[2019] JMCA Civ 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 45/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS P (AG)
THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN	**MAYBERRY INVESTMENTS LIMITED**	**APPELLANT**
AND	**BRIDGETON MANAGEMENT SERVICES LIMITED**	**RESPONDENT**

Jerome Spencer instructed by Patterson, Mair, Hamilton for the appellant

Ransford Braham QC and Miss Kimberly Morris instructed by BrahamLegal for the respondent

21, 22 January and 15 March 2019

PHILLIPS P (AG)

[1] I have read in draft the detailed and comprehensive judgment of my brother Fraser JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

EDWARDS JA

[2] I too have read the draft judgment of my brother Fraser JA (Ag) and agree with his reasoning and conclusion.

FRASER JA (AG)

Background

[3] The appellant, Mayberry Investments Limited ('MIL'), and the respondent, Bridgeton Management Services Limited ('BMSL'), entered into two Client's Opening Margin Agreements for accounts held by BMSL with MIL. The first agreement was on 14 September 2004 for account 709246 (Margin Agreement 1) and the second was in June 2005 or 2006 for account 700083 (Margin Agreement 2). These agreements permitted BMSL, as an investor, to borrow against the value of the eligible securities in the accounts to purchase or sell securities. The agreements included a margin maintenance requirement which stipulated that BMSL had to maintain a certain market value in these accounts, failing which they would be subject to a "margin maintenance call" by MIL. A margin maintenance call requires an investor to repay debt owed in cash or deposit, or to sell sufficient securities to achieve the margin maintenance requirement.

[4] The Margin Rate, which is the interest rate to be charged on Margin Agreement 1, is stated at clause 7 of the agreement. It states:

> "I agree that a Margin Rate based **on the current 30 (Thirty) Day Bank of Jamaica Treasury Rate plus 5% (+Five percentage points)** be charged against my account for the period of time that the margin position is held with MIL. These and any other charges aforementioned will be applied monthly and interest is calculated on a compounded basis. MIL may, at its discretion, revise its Margin Rate agreed to in this contract whenever deemed necessary, by advising me in writing." (Emphasis supplied)

[5] As it relates to Margin Agreement 2, clause 7 contains details of the applicable Margin Rate. It states that:

> "I agree that a Margin Rate based on **the current 365 (Three Hundred and Sixty-Five) Day Bank of Jamaica Treasury Rate plus 5% (+Five percentage points)** be charged against my account for the period of time that the margin position is held with Mayberry. These and any other charges aforementioned will be applied monthly and I further understand and agree that interest is calculated on a compounded basis. Mayberry may, at its discretion, revise its Margin Rate agreed to in this contract whenever deemed necessary, by advising me in writing." (Emphasis supplied)

[6] From 15 June 2005 onwards, BMSL contended that MIL had, since September 2004, incorrectly applied a higher margin rate than applicable under the margin agreements. MIL maintained that the relevant rate was 21.5% and BMSL that it was 18.5%. The effect of the difference in rates was significant. Based on the higher rate applied by MIL, BMSL was determined to be in default entitling MIL to make margin calls or sell off stocks to restore the margin maintenance requirement. BMSL, however, contended that the lower rate should have been applied, in which event, it would not have been in default and no margin call or sale would have been required.

[7] Despite several exchanges through correspondence and otherwise over a period of five years, the disagreement concerning the rates proved resistant to resolution. Finally, on 1 July 2010, the parties met and had discussions which were later reduced into writing in a 'without prejudice' letter from MIL to BMSL dated 19 August 2010. The effect and outcome of the meeting of 1 July 2010, and the subsequent letter are,

however, now also in dispute, with BMSL maintaining that a settlement was arrived at, while MIL contends it was a proposal that never ripened into an agreement.

[8] Paragraphs 1 and 2 of MIL's letter of 19 August 2010 read as follows:

> "1. I refer to the meeting of July 1, 2010 at our offices which was attended by your John Jackson and your attorney Norman Minott. Mayberry, as you will recall was represented by Sharon Harvey-Wilson and Trevor Patterson.
>
> 2. At the meeting, you argued that there were no 30-day BOJ treasury rate or 365-day BOJ treasury rate as provided for the margin agreements. In the interest of an amicable resolution, it was agreed that the following rates would be used:
>
> (a) first, the comparable GOJ treasury bill rate for the same tenor;
>
> (b) failing (a) above, the BOJ repo rate for the same tenor would be used;
>
> (c) interest, as calculated above, based on one of the above rates as applicable would be compounded at monthly rests as provided for in the Agreement."

