[2012] JMCA Civ 8

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 16/2012

BETWEEN	**WILLIAM CLARKE**	**APPELLANT**
AND	**THE BANK OF NOVA SCOTIA JAMAICA LIMITED**	**RESPONDENT**

Written submissions filed by Henlin Gibson Henlin for the appellant

Written submissions filed by Michael Hylton & Associates for the respondent

13 March 2012

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4 of the Court of Appeal Rules 2002)

IN CHAMBERS

BROOKS JA

[1] The appellant Mr William Clarke and his former employer, The Bank of Nova Scotia Jamaica Limited (the bank), have so hardened their respective positions in respect of their acrimonious battles since their parting, that in the proceedings, from which this appeal emanates, they both refused to provide information requested of them by the Supreme Court. Faced with that lack of co-operation, the learned judge at first instance, made a ruling based on the information, which was before her. Mr Clarke now appeals on the basis that she erred in striking out his claim against the bank.

[2] The issue raised by the appeal, is whether the learned judge correctly ruled that Mr Clarke's claim properly fell within the ambit of a settlement agreement that he made with the bank, on 7 June 2011. In that document, the parties had agreed that all matters relating directly or indirectly to certain previous proceedings between them had been settled on specific terms. One of those terms was that, in the event of any dispute concerning the interpretation or implementation of the agreement, that dispute would be "resolved by Graeme Mew...whose decisions shall be final and binding".

[3] In order to determine whether the learned judge was correct, it is necessary to outline the background to the claim. Before doing so, however, it should be noted that there was a dispute as to whether this is a procedural appeal. The procedural aspect will be addressed first.

Procedural issue

[4] Mr Clarke's appeal was filed as a procedural appeal pursuant to rule 2.4 of the Court of Appeal Rules 2002 ("the CAR"). Rule 2.4 (3) stipulates that the general rule is that such appeals are to be considered on paper by a single judge of this court. The bank's attorneys-at-law contended that this is not a procedural appeal because the striking out of Mr Clarke's claim "directly decided" the substantive issues between the parties. They submitted that this was a matter which should be dealt with by a panel of this court.

[5] The term "directly decided" as used by the bank's attorneys-at-law is a reference to the relevant provision in rule 1.1 of the CAR. The rule defines "procedural appeal" to mean:

> "...an appeal from a decision of the court below which does not directly decide the substantive issues in a claim..."

[6] I cannot agree with the bank's stance. Its objection to Mr Clarke's claim, in the court below, was that that was not the proper forum for the substantive issues to be decided. The learned judge agreed and, accordingly, struck out the claim. The bank cannot properly, now say that the judge had decided the substantive issues. I, therefore, find that this is a procedural appeal. It is properly before me, as the learned judge granted permission to appeal and the notice of appeal was lodged within the allotted time.

[7] Although it was not a point of dispute before him, Panton JA (as he then was) specifically considered an appeal from an order for a stay of proceedings, in circumstances similar to the instant case, to be a procedural appeal. This was in **House of Blues Ltd and Another v Secret Paradise Resort Ltd** SCCA No 43/2005 (delivered 21 September 2005). I draw support from that decision. I now turn to the background to the claim.

The Background

[8] The relevant background to Mr Clarke's claim was that, in or about the year 2006, he had agreed with the bank that he would pay monies, totalling a certain sum, into an account, over the course of four years. This would entitle him to purchase a

certain motor car, from the bank, at the end of that period. The vehicle had been assigned to him, for his use, while he was employed to the bank. He paid a total of £41,181.06 into the account pursuant to the agreement but before the period had expired and before the full sum had been paid, his employment came to a less than amicable, end. Mr Clarke, thereafter, became engaged in acrimonious litigation with the bank. In attempting to resolve their differences, the parties referred a number of issues for arbitration, through the London Court of International Arbitration (LCIA).

[9] On or about 15 March 2011, as a part of the arbitral process, Mr Clarke filed a statement of case. In it, he addressed the agreement concerning the motor car. For completeness the relevant portion of the statement of case is set out:

> "v. The Claimant [Mr Clarke] was provided with a 2007 BMW 750 motor car (0894 EX) by the Respondent [bank]. This was also based on his position and service to the Respondent. The Claimant also contributed directly to the purchase price for this car and would have continued to do so but for his early retirement from the Respondent. It was agreed that the Claimant would have the right to purchase this motor car at the market value less the amount of his contribution."

