[2022] JMCA Civ 24

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CIVIL APPEAL NO 116/2018

BETWEEN	**JOSA INVESTMENTS LIMITED**	**APPELLANT**
AND	**PROMOTIONS AND PRINT ESSENTIALS LIMITED**	**RESPONDENT**

Mrs Symone Mayhew QC and Miss Carol Davis instructed by Carol Davis for the appellant

Emile Leiba, Jonathan Morgan, and Miss Chantal Bennett instructed by DunnCox for the respondent

4 November 2020 and 1 July 2022

P WILLIAMS JA

[1] In this appeal, JOSA Investments Limited ('the appellant') is challenging the decision of Batts J ('the learned judge'), who, on 14 November 2018, dismissed its fixed date claim on the basis that there was no reasonable ground for bringing the claim. The decision was made on the application of Promotions and Print Essentials Limited ('the respondent'). The appellant had filed the claim against the respondent in its attempt to set aside an arbitration award that had been made against it.

Background

[2] The parties entered into a lease agreement dated 5 October 2015 ('the agreement'), whereby the appellant leased a site on its property located at 61 Constant Spring Road, Kingston 10, to the respondent for the erection, maintenance, and operation of a structure on which advertisements were to be displayed, namely, a hoarding. In the schedule of the agreement, the site was described as "Building Tower/s" and "Building Roof". The property itself had a shopping plaza consisting of 50 shops and offices, and the hoarding was to be constructed on the roof of one of the buildings.

[3] The agreement was for a period of three years with an option to renew for a further three years. The rental sum was $900,000.00 per annum plus General Consumption Tax payable bi-annually, and a rate of increase was to be negotiated upon renewal.

[4] Mr Winston Lee, managing director of the appellant, in an affidavit filed on its behalf, explained that at the time the parties entered into the agreement, he was of the view that the hoarding with its advertisements would be compatible with the commercial shops and offices that the appellant intended to rent to individual commercial tenants.

[5] In November 2015, the appellant became aware of an entity that wished to rent the property as one unit rather than the 50 shops and offices originally intended. Mr Lee explained that the appellant considered the matter and determined that renting the property to one tenant would be "a better use of the land" than having to deal with 50 tenants. It was felt that management costs would be reduced, as would the risk of problems of rent collection and accounting associated with 50 units.

[6] In December 2015, the respondent was advised that the appellant was going to seek to terminate the agreement with the respondent because it was negotiating a lease for the property with another tenant, the Ministry of Justice. On 17 December 2015, the attorneys-at-law for the respondent wrote to the appellant expressing concern about the anticipated breach of the agreement and indicated that any unilateral termination by

them, for that reason, would constitute a breach of contract entitling the respondent to significant compensation.

[7] On 18 December 2015, a notice to quit was served on the respondent requiring them to deliver up possession of the site on 4 July 2016, or at the end of the tenancy, that would expire after six months from the date when the next month's rent became due and payable. The reason given for the notice was in reliance on a clause of the agreement which provided that it had the right to terminate the agreement by serving six months' notice in writing on the respondent if, as the landlord, it required the site "for the better amenity of any adjoining land of the Landlord" (clause 5.2 of the agreement).

[8] The respondent rejected the purported termination contending that the reason, as set out in the notice to quit, was "not genuine". The respondent, having learned that the appellant was desirous of terminating the lease to rent the property to a single tenant, demanded that their agreement be honoured; failing which "breach of contract proceedings" would be instituted to recover all associated losses.

[9] Efforts to resolve the matter proved futile, with the respondent maintaining that the appellant had breached the contract. The agreement provided that any questions or differences were to be referred to a single arbitrator. Thus, it was agreed that the matter be referred to an arbitrator, Mr Dan O Kelly, with an arbitration submission agreed upon between the parties and dated 12 April 2016.

[10] In its statement of claim before the arbitrator, the respondent identified the issue as being whether the appellant's termination of the agreement in the circumstances constituted a breach of contract entitling the respondent to compensation. In its amended statement of defence to the claim, the appellant stated that the agreement was not enforceable since no consideration had passed between the parties and asserted that it required the site for the better amenity of adjoining land.

[11] The arbitration was heard on 17 January and 22 February 2017. In his final arbitration award, the arbitrator identified the following as the four issues to be determined:

> "**ISSUE NO. 1**
>
> Whether the Commercial Agreement between [the respondent] and the [appellant] was valid?
>
> **ISSUE NO. 2**
>
> Whether the erection of the hoarding was a condition precedent to the Commercial Agreement coming into effect?
>
> **ISSUE NO. 3**
>
> Whether [the appellant's] termination of the Commercial Agreement constitutes a breach of Contract?
>
> **ISSUE NO. 4**
>
> Whether the [respondent] suffered any loss or damage as a result of the [appellant's] termination of the Commercial Agreement?"

[12] After he analysed the evidence and arguments, the arbitrator made the following declarations and award:

> "1. The Commercial Agreement dated the 5th day of October, 2015 is a valid, legally binding and enforceable Agreement between the [respondent] and the [appellant].
>
> 2. The erection of the hoarding was not a condition precedent to the Commercial Agreement dated the 5th of October, 2015 coming into effect.
>
> 3. The [appellant's] termination of the Commercial Agreement by way of Notice to Quit dated the 18th day of December, 2015 constitutes a breach of contract.
>
> 4. The [respondent] has suffered loss and damage as a result of the [appellant's] breach of contract.