[9] The letter also outlined that the margin rates had been adjusted on 1 March 2008 to 22% per annum, on 8 December 2008 to 25% per annum and on 1 April 2010 to 20% per annum. The letter was accompanied by two sets of spreadsheets; "A" and "B". The set marked "A" showed a) the margin rates initially applied to both accounts; b) the rate used based on paragraph 2 of the letter; and c) the actual calculation and relative adjustments arising from the use of the new rates. The set marked "B" compared the

margin maintenance threshold with the recomputed loan balance. The letter ended with a demand for amounts due based on the terms of the letter.

[10] Subsequent to this letter, disputes arose concerning whether the new interest rates were applied to Margin Agreement 1 and whether when the new rates were applied, BMSL was in fact in default, entitling MIL to make a margin call and sell stocks belonging to BMSL.

[11] On 29 June 2016, BMSL served a Notice of Arbitration Proceedings on MIL, referring the disputes, differences and controversies relating to the agreements to arbitration.

[12] MIL, through their attorneys-at-law, responded on 12 July 2016 indicating that any claim flowing from disputes that arose in 2004 and 2005, were statute barred and as such it would not submit to arbitration. BMSL disagreed that the claim was statute barred and pursuant to section 6 of the Arbitration Act 1900 ('the Act of 1900'), by letter dated 13 July 2016, served on MIL a Notice to Appoint Arbitrator requiring R Anderson J (retired) to be appointed as the arbitrator. The notice also indicated that failure to appoint, or concur in the appointment of the arbitrator, would result in an application being made to the Supreme Court for an order to effect the appointment.

The proceedings in the Supreme Court

[13] MIL failed to concur in the appointment of the arbitrator and on 30 September 2016, BMSL, by fixed date claim form, applied to the Supreme Court to appoint R Anderson J (retired) as the arbitrator to settle the disputes and controversies between

the parties. MIL, in response, contended that the claim was an abuse of the process of the court and should be struck out.

[14] Before Batts J, BMSL argued that the arbitrator should be appointed as the claim was not statute barred and, in any event, the determination as to whether it was, should be made at the arbitration proceedings. In response, MIL submitted that the claim was statute barred and therefore appointing an arbitrator would be an exercise in futility. MIL also contended that the arbitrator could not be asked to determine issues relating to his own jurisdiction. Therefore, since the question of whether the claim was time barred would depend on whether the parties had entered into a settlement agreement, the issue was not for the arbitrator to decide. MIL also submitted that section 6 of the Act was not mandatory and, in the circumstances, the learned judge should exercise his discretion by declining to make the appointment sought.

[15] After considering the evidence and submissions of counsel for both parties, on 7 April 2017 Batts J made the following orders:

> "1. Pursuant to Section 6 of the Arbitration Act The Honourable Mr. Justice Roy Anderson (retired) is appointed sole arbitrator to determine the matters in dispute between the parties or and concerning the construction, performance or breach of the Margin Agreements dated the 12th September 2004 and 16th September 2006 [sic] or any other agreements entered into between [the Respondent] and [the Appellant].
>
> 2. Liberty to Apply.
>
> 3. Costs to the [Respondent] to be agreed or taxed."

[16] It should be noted at this point that there is some conflict concerning in which year Margin Agreement 2 was executed. In a letter to Mrs Harvey-Wilson dated 21 August 2010, Mr Jackson, principal in BMSL, referenced both years. In a follow up letter to her dated 29 August 2010, he indicated that the agreement was executed in mid-June 2006. In his affidavit filed 30 September 30 2016, he however stated the agreement was entered into 16 June 2005. At paragraph 7 of his judgment, and in the first of the final orders made, Batts J refers to this agreement as being in 2006. As dates are of some significance in this matter, at the appropriate time the discrepancies in the date may need to be settled.