[10] The summary to the statement of case included a claim for the transfer of the said vehicle, "free of all encumbrances, without the Claimant being required to make any payments in respect thereof". That summary referred to an agreement at a meeting of the bank's board of directors on 6 October 2008, deciding the transfer of the vehicle on those terms. It continued, in part:

> "(ii) ...The Claimant was required to contribute $3,524,275.11 with respect to the purchase price of this motor vehicle with an agreement that he would be

> able to purchase the vehicle at the end of four years....The fact that the Claimant was requested by the Board to retire prematurely in no way negates the agreement. It is for this reason that the Board resolved on October 6, 2008 that the vehicle should be transferred to the Claimant at no cost to him."

[11] The arbitration was amicably settled and Mr Clarke signed both a settlement agreement and a form of release and indemnity. The Minutes of Settlement stated that the parties had agreed "that the matters in dispute, relating directly or indirectly to the Request for Arbitration...and Statement of case filed on or about March 15, 2011 by the Claimant with the [LCIA] and all matters relating directly or indirectly to [other specified litigation matters] are settled on the following basis:…"

[12] The court below was not provided with any of the terms of the settlement except, from a copy of the last page thereof, the settlement included terms that: firstly, Mr Clarke would execute the form of release and indemnity; secondly, that all of the provisions of the settlement would be held in strict confidence; and thirdly, and most importantly, for these purposes:

> "11. In the event of any dispute concerning the interpretation or implementation of this agreement, such dispute shall be resolved by Graeme Mew who shall determine the appropriate procedure to be used and whose decisions shall be final and binding."

[13] The form of release and indemnity was comprehensive. The learned judge below, described it as "clear and unambiguous". It stated, in part:

> "IN CONSIDERATION of the terms set out in the Minutes of Settlement dated June 7th, 2011, the sufficiency of which is hereby acknowledged William Clarke (hereinafter

referred to as the 'Releasor') and his heirs, executors, predecessors, successors, assigns and agents do hereby remise, release and forever discharge The Bank of Nova Scotia, its heirs, executors, predecessors, successors, affiliates, subsidiaries (including but not limited to The Bank of Nova Scotia Jamaica Limited), officers, directors, employees, servants, agents and assigns (collectively, 'the Bank') of and from all manner of actions, causes of action, suits, debts, dues, **accounts,** bonds, covenants, contracts, claims and demands whatsoever which against the Bank the Releasor ever had, now has or hereafter can, shall or may have by reason of any matter, cause or thing whatsoever existing to the date hereof, known or unknown, **including, without limitation, all matters relating directly or indirectly to the Request for Arbitration filed on or about July 21, 2010 and Statement of Case filed on or about March 15, 2011 by the Releasor with the London Court of International Arbitration**, and all matters relating directly or indirectly to the [various litigation matters].

AND FOR THE SAID CONSIDERATION THE RELEASOR agrees not to make any claims or demands, or commence, maintain or prosecute any action, cause or proceeding for damages, compensation, loss or any other relief whatsoever in connection with the matters released hereby. The Releasor further agrees that this Release shall operate conclusively as an estoppel in the event of any such claim, action or proceeding and may be plead[ed] as such....

THIS RELEASE AND INDEMNITY shall be construed in accordance with the laws of Ontario….

THE RELEASOR DECLARES THAT he fully understands the terms of this settlement and has had the opportunity to obtain independent legal advice prior to executing this document and that he voluntarily accepts the consideration offered for the purpose of making full and final compromise and settlement of all claims as noted above." (Emphasis supplied)

The Present Claim

[14] It is against that background that Mr Clarke filed the present claim on 19 October 2011. Essentially, the claim is for recovery of the monies that he lodged to the account toward the purchase of the motor car. He asserts that, subsequent to the settlement, he demanded the sum from the bank and it failed or refused to pay it over to him. The bank, in response to the claim, filed an acknowledgment of service and applied to have it struck out on the basis that the court had no jurisdiction to try the claim. It asserted that the subject matter thereof had been settled, pursuant to the settlement agreement.

[15] When the application came on before the learned judge, Mr Clarke's attorneys-at-law submitted that the matter involved a straight banker-customer relationship and had nothing to do with the settlement agreement. It is, however, important to note that in his particulars of claim Mr Clarke did refer to the reason for placing the monies in the account. At paragraph 4 thereof he stated:

> "It was an expressed term of the contract [the bank account between the parties] that the amounts standing in the account would be applied to the purchase price of a 7 Series BMW acquired by the Defendant [bank] for the Claimant [Mr Clarke] as part of the perquisite [sic] of his position of...of the Defendant in 2006 if he exercised an option to purchase the vehicle at market value in the circumstances set [sic] herein..."

