IN THE EASTERN CARIBBEAN SUPREMEM COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV 2017/0-043

BETWEEN

THE SOCIAL SECURITY FUND	**Claimant**
And	
EMMANUEL GALLOWAY	**Defendants**
ADRIAN GALLOW	
CLAYTON WEEKES	
(TRADING AS 'THE GALLOWAY GROUP')	

APPEARANCES

Mr Kharl Markham for the claimant.

Mr Jean Kelsick for the defendants.

2018: MARCH 23

RULING

On staying or 'suspending' enforcement of an arbitration award

1 The claimant (the DSS[1]) lost at arbitration published on 09.12.17, and on 22.12.17 filed to appeal an award of $1413974.58ec, with interest accruing at $325.98ec per day. Dispute had

[1] For the purposes of this ruilng, the parties and others will be referred to as bracketed for ease of reading, with no disrespect intended by not writing out on each mention full names and titles or the legalese as to whether claimants or defendants.

arisen over a building constructed by the defendant group (the Galloways). The contract price had been agreed on 06.07.12 as $5340034.35ec, but later there were 52 variations to the building sought, leading to further costs, which had then been the subject of arbitration.

2 The DSS has paid nought on the award and on 12.03.18 filed to stay or 'suspend' the award pending appeal. What they really want is for the court to stop the interest accruing.

3 In support of his argument, Counsel Markham has addressed the court for 4 hours on 14 and 16.03.18, and Counsel Kelsick replied in 25 mins. I have ruled there will be no stay or suspension, promising brief written reasons, which these are.

4 The short point is that there can be no stay unless enforcement has been sought, which it has not, and any 'suspension of enforcement' should be granted only with caution at the least.

5 The relevant law was reviewed by Eder J in the recent authority of **Y v S 2015 EWHC 612.** While considering **Apis AS v Fantazia Kereskedelmi KFT 2001 AER 348,** at para 17 the learned judge observed that in the **Apis** case HH Judge Jack QC had said: *'…until leave is given [to enforce an award] no question of staying execution can arise'*. As for suspension of enforcement, which de facto is a pre-emptive stay, Eder J further said at para 19: *'…I am prepared to assume …that the court has an inherent jurisdiction to make an order suspending enforcement… However, it is plain from the terms of s1(c) of the 1996 [Arbitration] Act, that the court should not intervene except as provided by this part of the Act, and although…this is not an absolute prohibition, the wording implies the need at the very least for "caution" before any court intervention'.*

6 On review of the authorities, it became common ground that what the DSS could rightly seek was suspension, not a stay.

7 Counsel Markham suggested 'caution' suspending was not as applicable in the jurisdiction of the Eastern Caribbean Supreme Court (ECSC) because the local Arbitration Act was from 1889, not 1996, as in the UK, though which had not been adopted from the UK, and so therefore the provisions of s1(c) of the UK **Arbitration Act 1996** could be ignored. I reject this argument. Any application of an 'inherent power' of the court ought in principle always to be

sparingly used, as it is unscripted or restrained by legislation, and if used over abundantly might usurp the legislature. Moreover, the UK update to the **Arbitration Act 1889** by the **1996 Act** can be persuasive, and I find it should be, as coming from a closely connected sister jurisdiction and in which in London there are huge quantities of arbitration of world-renown. Therefore, consistent with London, and thereby not agreeing with Counsel Markham to strike an arguably recklessly divergent pose, I find any suspension should be sparingly applied.

8 To this end, in assessing caution, I had asked Counsel Markham in a good natured exchange to identify one or two best points on appeal, and to offer what he thinks is the sort of argument he will likely 'knock for six'. Cricket being so very popular within the ECSC, he liked my analogy and sought to rise to the challenge. Unfortunately, notwithstanding a spirited and lengthy performance, there was nothing in his submissions which leapt out as overwhelming, as a likely 'six', or even as a 'boundary', and in large part he lacked focus on details, relying mostly on assertion that the pleadings were deficient, meaning that the arbitrator had considered materials which he should not have done, despite an agreed sixth version Scott schedule. His best point seemed briefly to develop as complaint about payment for 'preliminaries' and for 'delay', which he pointed out had not been pleaded, instead the pleadings only referring to 'scope of works'; however, Counsel Kelsick quickly scotched this when he showed the court the Scott schedule in summary and in bundle 6 which listed the figures for preliminaries and delay, making a clear case these might be considered part of the scope of works. In the end, without pre-judging the merits on appellate close analysis, it seemed to the court that, while Counsel Markham did not lose his wicket, in argument he merely 'struck a few singles', and the whole match will have to play out on appeal. In the absence of a robust point, knowing the power to suspend should be cautious, I decided there should be no suspension.

9 Moreover, there is nowhere an authority that a suspension must mean the interest should stop. Interest is designed to encourage payment of an award, and to maintain its value pending payment. It would be unfair to stop it, with possibly no money being paid for years. Also, interest is awarded because of the terms of what was agreed between the parties during negotiation of the original contract, then settling the arbitration clauses, and in the absence of

some persuasive authority to the contrary, the court hesitates to find it has the power to suspend that agreement as to accumulating interest.

10 The Galloways have not sought to enforce the award as the interest rate is high, and so it suits them to accumulate value on the award while the DSS appeals.

11 Concerning costs, the order is that the costs of the hearing to stay or suspend shall be in the cause, and to move matters forward, on 23.03.18 there shall be directions as to the appeal when the matter is next listed[2].

The Hon. Mr. Justice Iain Morley QC

High Court Judge

23 March 2018

[2] Note however, at the hearing on 23.03.18 the appeal was then discontinued.