The grounds of appeal

[17] Before this court, MIL challenged the decision of Batts J to appoint the arbitrator on the following grounds:

> "(1) The Learned Judge erred as a matter of fact in his finding that the dispute that arose between the parties concerned contracts called margin agreements.
>
> (2) The Learned Judge's finding that there was no challenge to the terms or existence of the arbitration clause and thus the arbitrator would not therefore be called upon to determine the existence of the clause or facts related to its existence was factually and legally incorrect. **[This ground was not pursued.]**
>
> (3) The Learned Judge erred in his interpretation of the authorities cited by the Appellant, including page Mustill's **Law and Practice of Commercial Arbitration** (second edition), **Attorney General for Manitoba v Kelly and others** [1922] 1 AC 268 and **Goldsack v Shore** [1950] KB 708, and thereby wrongly concluded that those authorities were inapplicable based on the issues which arose on the hearing of the claim.

(4) In circumstances where the scope of the intended arbitrator's jurisdiction was being challenged by the Appellant, the Learned Judge fell into error when he found that it was for the proposed arbitrator to consider if the relevant exchange of correspondence created a new arrangement, agreement or acknowledgment when that was a matter for the court to decide as a necessary precondition for the appointment of an arbitrator under the relevant agreements.

(5) The Learned Judge's finding that there was no doubt or confusion as to the extent of the intended arbitrator's jurisdiction was factually incorrect as the scope of the arbitrator's jurisdiction was one of the central issues raised by the Appellant at the hearing.

(6) Based on the wording of the relevant arbitration clauses, it was an error of law for the Learned Judge to find that the determination of whether there was a settlement agreement was a matter for the arbitrator to resolve.

(7) The Learned Judge erred in finding that the parties had manifested a desire to have all disagreements determined by arbitration." (Emphasis supplied)

[18] MIL sought orders including a declaration that there was no settlement agreement between the parties or, alternatively, that the determination of whether there was a settlement agreement between the parties be remitted to the Supreme Court for resolution.

The issues for determination

[19] The issues for determination in this appeal are:

A. Whether the learned judge erred as a matter of fact when he found that the dispute which arose between the parties concerned contracts called margin agreements;

B. Whether the learned judge was correct in holding that the arbitrator once appointed, would be empowered to determine if he has jurisdiction to conduct arbitration proceedings, given the terms of the arbitration clauses in Margin Agreements 1 and 2 and the nature of the dispute between the parties;

C. If the learned judge was correct that the arbitration clauses in this case made it possible for the arbitrator to determine his own jurisdiction, whether in the circumstances of this case, his decision to appoint the arbitrator was a wrongful exercise of his discretion; and

D. Whether the applicability of the limitation defence, that was raised before the arbitrator was appointed, was a matter for the court or the arbitrator to decide.

The submissions in summary

The appellant's submissions

[20] The principal submission advanced on behalf of MIL relates to grounds 3–6 of the grounds of appeal. Mr Spencer, counsel for MIL, contended that the learned trial judge erred as a matter of law when he determined that the relevant arbitration clauses were, on their true construction, wide enough to enable the appointed arbitrator to determine issues concerning his jurisdiction.

[21] He argued that, based on the wording of the clauses, access to the arbitrator's jurisdiction was dependent on the existence of a settlement agreement having been arrived at by the parties in 2010. There was, however, a dispute between the parties as to whether their discussions had resulted in an agreement. BMSL says there was an agreement while MIL says a) there was no resulting agreement and b) alternatively, that even if an agreement had initially been reached, it was subsequently repudiated by BMSL. Therefore, in any event, there was no agreement in being. Counsel recognised that the significance of whether or not there was a settlement agreement did not only go to jurisdiction, as, if there was an agreement, it would also mean that the claims may not be statute barred.

[22] Counsel submitted that the question of whether or not there was a settlement agreement between the parties was a question for the court and not for the arbitrator to determine. He relied in his written submissions on the cases of **Attorney General for Manitoba v Kelly and others** [1922] 1 AC 268, **Goldsack v Shore** [1950] KB 708 and an extract from The Law and Practice of Commercial Arbitration in England, 2nd edition by Mustill and Boyd, Butterworths 1989, page 114. In oral submissions, counsel embraced the authorities relied on by Queen's Counsel for BMSL, asserting they supported MIL's position; these being the case of **Ashville Investments Ltd v Elmer Contractors Ltd** [1988] 2 All ER 577 ('**Ashville**') and excerpts from pages 117–118 of the text previously cited.

