errors as well as to make an additional award based on claims they alleged were not dealt with in the award. If indeed they had not agreed that Saint Lucia be the seat of arbitration, they would have become aware of the fact that the award stated that the applicable law shall be the Laws of

[4] [2007] EWCA Civ 1282

Saint Lucia and, nevertheless, applied to the Arbitrator to make an additional award, under the same applicable Laws of Saint Lucia.

[45] In any event, even if the seat of arbitration was London, I do not perceive that any substantial miscarriage of justice has occurred since the legal dispute was a simple one involving basic principles applicable to breach of contract, the basic rules of evidence and measure of damages. The applicable principles of law and the learning from authorities relied upon would not have been different had the seat of arbitration been London. The outcome of the dispute really turned on the facts and I have no hesitation in holding that had the Arbitrator applied English law (in effect, the same English common law principles of contract law applicable in Saint Lucia), the outcome would have been the same.

[46] I therefore make the following orders:

(1) Judgment is entered for the Defendant.

(2) The Claimants claim is dismissed.

(3) Costs are awarded to the Defendant in accordance with Part 65 (5) of CPR 2000.

Godfrey P. Smith SC
High Court Judge

By the Court

Registrar