> 5. The [appellant] shall forthwith pay to the [respondent] the sum of Sixteen Million Eight Hundred and Twelve Thousand Eight Hundred and Eleven Dollars and Twenty Cents ($16,812,811.20) as damages for breach of contract…
>
> 6. The [appellant] shall pay interest on the amount awarded at the rate of three percent (3%) per annum from the date of this Award until the date of full payment of damages.
>
> 7. The cost of the Arbitration in the sum of Two Million Three Hundred and Forty-Six Thousand Eighty-Five Dollars and Forty-One Cents ($2,346,085.41) to be borne by the [appellant]…."

[13] The appellant, being dissatisfied by the award, filed a fixed date claim form on 3 May 2018 in the commercial division of the Supreme Court, seeking, among other things, the following order:

> "1. That the final arbitration award made by the Arbitrator Dan O. Kelly on 28th February 2018 in the proceedings between the [appellant] and the [respondent] be set aside for misconduct pursuant to section 12(2) of the Arbitration Act 1900 and/or or [sic] pursuant to the inherent jurisdiction of the Court."

The main ground on which it was seeking the order was that the arbitrator made some nine errors of law that were on the face of the record.

[14] On 16 August 2018, the respondent filed a notice of application for court orders seeking to have the appellant's statement of case struck out as the court was without jurisdiction or should refuse to exercise jurisdiction to determine the issue. In the alternative, it sought that the statement of case should be struck out because it disclosed no reasonable grounds for bringing a claim under section 12(2) of the Arbitration Act ('the Act').

[15] Batts J heard the application on 1 November 2018 and delivered his decision on 14 November 2018 in a written judgment (with neutral citation [2018] JMSC Comm 37).

He was satisfied that even if the allegation of error of law did not constitute misconduct falling within section 12(2) of the Act, the court's inherent jurisdiction was also to be considered. He found that:

> "… the latter plea is sufficient to incorporate an error of law on the face of the record. This is because it is in such a case that the court's inherent jurisdiction to revoke an arbitrator's award arises. It flows from the court's supervisory jurisdiction over inferior tribunals." (see para. [11])

Thus, on this issue, he concluded that he had jurisdiction to consider the matter.

[16] He went on to consider whether there were reasonable grounds to allege an error of law on the face of the record and invoke the court's inherent jurisdiction. On this issue, he found that some of the complaints were really efforts to overturn either factual findings or the arbitrator's interpretation of the contract and did not constitute errors of law on the face of the record.

[17] The learned judge found that the arbitrator's decision related to mitigation of damages "caused him to pause". He, however, ultimately concluded that the arbitrator's treatment of the issue did not disclose an error of law properly so-called because the arbitrator had correctly stated the relevant principle with respect to mitigation of damages and made an assessment thereafter, which was one of fact and not law.

[18] Finally, the learned judge found another reason to dismiss the fixed date claim. He determined that it was "manifest, on the agreement to arbitrate, on the statements of case filed and on the arbitrator's statement of the issues before him, that the matters complained of in the fixed date claim were questions the arbitrator had been asked to decide" and "were not tangential to the result". Thus, the learned judge dismissed the fixed date claim on the basis that, on the facts alleged by the appellant, there was no reasonable ground for bringing the claim. He granted leave to appeal, if required.

The appeal

[19] It was from this order that the appellant filed its appeal on 26 November 2018. The grounds of appeal were as follows:

> "(1) The learned judge erred when [he] found that error of law on the face of the record was not a type of misconduct as contemplated by section 12(2) of the Arbitration Act.
>
> (2) The learned judge erred in his finding that there was no misstatement of the applicable or any principle of construction on the face of the record of the Arbitrator's award which was repugnant to law and therefore an error of law.
>
> (3) The learned judge erred in not finding that the Arbitrator' construction that the words 'better amenity of the adjoining land' was a construction that the law would not countenance and accordingly an error of law.
>
> (4) The learned judge erred in finding that the Arbitrator correctly stated and applied and [sic] the principles relating to mitigation of damages.
>
> (5) The learned judge erred when he found that the Arbitrator's reduction of damages by 20% was an assessment of fact not of law, in circumstances [sic] the Arbitrator misapplied the principles of law relating to the effect of a failure to mitigate losses arising from a breach of contract and was therefore an error of law on the face of the record.
>
> (6) The learned judge erred in finding that the Statement of Case disclosed no reasonable cause of action as the matters complained of in the Fixed Date Claim Form were central to the issue the Arbitrator was asked to determine and accordingly the court ought not to interfere with the award.
>
> (7) The learned judge erred in dismissing the claim."

[20] When the matter came on for hearing before us, Mrs Symone Mayhew QC, on behalf of the appellant, indicated that she would not be pursuing ground 1, which she acknowledged could be viewed as being solely of academic interest, given the learned judge's overall treatment of the matter. She identified the general areas in which the challenge to the learned judge's decision would be mounted as follows:

1. the treatment of the arbitrator's construction of the terms of the contracts (grounds 2 and 3);
2. the treatment of the arbitrator's award of damages (grounds 4 and 5); and
3. the finding that the arbitrator, on the face of the award, expressly determined the issues that were before him (ground 6).