[23] Mr Spencer also highlighted that section 19(1) of the new Arbitration Act, 2017 which entered into force on 21 June 2017, gives an arbitral tribunal power to rule on its

own jurisdiction, which he said was not previously the case, unless the parties expressly so agreed or that power arose by necessary implication. As this matter is governed by the Act of 1900, he argued that the common law position remained applicable where, unless indicated otherwise in the arbitration agreement, matters concerning the jurisdiction of the tribunal were the purview of the courts and not the tribunal itself.

[24] Counsel advanced that as MIL had not brought a counter claim in the action seeking the appointment of the arbitrator, and for a declaration that there was no settlement agreement, if this court agreed with his submission, the matter would need to be remitted to the Supreme Court for that issue to be determined.

[25] Counsel rightly conceded that the scope of the arbitration clauses went beyond the existence of agreements, in so far as they referred to "any transaction"; therefore, on that basis, it could be argued that the arbitrator would have had jurisdiction depending on the interpretation of "any transaction". He also acknowledged that under section 6 of the Act of 1900, the court had a discretion to appoint an arbitrator where the parties have not concurred in the appointment of one. He however maintained that, in the particular circumstances of this case, the court should not have made the appointment as the transactions relate to matters going back to the years 2004–2005, and were therefore plainly statute barred. That being the case, counsel submitted it was an inappropriate exercise of discretion by the learned trial judge to refer the dispute to arbitration, in a context where the issue of the limitation defence was raised even before the notice was issued by BMSL. Accordingly, on all these bases, Mr Spencer invited the court to hold that the entire decision of the learned trial judge was incorrect and should be set aside.

The respondent's submissions

[26] Mr Braham QC, for BMSL, framed his submissions under three broad headings: the jurisdiction point, the limitation point and the substantive question of the existence of a settlement agreement.

The Jurisdiction Point

[27] In relation to the determination of jurisdiction by the arbitrator, Mr Braham submitted that an arbitrator is entitled and empowered to consider and determine his jurisdiction, including the facts necessary to give rise to the existence of the jurisdiction; a position which he stated has been confirmed by section 19(1) of the Arbitration Act, 2017.

[28] Queen's Counsel noted however, that after an arbitrator makes an award, it was open to review in the courts, a part of which could include a challenge to his jurisdiction. See **The National Housing Trust v YP Seaton & Associates Company Ltd** [2015] UKPC 43 and The Law and Practice of Commercial Arbitration in England, pages 114 and 118.

[29] In order for MIL to succeed, Mr Braham contended that it would have to be shown that the learned trial judge's determination that the question of jurisdiction can be decided by the arbitrator was plainly wrong; which in his submissions it was not. He contended further that when a judge was asked to consider whether an arbitrator has jurisdiction, the judge could either choose to do so or leave the issue for the determination of the arbitrator. He highlighted that the timing of the challenge to jurisdiction is important, as

in order to determine the issue of jurisdiction in this case, there would have to be findings of facts concerning whether an oral agreement was arrived at and the effect of the subsequent correspondence. This, in a context where it was unchallenged that there was an arbitration agreement. The challenge, he submitted, was whether a settlement agreement had been arrived at and, if so, had it been subsequently repudiated.

[30] Mr Braham further submitted that the settlement agreement (which he maintained was extant), was effectively an amendment of the main contract, to supply the interest component which was lacking. It, therefore, revived any contract that went before, which might otherwise have been affected by the limitation period. For the determination of whether or not an agreement existed, all the correspondence, the spreadsheets which were not before the learned trial judge, and perhaps oral evidence would have to be considered.

[31] Mr Braham advanced that in those circumstances, the arbitrator would be best placed to hear all the evidence and make the determination. Queen's Counsel cited an extract from Chitty on Contracts, 31st Ed, Vol II, Specific Contracts, at page 162 and the case of **Christopher Brown Ld v Genossenschaft Oesterreichischer Waldbesitzer Holzwirt-Schaftsbetriebe Registrierte Genossenschaft Mit Beschrankter Haftung** [1953] 3 WLR 689 ('**Christopher Brown**').