[16] Thereafter, the particulars of claim set out the details concerning the acquisition of the motor car and the agreement concerning the method by which Mr Clarke would acquire it after the four years. Subparagraph g of paragraph 5 averred that Mr Clarke

"did not purchase the [motor car] in accordance with this agreement". Paragraph 6 of the particulars of claim then stated:

> "It was an implied term of the contract between the Claimant and the Defendant that the Defendant would comply with any instructions by the Claimant to his order up to the amount standing to his credit either to the purchase price of the 7 series BMW if the option were exercised as agreed **or** to pay the money to him **or** as otherwise directed by him if the option to purchase the BMW was not exercised." (Emphasis as in the original)

[17] In the face of those pleadings, the bank's attorneys-at-law submitted that the matter of the account fell within the ambit of the settlement agreement and that if there was any issue to be resolved, the settlement agreement stipulated that that issue should be referred to Mr Graeme Mew, mentioned above. Mr Clarke's attorneys-at-law have argued that the reference to the car and the matters surrounding it, was only by way of context and that it did not affect the fact that these were monies standing to Mr Clarke's credit in his bank account.

[18] Each party stoutly insisted that it would not provide the details of the settlement agreement. They both pleaded, in support of that position, its provisions requiring confidentiality. Each argued that if the details were to be produced to the court, it would be incumbent on the other party so to do. Mr Clarke's attorneys-at-law relied, in part, on **Spiliada Maritime Corp. v Cansulex Ltd; The Spiliada** [1986] 3 All ER 843. The bank's attorneys-at-law, for their part, relied on **Ford v Clarksons Holidays Ltd** [1971] 1 WLR 1412; [1971] 3 All E.R. at 454 to support their position on this issue.

[19] It is against that background, that the learned judge made her decision on the information, of which the court was then seised. I respectfully concur with her decision to so proceed. Parties who refuse to assist the court should not be allowed to unduly consume its scarce resources, one of which is its time. It is for that reason, that I declined an invitation by the bank's attorneys-at-law to have a hearing in chambers with both parties making oral submissions. I also find support for this position in the speech of Lord Templeman, in **The Spiliada**. The learned Law Lord said at page 846 j:

> "In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days."

The analysis

[20] In **The Spiliada** Lord Goff of Chieveley examined the principle of *forum non conveniens* as it applied to cases of stay of proceedings. At pages 854 b – 856 f, he summarised the relevant law by setting out a number of principles. I need not set out all the principles here, it will be sufficient to highlight the major relevant ones. The first and basic principle is that "a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action".

[21] His Lordship pointed out that where a defendant seeks a stay on that basis, the general burden is on that defendant to show that such an alternative forum exists (page 854 j – 855 a. Where the defendant does so, the burden shifts to the plaintiff to show "that there are special circumstances by reason of which justice requires that a trial should nevertheless take place in" the forum that he has chosen. The decision which the court should make should be based on the court's assessment of the competing forum. His Lordship made it clear that it should be the more appropriate forum which should be chosen. He concluded the points at page 856 c - d:

> "(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay...
>
> (f) If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted…."

His Lordship made it clear that the court should consider all the circumstances of the case. The ultimate aim is to choose the forum which is most likely to produce a just result for the relevant parties.

[22] **The Spiliada** was decided in respect of a defendant who was applying to set aside an order for permission to serve a claim outside of England. He sought to show that another more appropriate jurisdiction existed and that the English court was the *forum non conveniens*.

[23] Where, however, as in this case, a defendant alleges that the parties have previously agreed that any dispute between them will be dealt with by reference to arbitration, another general principle must be introduced into the mix. That defendant is not only saying that another, more appropriate, forum exists but that the parties have already agreed on that forum. The principle, which must also be considered, is that where the parties have agreed that any dispute between them should be referred to arbitration, then their agreement should be given effect and that no party should be allowed to renege on that agreement without good cause.

[24] The Supreme Court has two bases on which it may grant a stay of proceedings brought before it in breach of an agreement to arbitrate. Firstly, section 5 of the Arbitration Act authorises the court to stay court proceedings commenced by a claimant who had previously agreed to submit a particular dispute to arbitration. For completeness the section is set out below:

> "5. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court or a Judge thereof, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

[25] Secondly, the Supreme Court has an inherent power "to stay proceedings brought before it in breach of an agreement to decide disputes in some other way" (per Lord Mustill, **Channel Tunnel Group v Balfour Beatty Ltd** [1993] 1 All ER 664 at page 677 d).