Issue 1: The treatment of the arbitrator's construction of the terms of the contracts (grounds 2 and 3)

The submissions

For the appellant

[21] Mrs Mayhew submitted that it was without question that a misconstruction of the terms in an agreement could amount to an error of law. She relied on **Sans Souci Limited v VRL Operators Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 20/2006, judgment delivered 12 December 2008, in support of this submission. Queen's Counsel further submitted that the courts have identified instances of the misconstruction of an agreement being an error of law on the face of the record. She referred to **The National Housing Trust v YP Seaton & Associates Company Limited** [2015] UKPC 43 ('**NHT v YP Seaton**') and **The Attorney General of Jamaica v National Transport Co-operative Society Limited** (unreported), Supreme Court, Jamaica, Claim No 2003HCV0169, judgment delivered 29 November 2004.

[22] Mrs Mayhew noted that the learned judge considered and approved the arbitrator's reliance on the meaning of the word amenity in Black's law dictionary in his construction

of the termination clause of the lease agreement. She submitted that in so doing, he ignored the principles enunciated by Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society and Others** [1998] 1 WLR 896, which should determine the court's approach to interpreting legal documents.

[23] Queen's Counsel further submitted that the learned judge erred in concluding that the fact that the arbitrator considered the dictionary meaning of the word "amenity" was no basis to challenge the award. She contended that the approach of the arbitrator was not a mere misapplication of the legal principles but one which "the law does not accept" since he had failed to ascertain the meaning of the termination clause by consideration of the factual matrix to determine the intention of the parties. In conclusion, on this issue, Mrs Mayhew submitted that the fact that the principles of construction used by the arbitrator were not in accordance with the law provided an arguable ground for setting aside the award.

For the respondent

[24] Mr Emile Leiba commenced the submissions on behalf of the respondent by reminding the court of the basis on which it could disturb the decision of the learned judge. He submitted that the appellant would need to convince the review court that there had been some apparent misunderstanding of law or evidence on the part of the learned judge, leading to his conclusion that there was no reasonable ground for bringing the claim.

[25] Counsel agreed that the approach to be adopted in determining whether there was an error of law on the face of the record was set out in **NHT v YP Seaton**. The first step was to identify the suggested error, the second was to determine whether the error was on the face of the award, and the third was to determine whether there was any basis in law for the conclusion arrived at by the arbitrator.

[26] Mr Leiba submitted that the learned judge was required to assess the award and any appended documents to ascertain whether an erroneous legal proposition informed

the basis of the award. If the arbitrator relied on correct legal propositions and then sought to apply those propositions to the facts, the court would not be at liberty to set aside the award, even if it had a different interpretation of the facts or would have arrived at a different result. He relied, for support, on **Champsey Bhara and Company v Jivraj Balloo Spinning and Weaving Company, Limited** [1923] AC 480 and **Government of Kelantan v Duff Development Company, Limited** [1923] AC 395.

[27] Counsel submitted that the arbitrator did not rely on any erroneous legal proposition which, on its face or otherwise, formed the basis of the award. Counsel contended that commercial contracts may be interpreted according to the meaning that the terms of the contract would convey to a reasonable person in the particular context. He contended that the correct legal approach to interpreting contacts was to ascertain the conventional usage of the language within the contract, having regard to the context or background of the agreement. Further, he submitted, the law required "[t]he ascertainment of the objective meaning of the terms of the Commercial Agreement as it would appear to a reasonable man having all the knowledge that would reasonably be available to the class of persons who interact with such a document". Mr Leiba referred to extracts from Halsbury's Laws of England, 5th edition, 2012, Volume 22, in support of these submissions.

[28] Thus, it was counsel's submission that the arbitrator correctly sought to find the conventional usage of the term "for better amenity of adjourning land" within the context of a real property commercial agreement. Further, counsel contended, the arbitrator did, in fact, consider the factual matrix that gave rise to the notice to quit and made findings of facts which he was entitled to make, based on the evidence. Ultimately, counsel submitted that the arbitrator was on a strong legal footing to prefer the interpretation advanced by the respondents and the appellant's contention that the arbitrator decided the matter on principles of construction that the law did not countenance, could not be sustained.

Discussion and disposal

[29] As correctly indicated by Mr Leiba, it is necessary to bear in mind the role of this court in reviewing the decision of the learned judge to dismiss the claim which was brought, challenging the arbitrator's award, on the basis that there was no reasonable ground for bringing it. It is well settled that this court will only interfere with the exercise of a judge's discretion where it was based on a misunderstanding of the law or evidence; or based on an inference which can be shown to be demonstrably wrong or so aberrant that no judge, mindful of his duty to act judicially could have reached it (see **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, at 1046 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, at paras. [19] and [20]).