The Limitation Point

[32] Mr Braham submitted that considering the two Margin Agreements, it was significant that, in respect of both, the parties chose to incorporate arbitration clauses

indicating that whatever dispute arose between them should be settled by arbitration. He argued the court was right to have regard to the preferred method of dispute resolution agreed to by the parties. Queen's Counsel cited **Belize Natural Energy Limited v Maranco Ltd** [2015] CCJ 2 (AJ), paragraph 16, which he pointed out was relied on by the learned trial judge.

[33] Queen's Counsel further advanced that the limitation defence was similar to other defences such as repudiation or mistake, in that it involves issues of mixed fact and law. The arbitrator would have to decide if a settlement agreement had been arrived at and whether it had been repudiated. Though it was being advanced that if there was an agreement it had been repudiated, a contract does not necessarily come to an end because of repudiation, as repudiation had to be accepted. Therefore, the issue of repudiation should properly be included in points of defence.

[34] Accordingly, Queen's Counsel argued, it was appropriate for the court to have left the limitation issue to be determined by the arbitrator after he hears all the relevant evidence. It is possible that he could actually find that some aspects of the claim were statute barred and others were not. Therefore, it would be dangerous for the court to foreclose that issue on incomplete facts.

The Substantive Question

[35] Mr Braham submitted that whether a dispute is subject to arbitration is a matter of interpretation of the arbitration clause itself, and parties can choose to give the

arbitrator wide powers. Queen's Counsel cited **Ashville** at pages 581-582, 588-589 and 591-592.

[36] Queen's Counsel argued that the term "transaction" in the arbitration clauses was very wide. He relied on the case of **Goldsack v Shore** cited by MIL to bolster the point that the word "transaction" could refer to something other than an agreement in a legal context, and is thus wide enough to include both contracts and matters that do not arise under a contract. Mr Braham went further to point out that the arbitration clause in Margin Agreement 1 spoke to "…all controversies which may arise between us concerning any transaction…" and the clause in Margin Agreement 2 referred to, "…all disputes, differences or controversies which may arise between us concerning any transaction…". Queen's Counsel contended that "controversies" was wider than "disputes" and reflected an intention by the draftsman to submit to arbitration other issues that may arise outside of a contract. This, in the context of a margin agreement where instructions are given everyday to trade in securities, make margin calls and where actions that do not arise out of a contract may affect a party.

[37] Mr Braham also submitted that the breadth of the concept of a "transaction" also had an impact on the question of the limitation defence as, if a relevant transaction did not fall under a contract, then the defence may not apply, even if the cause of action would have been statute barred.

[38] Queen's Counsel then reviewed several bits of correspondence with a view to showing that it was pellucid that the parties had come to an agreement, and that the

dispute was whether that agreement was being properly applied; with BMSL contending that the improper application had led to it suffering loss and damage. Mr Braham, therefore, invited the court to dismiss the appeal with costs so that the arbitration could proceed.

Analysis

The applicable statute and arbitration clauses

[39] The natural starting point is the statute that governs agreements which incorporate arbitration clauses. The Act of 1900 is the applicable statute and so far as is relevant to this matter, section 6 states:

> "6. In any of the following cases-
>
> (a) **where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator**; …
>
> (b) – (d) …,
>
> **any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator**.
>
> If the appointment is not made within seven clear days after the service of the notice, the Court or a Judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference, and make an award as if he had been appointed by consent of all parties." (Emphasis added)

[40] Section 6 therefore provides for circumstances such as occurred in this case, where one party may approach the court to appoint an arbitrator after the parties have failed to

reach an agreement to appoint one. This section was invoked by BMSL based on the arbitration clauses in Margin Agreements 1 and 2. The relevant arbitration clause in each agreement reads as follows:

Margin Agreement 1:

> "The undersigned agrees, and by carrying an account for the undersigned you agree, that **all controversies which may arise between us concerning any transaction or the construction, performance or breach of this or any other agreement between us, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration**. Arbitration is final and binding on all parties." (Emphasis added)

Margin Agreement 2:

> "The undersigned agrees, and by carrying an account for the undersigned Mayberry agrees, that **all disputes, differences or controversies which may arise between us concerning any transaction or the construction, performance or breach of this or any other agreement between us, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration**. The choice of Arbitrator shall be in the first instance chosen from a panel of three persons by Mayberry from whom the undersigned shall select one." (Emphasis added)

Issues

[41] The nature of this case is such that it will be convenient to address multiple issues and multiple grounds together given the extent of overlap. Issues A – C touch and concern almost all aspects of grounds 1 and grounds 3 – 7 filed by MIL, while issue D specifically deals with whether in light of MIL's indication that it would be relying on the

"limitation defence", the learned trial judge should have exercised his discretion differently, which relates particularly to grounds 4 and 6.

Issues A – C (Ground 1; Grounds 3 – 7)

A. **Whether the learned judge erred as a matter of fact when he found that the dispute which arose between the parties concerned contracts called margin agreements;**

B. **Whether the learned judge was correct in holding that the arbitrator once appointed, would be empowered to determine if he has jurisdiction to conduct arbitration proceedings, given the terms of the arbitration clauses in Margin Agreements 1 and 2 and the nature of the dispute between the parties;**

C. **If the learned judge was correct that the arbitration clauses in this case made it possible for the arbitrator to determine his own jurisdiction, whether in the circumstances of this case, his decision to appoint the arbitrator was a wrongful exercise of his discretion.**

[42] The contention of MIL is that, under the terms of the arbitration clauses in the two margin agreements, the arbitrator would only be clothed with jurisdiction if there was an operative settlement agreement between the parties arrived at in 2010. It was argued that the court, and not the arbitrator, should determine whether there was such an agreement, as the arbitrator had not been expressly given the power to determine his own jurisdiction.

[43] Unlike the Arbitration Act, 2017, the Act of 1900 does not explicitly address the issue of how challenges to the jurisdiction of the arbitrator should be resolved. Therefore,

reliance has to be placed on the common law. At common law, this issue has been considered in a number of cases. It is clear that, subject to statutory provisions, the terms of the agreement under which the parties agree to submit to arbitration circumscribe the powers of the arbitrator. In **Attorney General for Manitoba v Kelly & Others**, an action was brought against building contractors to recover sums improperly paid under a contract and for damages. A consent judgment was entered into which included that the plaintiff should recover, among other sums, "all loss to the plaintiff by reason of defective workmanship and materials" and that certain other sums should be set off against that loss. The judgment also provided that the sums to be debited and credited to the parties should be determined by two appraisers and any matter upon which they differed should be referred to an umpire whose decision should be final. An umpire was appointed and he made a report.

[44] This report was challenged by the building contractors on the ground that the umpire had exceeded his powers by including elements of "loss" not submitted to his jurisdiction. Having examined in detail the contents of the report under the several heads of loss under which the umpire made his calculation, the Judicial Committee of the Privy Council held that the award had been made within the jurisdiction conferred by the submission. Further, that there being no error apparent on its face, it could not be questioned in fact or law. At page 275, Lord Parmoor writing for the Board had this to say:

> "The jurisdiction of the umpire is derived solely from the agreement of the parties contained in the consent judgment."

[45] Continuing at page 276, regarding the question of the determination of the umpire's jurisdiction where that was the subject of dispute, he stated:

> "Whenever there is a difference of opinion between the parties as to the authority conferred on an umpire under an agreed submission, the decision rests ultimately with the Court and not with the umpire: **Produce Brokers Co v Olympia Oil and Cake Co** [[1916] 1 AC 314, 327, 329]. It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties."

[46] At first blush, MIL may take comfort from this case. However, it should be noted that in that case, the determination of the question of jurisdiction occurred after the award was made and then challenged. This is significant as while it is accepted that a jurisdictional point may be taken at any stage and at any level of adjudication, there may be some circumstances in which facts, and in some cases the relevant law, have to be ascertained and interrogated before the issue of jurisdiction can be settled. In **Attorney General for Manitoba v Kelly & others**, it was only after the umpire had conducted his assessment that the court determined, based on what he found and the heads under which he reported the loss, whether such loss was captured within the submission.