[26] There are a number of local cases on the point. The learned judge cited but one: **Douglas Wright T/A Douglas Wright Associates v The Bank of Nova Scotia Jamaica Ltd** (1994) 31 JLR 351. In that case, Courtenay Orr J, after referring to the impact of section 5 of the Arbitration Act, pointed out that once the defendant had shown that the parties had agreed to go to arbitration on the disputed issue, the onus of persuading the court that it was proper to refuse the stay, rested on the plaintiff. Orr J cited the case of **Ford v Clarksons Holidays Ltd**, and in particular the following quote from Edmund Davis LJ, in support of that position:

> "…once the party moving for a stay has shown that the dispute is within a valid and subsisting arbitration clause, the burden of showing cause why effect should not be given to the agreement to submit is upon the party opposing the application to stay." (See page 459 of **Ford v Clarksons Holidays Ltd**)

[27] In the instant case, I find that the bank has produced sufficient evidence to show that an alternative forum exists to which the parties have agreed to refer their dispute. I find that the reference, in Mr Clarke's particulars of claim, to the motor car and the agreements concerning that vehicle is not merely by way of context but explains the basis on which the money had been placed into the account. The close connection between Mr Clarke's statement of case to the LCIA and the particulars of claim filed in

the court below, as it relates to the motor car, is a strong indication that this is an issue involving "the interpretation or implementation" of the settlement agreement. In addition, the form of release and discharge also referred to all accounts between the parties and all matters directly or indirectly related to the issues raised by the statement of case.

[28] In my view, these are matters which the parties have agreed should be the subject of a submission to Mr Graeme Mew. The learned judge expressed herself clearly, to also have been of that view. She had a discretion in respect of the matter and the result of an exercise of that discretion should not lightly be interfered with (see **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 at page 1046 a – b and **Hardy v Focus Insurance Co Ltd (in liquidation)** (1995) 47 WIR 116 at page 121 b).

[29] It would seem to me that a stay of Mr Clarke's claim would have been preferable to a striking out. That would have been in keeping with the learning set out above. It could be, however, that the learned judge viewed Mr Clarke's refusal to abide by the settlement agreement, combined with his refusal to accede to the court's request to produce the terms of the settlement agreement, as an abuse of the process of the court. She, however, did not so state. The learned judge found instead that the court had no jurisdiction to try the claim.

[30] In this regard, the bank's attorneys-at-law filed a counter-appeal and submitted, among other things, that the claim could have been properly struck out pursuant to rule

9.6(6) or rule 26.3 of the Civil Procedure Rules (the CPR). The former rule does not assist the bank. What it does, is to authorise the court to strike out the particulars of claim filed or set aside service of the claim form and discharge any order made before the claim was filed or the claim form served. The court may make such orders on an application by a defendant, who "(a) disputes the court's jurisdiction to try the claim; or (b) argues that the court should not exercise its jurisdiction..." (rule 9.6(1)).

[31] In my view, the instant case does not lend itself to an application of this rule. Firstly, the court clearly has jurisdiction in the matter and secondly, the court should not lightly refuse its jurisdiction to a party who is, *prima facie*, entitled to it. The established procedure is to grant a stay of the proceedings in such circumstances.

[32] With regard to rule 26.3(1) of the CPR, the bank's attorneys-at-law submitted that the claim was an abuse of the process of the court because the claim had already been settled. I, respectfully, cannot agree with that stance. Mr Clarke has money in a bank account standing in his name. That account, as far as the court has been informed, was not specifically mentioned in the agreement between the parties. The court, in my view, has not been presented with sufficient information to rule that his entitlement to that money has already been settled. It is not obvious that, in filing this claim, he is abusing the process of the court in seeking to recover that money. Rule 26.3 (1) cannot avail the bank in respect of this point.

[33] Based on the above reasoning, I cannot agree with the decison of the learned judge that the court had no jurisdiction to hear the claim. I find that her decision on

that point was based on a misconception of the effect of section 5 of the Arbitration Act. I find that the claim should be stayed rather than struck out.

Conclusion

[34] An appellate tribunal should not overturn a decision of a judge at first instance, if that judge's decision was an exercise of a discretion. The appellate tribunal may set aside the judge's exercise of his discretion on the ground (among others) that it was based on a misunderstanding of the law or of the evidence. I find, with respect to the learned trial judge, that after correctly deciding that the parties had agreed upon another tribunal to hear their dispute, she did not consider the law regarding a stay of execution. I find, therefore, that her decision to strike out the claim was wrong and that the appropriate order was to stay the proceedings.

Costs

[35] Despite this finding, it is Mr Clarke who should bear the costs of the appeal and the application below. I find that he ought to have either proceeded to arbitration before filing the claim or, having filed the claim, agreed to its stay pending the arbitration.

Order

[36] (1) The order of Sinclair-Haynes J, made on 27 January 2012, is set aside;

(2) Claim No 2011 CD 00075 is hereby stayed pending the parties proceeding to arbitration pursuant to a settlement agreement made between them on 7 June 2011 and until further order of the court;

(3) The costs of the procedural appeal and the costs of the application in the Supreme Court are to be borne by the appellant. Such costs are to be taxed if not agreed.