[30] The challenge in grounds 1 and 2 relates to the arbitrator's construction of a particular term in the lease agreement. There is no challenge to the fact that the arbitrator was entirely correct when he identified one of the issues he had to determine as being whether the termination of the agreement constituted a breach of the contract. There can be no dispute that his interpretation of the termination clause of the agreement was pivotal to his resolution of that issue. The relevant clause that was relied on for the termination of the agreement provided the following:

> "*5.2 If the Landlord requires the Site for the purpose of building or development or the better amenity of any adjoining land of the Landlord then the Landlord may terminate this Agreement by serving 6 months' notice in writing on [the respondent] expiring at any time and on expiry of such notice this Agreement shall end but without prejudice to any right of action of the Landlord in respect of any breach of [the respondent's] agreements and to recover the costs of removing the Hoarding if the Landlord removes it."* (Italicised as in original)

[31] It is useful to consider the manner in which the parties in the statement of their respective cases to the arbitrator had sought to deal with what was meant by the clause

"better amenity of any adjoining land". The respondent maintained in its statement of claim that the true reason for the appellant's termination of the agreement was "to pursue a preferred arrangement for the property" with a third party. It was contended that the reliance on the clause was a misrepresentation and that the "better amenity" of a subsequent tenant would not qualify as a ground for termination in any event. The appellant countered that, as the owner of the adjoining land, it wished to rent it to a single commercial entity for the "convenience and better use of the said land". Further, the appellant contended that it was a more convenient and desirable use of the land to rent to such an entity since they wished to rent the entirety of the adjoining land and would wish to deal with only one tenant and not several individual tenants of 50 units. This, they maintained, would greatly reduce administrative costs, and the single tenant was more likely to be a "well established and sure tenant", so rent collection would be easier. Thus, the appellant concluded that the contract's continuation was incompatible with the intended use of the land.

[32] It is further noted that, in reply to this defence, the respondent stated that the correct interpretation of the provision entitling the appellant to terminate the lease for "better amenity" of adjoining land limited its applicability to situations where termination of the lease was necessary because of the obvious incompatibility of the said lease with the landlord's plans for the land, for example where continuation of the lease would impede construction plans and would result in disproportionate prejudice to the landlord. It was contended that the mere "convenience" or "desirability" of a potential tenant could not, without more, give rise to a right of termination in accordance with the termination clause.

[33] In concluding that there was a breach of contract, the arbitrator firstly found that based on the written and oral evidence presented it was apparent that the appellant had decided, prior to the issuance of the notice to quit, to terminate the agreement in order to secure "a greater economic benefit to itself by leasing its properties…to one tenant instead of several, as was previously contemplated". He then expressly accepted the definition of 'amenity' as provided in the Black's Law Dictionary, noting that it supplied "a

context for the definition in terms of real property law which governs the subject matter of the Commercial Agreement". He also accepted the reasoning outlined by the respondent in its closing submissions, which included the contention that the phrase "better amenity", in the context of the agreement, was never meant to include using the property in such a way to earn more income from its use. He ultimately concluded that it was evident that the appellant had not served the notice to quit in accordance with the clause as it "did not seek to use the Site for the better amenity of its adjoining land but instead it sought to use its properties in a manner which was more convenient and profitable for its rental pursuits".

[34] The learned judge addressed the issue of the arbitrator's construction of the clause in the following way:

> "[13] The [appellant] relied on both the **Sans Souci** and **National Transport Cooperative** cases…in support of a submission that an error in construction of a contract is an error of law and therefore reviewable by the court. This is not always the case. An error of law occurs where the interpretation of the contract is done using an approach to construction which the law does not accept. The mere misapplication of the correct principle of construction will not suffice. The court will not interfere with the decision of an arbitrator, tasked to construe an agreement, merely because it disagrees with his interpretation of the agreement, **Government of Kelantan v Duff Development Company [Limited]** [1923] AC 395 at 409 and 411.
>
> [14] In this case there is neither a misstatement of the applicable or any principle of construction, nor is it manifest on the face of the record that the arbitrator applied a or any principle of construction that was repugnant. So, for example, the arbitrator sought comfort in Black's Law Dictionary insofar as the meaning of 'amenity' was concerned. This was a central issue in the arbitration. He could not be faulted for so doing. Furthermore, the arbitrator's conclusion, on the meaning of the words allegedly misconstrued, far from being an obvious error, is reasonable and one

that any reasonable arbitrator might have arrived at. As he said at paragraphs 32 (e) and (f) of his award:

> *'(f) The better amenity of adjoining land therefore refers to the implementation of improvements on land, which adjoins another, with the effect that it would increase the pleasantness or desirability of the adjoining land or contribute to the pleasure and enjoyment of the occupants and not to the desires of the owner of such land.*
>
> *(e) Accordingly, in the context of real property law, the better amenity of adjoining land does not require the land to be put to its best use or to a use most agreeable to the Landlord, as is suggested by the [appellant].'*
>
> The complaints in paragraphs (i), (ii), (iii), (iv), (v), (vi), (viii) and (ix) of the grounds of the Fixed Date Claim, are really efforts to overturn either factual findings or the arbitrator's interpretation of the contract. They do not constitute errors of law on the face of the record. These averments, on the facts of this case, disclose no reasonable ground for bringing this claim." (Italicised as in original)

[35] It is apparent that the learned judge correctly appreciated what should be his approach in determining whether the arbitrator had misconstrued the terms of the termination clause, which could amount to an error of law. He found there was no misstatement of any applicable principle of construction; neither was it manifest that the arbitrator applied any principle of construction that was repugnant. However, the appellant has sought to challenge the learned judge's conclusion by asserting that the arbitrator had adopted an approach that the law does not accept and pointed to the arbitrator resorting to the meaning of the words to construe the clause as an approach which was wrong in law.

[36] **Investors Compensation Scheme v West Bromwich Building Society** is regarded as the seminal authority on the interpretation of documents. Lord Hoffmann, at pages 912 to 913, laid out the principles by which contractual documents are to be

construed. Those principles are accepted as providing useful guidance for interpreting other documents. Some of the principles relevant to this matter are as follows:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact,' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties, and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> …
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd v Eagle Star Life Assurance Co. Ltd*. [1997] AC 749.
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had…"

[37] It is to be noted that Lord Hoffmann went on qualify this summary of general principles in his dissenting judgment in **Bank of Credit and Commerce SA v Ali and Others** [2002] 1 AC 251, where at para. 39, he stated:

> "The background is however very important. I should say in passing that when, in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man', I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as *relevant*. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: 'we do not easily accept that people have made linguistic mistakes, particularly in formal documents'. I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage."

[38] Mrs Mayhew referred to Lord Hoffmann's speech in **Investors Compensation Scheme v West Bromwich Building Society**. She concluded that His Lordship frowned upon the approach of relying upon the dictionary meaning of words in order to ascertain the intention of the parties, and further that, based on these guidelines, the approach of the arbitrator was not a mere misapplication of legal principles, but was one with which the court did not agree. However, it seems to me that Lord Hoffmann did not expressly prohibit reliance on the dictionary meaning of words in absolute terms such that any reliance would, without more, be considered an approach which was incorrect or one wrong in law.

[39] The arbitrator had accepted the definition of the word 'amenity' as provided in the Black's Law Dictionary, because he found that "notably it supplies a context for the

definition in terms of real property law which governs the subject matter of the Commercial Agreement". Certainly, this use of this dictionary could be viewed by a reasonable man as relevant and of assistance in understanding the language of the agreement. In the circumstances, the learned judge did not err in finding that the arbitrator could not be faulted for having "sought comfort in Black's Law Dictionary insofar as the meaning of 'amenity' was concerned".

[40] Mr Leiba was correct that the arbitrator did, in fact, consider the factual matrix that gave rise to the notice to quit and made findings of fact he was entitled to make from the evidence, which was before him. Indeed, there has been no indication of what aspect of the factual matrix the arbitrator failed to consider.

[41] The learned judge cannot be faulted for concluding that there was no misstatement of any applicable principle of construction and that it was not manifest, on the face of the record, that the arbitrator applied any principle of law, which was repugnant. Therefore, there is no merit in grounds 2 and 3.

Issue 2: The treatment of the arbitrator's award of damages (grounds 4 and 5)

The submissions

For the appellant

[42] Mrs Mayhew highlighted the fact that the arbitrator, having accepted that the respondent failed to mitigate its loss, proceeded to reduce the respondent's damages by 20%. She noted that the learned judge concluded that the arbitrator had not misstated the principles of law relating to mitigation of damages and went on to state that the reduction of 20% was an assessment of probabilities, which was one of fact, not law. She submitted that the learned judge erred in his treatment of this issue, as the law is clear that issues relating to mitigation of damages can amount to errors of law.

[43] Queen's Counsel referred to **Attorney General of Jamaica v National Transport Co-operative Society Limited**, where she contended Brooks J (as he then

was) had found that the failure to mitigate was a ground on which the arbitration award should be set aside. She also referred to **British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London Limited** [1912] AC 673, where Viscount Haldane LC had distilled the broad principles in assessing damages for breach of contract.

[44] Queen's Counsel submitted that the learned judge erred since, contrary to his conclusion, the arbitrator's treatment of the mitigation issue was one of fact and not law; it was not just a matter of mathematics. She contended that since the arbitrator found that the respondent had failed to mitigate its losses, it was debarred from recovering any damages. She further contended that the arbitrator approached the matter by reducing the award when he ought not to have made any award. This, she submitted, was an approach that the law ought not to countenance.

[45] Mrs Mayhew's conclusion on these two grounds was that, in the circumstances, the learned judge was clearly wrong in finding that there was no reasonable basis to challenge the arbitrator's award in relation to his treatment of the mitigation issue. She submitted that the arbitrator misapplied the legal principle, which was a significant matter that would warrant the court's intervention.

For the respondent

[46] Mr Leiba submitted that the learned judge's finding that the arbitrator's determination was an assessment of fact governed both questions of whether the respondent took sufficient steps to mitigate its loss in the given circumstances, as well as the extent to which its mitigating step or lack thereof, should have impacted the normal measure of damages. Counsel relied on extracts from McGregor on Damages, 16th edition, where the authors set out the rules governing mitigation of damages (see para. 300), as well as some of the factual considerations that an adjudicator may assess when seeking to determine the extent to which mitigating steps could affect the measure of damages (see para. 313).

[47] It was counsel's contention that it was indisputable that the onus of proof was on the appellant to establish whether the respondent had mitigated its losses and any impact there was on potential damages. He noted that although the appellant had asserted that the Ministry of Justice would have been prepared to enter a sub-lease with the respondent to erect hoardings on the property after the termination of the lease agreement, there was no evidence indicating any details of that offer or showing that the offer would not have been available alongside the original lease agreement. Counsel submitted that these were material considerations that the arbitrator would have had to assess when determining the issue.

[48] Mr Leiba invited the court to take note of the fact that the arbitrator had expressly considered the efforts made by the respondent to mitigate its losses through attempts to secure additional locations to erect and operate the digital advertising boards it had intended to utilise in its contract with the appellant. Counsel submitted that, in the circumstances, the arbitrator's award showed how his factual assessment of the reasonableness of the respondent's efforts to mitigate its losses resulted in his determination that the damages were to be reduced by 20%. Further, counsel submitted, the learned judge accurately categorised this determination as an assessment of fact and correctly stated that the arbitrator had not erred in so finding. Counsel referred to **Traille Caribbean Limited v Cable & Wireless Jamaica Limited T/A LIME** [2020] JMCA Civ 35; **Caribbean Cement Company Limited v Freight Management Limited** [2016] JMCA Civ 2; and **National Transport Co-operative Society Ltd v The Attorney General of Jamaica** [2011] JMCA Civ 34.

Discussion and disposal

[49] The main thrust of the appellant's challenge on grounds 4 and 5 was regarding the arbitrator's approach to the issue of mitigation which the learned judge accepted as appropriate. The arbitrator commenced his consideration of the damages to be awarded by recognising that the respondent had opted to base its claim for damages on expectation loss. In this regard, he considered evidence that the respondent had provided

showing the loss it sustained from its inability to complete arrangements with Pepsi-Cola Jamaica Bottling Company Limited, which was to have engaged its services for a period of six years at a fixed annual rental.

[50] The arbitrator then recognised that the issue of mitigation was to be considered. He noted letters the respondent had submitted "as evidence of its efforts at mitigation", which, he noted, were intended to demonstrate attempts to secure additional locations to erect and operate its digital advertising boards. He, however, went on to find that the respondent "failed to appropriately mitigate its losses when it neglected to take advantage of the Ministry of Justice's non-objection to the erection of the hoarding or its offer to enter into a sub-lease". He concluded that the award of damages for loss of expectation must be reduced to take into account the "insufficiency of the [respondent's] attempt to adequately mitigate its losses".

[51] The learned judge, in addressing the arbitrator's award as it related to mitigation of damages, had this to say:

> "[15] … The allegation is that an error of law on the face of the record occurred with the arbitrator's treatment of the question of mitigation of damages. I have come to the conclusion that the arbitrator's treatment of this issue does not disclose an error of law properly so called because the arbitrator correctly stated the relevant principle with respect to mitigation of damages:
>
> 36. *To reiterate, it is trite law that the purpose of the award of damages for breach of contract is to compensate the injured party for the loss sustained as a result of the breach. Generally, the damages awarded are meant to put the injured party in the same position that the injured party would have been in had the contract been performed in accordance with its terms.*
>
> …

45. *Importantly, the issue of mitigation of damages must also be considered. The basic rule of mitigation is simply that a Claimant may not recover losses which he or she should reasonably have avoided. Consequently, any failure by the [respondent], in the instant case, to mitigate its loss must reduce its claim for damages.*

…

48. *It is my finding that the [respondent] failed to appropriately mitigate its losses when it neglected to take advantage of the Ministry of Justice's non-objection to the erection of the hoarding or its offer to enter into a sub-lease.*

…

50. *Taking the foregoing matters into consideration, I have found that the award of damages for loss of expectation must, of course, be reduced to take into account the insufficiency of the [respondent's] attempt to adequately mitigate its losses.'*

[16] The [appellant] takes no issue with the statement of principle by the arbitrator. Rather the complaint is that, in applying the principle, he adopted the wrong approach. The [appellant] contends that instead of reducing damages by 20%, as he did, the arbitrator ought to have used a more mathematically correct approach. As per paragraph 16 of the [appellant's] written submissions:

> '*16. The other main issue raised in the claim is mitigation of damages. The Arbitrator having accepted that the respondent failed to mitigate their loss proceeded to 'reduce' the claim by 20%. At the hearing of the Fixed Date Claim Form it will be submitted that the Arbitrator failed to assess the proper loss to the Respondent especially in circumstances in which if they had properly mitigated they would have suffered no loss.'*

> In oral submissions this was expanded. It was argued that, as the evidence demonstrated that the Ministry of Justice was prepared to offer to the [respondent] a contract on the same or similar terms, the arbitrator ought to have made no award for damages.
>
> [17] It is clear to me that the complaint is about the arbitrator's factual finding. Inherent in his assessment of a 20% reduction for mitigation is an assessment of probabilities. The arbitrator having correctly stated the principle was, on the evidence, satisfied neither that the possibility to mitigate was 100% certain nor that the effort to mitigate would have been 100% effective. That assessment was one of fact not law." (Italicised as in original)

[52] It is useful to consider the pronouncements of this court on the issue. In **Traille Caribbean v Cable and Wireless Jamaica Ltd**, at para. [154], Brooks JA (as he then was) stated:

> "[154] Another key feature of mitigation is that the duty is on the negligent party to show that the injured party failed to take a reasonable step to mitigate the losses. Phillips JA, in **Sinclair,** distilled this principle at paragraph [38] as follows:
>
> > 'It is important to note too that **it is settled law that the onus lies on the negligent defendant to show that the claimant ought, on the facts, reasonably to have pursued some course of action, which he did not, in order to mitigate his loss. Although the claimant does not have to take the most 'efficacious' course, the defendant must put forward a 'concrete case' to demonstrate what the claimant might reasonably have done but failed to do.** The failure to mitigate does not of course bar any claim at all for damages under the particular head in question (per Laws LJ in **Lee James Leonard Samuels**, **TG Motors Ltd v Michael Benning** [2002] EWCA Civ 858). The question of mitigation of damages is, however, a question of fact not law (see **Payzu** v **Saunders**

> [1919] 2 KB 581)." (Emphasis as supplied in extract)

[53] In **National Transport Co-Operative Society Ltd v The Attorney General**, an earlier decision of this court, Morrison JA (as he then was) stated:

> "[50] The innocent party must therefore take all reasonable steps to mitigate the loss flowing from the defendant's wrong and he will not be allowed to recover damages in respect of any part of his loss which is really due not to the breach, but to his own failure to behave reasonably after the breach (Anson's Law of Contract, 28th edn, page 614) The governing criterion is reasonableness, which is a question of fact dependent upon the particular circumstances of each case, not of law, and the burden of proving that a claimant failed to take reasonable steps in mitigation rests upon the defendant (**Payzu Ltd v Saunders** [1919] 2 KB 581). This burden, as Professor Furmston puts it (in Cheshire, Fifoot and Furmston's Law of Contract, 15 edn, page 780), 'is by no means a light one, for this is a case where a party already in breach demands positive action from one who is often innocent of blame."

[54] It is apparent that the learned judge's assessment of the arbitrator's treatment of the issue of mitigation of the damages was entirely accurate. The respondent could not recover damages in respect of any part of its loss that was due to its failure to behave reasonably after the breach. The assessment thus became one fact, not of law. The appellant's attempt to show that the learned judge had erred in his findings on this issue was misconceived, and grounds 4 and 5 are accordingly unmeritorious and must fail.

Issue 3: The finding that the arbitrator, on the face of the award, expressly determined the issues that were before him (ground 6)

The submissions

For the appellant

[55] Mrs Mayhew submitted that there were no specific questions of law or facts set out for the arbitrator to decide in the agreement submitted to him, but rather the dispute was put before him for his resolution in very general terms. As such, she contented, the

learned judge was clearly wrong when he concluded that the matters complained of in the fixed date claim form were the very issues put to the arbitrator to decide. She referred to **NHT v YP Seaton** to support this submission.

[56] Queen's Counsel further submitted that even if the matters complained of were the very matters that the arbitrator was called upon to decide, there was no absolute bar to the setting aside of the award if an error of law was made. She noted that the appellant complained that the construction of the term 'better amenity' was not in accordance with the law and, therefore, there was an error in its face. She contended that even if the issue was a specific question of law put to the arbitrator, which it was not, there was an error of law in the construction of the agreement by the arbitrator that was repugnant to the guidelines of Lord Hoffmann in **Investors Compensation Scheme v West Bromwich Building Society**. She submitted that the court therefore had jurisdiction to set it aside.

For the respondent

[57] Mr Leiba submitted that the common law principle that empowered the court to set aside the award of an arbitrator was not without limitations. He noted that in **FR Absalom Limited v Great Western (London) Garden Village Society Limited** [1933] AC 592, the House of Lords acknowledged that the court's jurisdiction to set aside the award of an arbitrator ought not to apply where the error on the face of the record related to a specific legal question referred to the arbitrator for decision.

[58] Counsel pointed out that the respondent specifically referred the single legal point in issue to the arbitrator in the following terms:

> "Whether [the appellant's] termination of the Agreement in the circumstances constitutes a breach of contract entitling [the respondent] to compensation."

Counsel further pointed out that the appellant had joined issue with the respondent on this ground and sought to defend the terms of the termination. Counsel submitted that, on that basis, the court ought not to exercise its common law jurisdiction to review the

award of the arbitrator on the specific legal question that the parties had agreed to. Counsel's conclusion on this issue was that the appellant was not at liberty to challenge that award simply on the basis that they disagreed with the outcome.

Discussion and disposal

[59] It is important that the full context of the finding of the learned judge that is being challenged is outlined. At para. [18] he stated:

> "[18] There is a further reason to dismiss the Fixed Date Claim. This is because it is manifest, on the agreement to arbitrate, on the statements of case filed and on the arbitrator's statement of the issues before him, that the matters complained of in the Fixed Date Claim were questions the arbitrator had been asked to decide. They were not tangential to the result. As indicated,…where the alleged error of law is central to the issue the arbitrator was asked to determine the court ought not to interfere, see also ***National Housing Trust v YP Seaton & Associates [2015] UKPC 43;(2015) 162 Con LR 117@134 para [34]***. The parties agreed that the arbitrator would, as between them, finally resolve issues related to the interpretation of the agreement and damages including the issue of mitigation. A submission that the arbitrator was not asked to construe the contract, even though such construction was necessary for his decision, is untenable, see **Government of [Kelantan] v Duff Development Company [Limited]** [[1923 AC 395] at page 418, per Lord Parmoor:
>
> > *'In the present appeal it was argued by the counsel on behalf of the appellants that the question of construction of the deed had not been specifically referred to the arbitrator, although the construction of the deed was absolutely necessary for the determination of the disputes which had been referred to him'.*
>
> Save in a most egregious case of injustice or absurdity, the arbitrator's decision on the meaning of a contact and the consequences flowing from its breach should, where these are the issues he was asked to determine, be allowed to stand. It creates no binding precedent and applies, in the final analysis,

> to no one except the parties who agreed to be bound." (Italicised as in the original)

[60] At para. [10], the learned judge had referred to Halsbury's Laws of England, 4th edition, Volume 2, para. 623, and had placed emphasis on the following:

> "If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and, where the question referred for arbitration is a question of construction, which is generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is an error in law which may be ground for setting aside the award." (Emphasis as supplied in extract)

[61] It seems to me that there can be no issue with the correctness of the learned judge's statement of the applicable principle on which he had relied. The challenge to his decision appears to be more related to how that principle was applied. As indicated, Queen's Counsel, on behalf of the appellant, had contended that no specific questions of law or facts were set out in the arbitration submission agreement for the arbitrator to decide. Hence, she urged that the learned judge was wrong to find that the matters in the fixed date claim form were the same as those put to the arbitrator to decide.

[62] It is, however, useful to note that the matter the arbitrator was being asked to decide was, in fact, expressed in general terms in the recitals as follows:

> "a) The [respondent] and the [appellant] have an unresolved legal dispute out of a commercial agreement relating to the rental of premises located at 61 Constant Spring Road, Kingston 8 in the parish of Saint Andrew."

The resolution of this legal dispute, of necessity, would involve a consideration of the commercial agreement and a determination of its terms. All questions flowing from such an exercise would, as the learned judge correctly stated, not be tangential to it.

[63] The learned judge also referred to the statements of case filed, and the arbitrator's statement of issues, in arriving at the conclusion that the matters complained of in the fixed date claim were questions the arbitrator had been asked to decide. In the statement of case, the respondent had included the following points of claim:

> "16. The true reason and/or purpose for [the appellant's] termination of the Agreement was to pursue a preferred arrangement for the Property with the Ministry of Justice. The reason for termination as set out in the Notice to Quit is a calculated misrepresentation intended to circumvent [the appellant's] obligation to compensate [the respondent] for unilateral termination of the Agreement in contravention of the termination provisions thereof….
>
> 17. The Agreement does not provide for unilateral termination by [the appellant] in the circumstances …. The 'better amenity' of a subsequent tenant would not qualify as a ground for termination under Clause 5 of the Agreement as a matter of law....
>
> 18. [The appellant's] termination of the Agreement in the circumstances constitutes a material breach of contract by [the appellant] entitling [the respondent] to compensation from [the appellant] for all associated loss and damage flowing from [the appellant's] breach of contract."

[64] The respondent gave the following as the point in issue:

> "20. Whether [the appellant's] Termination of the Agreement in the circumstances constitutes a breach of contract entitling [the respondent] to compensation."

[65] The appellant, in its amended statement of defence to claim, made no admissions or denials of much of the assertions set out by the respondent in its statement of claim.

The appellant expressly set out what it meant by requiring the site for the better amenity of adjoining land. Significantly, the amended statement of defence concluded with the following:

> "9. With regard to paragraph 20, the [appellant] says the points of issue are to be determined in accordance with the pleadings.
>
> 10. With regard to [the] relief sought, [the appellant] denies that the [respondent] is entitled to the reliefs as set out or at all. In the alternative, the [appellant] says the [respondent] is required to provide strict proof of any damages claimed, and says further that [the respondent] is required to mitigate any loss claimed."

[66] The issues in dispute that were identified by the arbitrator, as set out in para. [11] herein, were as follows:

> 1. Whether the commercial agreement between the respondent and the appellant was valid?
>
> 2. Whether the erection of the hoarding was a condition precedent to the commercial agreement?
>
> 3. Whether the appellant's termination of the commercial agreement constitutes a breach of contract?
>
> 4. Whether the respondent suffered any loss or damage as a result of the appellant's termination of the commercial agreement?

[67] It seems to me that the learned judge was entirely correct in concluding that, from all the documents before him, the matters that the arbitrator had been asked to decide were the same as the issues complained of in the fixed date claim. The issues that the appellant identified in the fixed date claim as errors of law on the face of the record concerned the construction of the terms of the agreement and mitigation, which

necessarily had to be determined by the arbitrator in resolving the dispute. The learned judge, therefore, did not err when he found that this conclusion was another basis for him to decline interfering with the award. Ground 6 must accordingly fail.

Issue 4: The learned judge erred in dismissing the claim (ground 7)

[68] Mrs Mayhew advanced no submissions specific to this ground. It is, however, pellucid that the fact that the other grounds were found to be without merit must mean that the learned judge was correct in the exercise of his discretion in dismissing the claim, there being no reasonable ground for bringing the claim.

Conclusion

[69] Based on the above reasoning, I would therefore dismiss the appeal. We heard no submissions on costs and I can find no basis to depart from the general principle that costs follow the event. Unless submissions proposing a contrary order are filed and served within seven days of the date of this order, I propose that costs be awarded to the respondent to be agreed or taxed.

D FRASER JA

[70] I have read in draft the judgment of my sister P Williams JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

SIMMONS JA

[71] I too have read the draft judgment of my sister P Williams JA. I agree with her reasoning and conclusion and have nothing to add.

P WILLIAMS JA

ORDER

1. The appeal against the decision of Batts J delivered on 14 November 2018 is dismissed.

2. Unless submissions proposing a contrary order are filed and served within seven days of the date of this order, costs to the respondent to be agreed or taxed.