[47] That is why in the quotation extracted, it is indicated that, whenever there is conflict concerning the jurisdiction conferred on an umpire under an agreed submission, "the decision rests ultimately with the Court". Ultimately does not necessarily mean initially. Initially, under an agreed submission, or arbitration clauses as exist in the instant

case, the arbitrator may, in carrying out his function, admit evidence of and consider relevant facts to determine whether particular matters fall within the submission or arbitration clauses. In the instant case, it appears a wide range of correspondence and possibly oral evidence will need to be examined and assessed by the arbitrator to make that determination. It will then be for a court to decide whether the arbitrator's determination was correct, if it is later challenged by either party.

[48] **Produce Brokers Co Ltd v Olympia Oil and Cake Co** [1916] 1 AC 314 ('**Produce Brokers**'), referred to by Lord Parmoor in the extract, was decided six years prior to the case of **Attorney General for Manitoba v Kelly and others** by a Board of which Lord Parmoor was also a member. It was held unanimously that, under a clause in a contract referring to arbitration any dispute arising under the contract, the arbitrator was competent to finally determine the existence of a custom affecting the rights and obligations of the parties under the contract, where such custom is not inconsistent with the terms of the contract.

[49] Lord Atkinson at pages 323 to 324 stated that:

> "Prima facie one would suppose that authority to decide disputes arising out of a contract necessarily conferred authority to decide what were the terms of that contract. It would appear to me to be impossible for any judge or arbitrator to determine whether any particular dispute arose out of a contract unless and until he knows what that contract is. This involves that the arbitrator must in such a case construe the contract which the parties entered into, and thus determine what they meant to express by the language they have used. If, for instance, in a contract relating to any art or trade or business the parties use terms having technical meanings in that art, trade, or business, then those terms

> should prima facie have that meaning attributed to them, simply because the parties to the contract presumably used those terms in their technical sense. In such a case it would appear to me that arbitrators or an umpire would, under such a submission as exists in this case, necessarily have authority to determine what was the technical meaning of those technical terms."

[50] In the instant case, it is appreciated that the contention of MIL is that there is disagreement as to whether there exists an operative contract arrived at in 2010. But, there is no disagreement that there were two arbitral clauses under which the parties agreed to submit to arbitration included in the two Margin Agreements.

[51] Perhaps most significantly however, **Produce Brokers** was like **Attorney General for Manitoba v Kelly & others**, a case where the competence of the arbitrators to make a decision was unsuccessfully challenged after they had completed the arbitration. Hence, they do not answer the question whether the jurisdiction of the arbitrator should be determined before the parties submit to arbitration, which is a central issue in this appeal.

[52] MIL sought further support from The Law and Practice of Commercial Arbitration in England where at page 114 under the heading "Issues as to facts founding the jurisdiction", it is stated:

> "Just as an arbitrator cannot make a binding award as to the existence of a contract which, if it does exist, is the source of his authority to act, so also does he lack the power to make a binding decision as to the existence of the facts which are said to found his jurisdiction. Thus, where a building contract provided that an arbitration should not take place until after

> completion of the works, it was held that the parties were not bound by a decision of the arbitrator that the works has been completed. Similarly, if the jurisdiction of the tribunal depends upon the giving of a notice, the tribunal has no power to decide whether an appropriate notice has been given."

[53] In my view, this extract does not support the conclusion that an arbitrator should not be allowed to proceed to consider the issues submitted for arbitration, because to do so will require him to rule on the existence of a contract, or to investigate facts, to determine if they establish or fall within his jurisdiction. Its import is that whatever decision an arbitrator makes on such jurisdictional points is not binding, as it will necessarily be subject to the final decision of the court, if challenged.

[54] The case of **Goldsack v Shore** provides more obvious support for MIL's position. In that matter, the Agricultural Holdings Act of 1948 in England ('the AHA') provided that disputes concerning certain agreements for the use of land as agricultural land should be determined by arbitration. A relevant dispute having arisen between two parties, an action for trespass was filed in court. The plaintiff claimed that no agreement existed between the parties for the use of his land. There had merely been a tenancy at will or a licence, granted to the defendant, to occupy the land by having sheep on it, which tenancy or licence had been determined.

[55] The county court judge having heard the plaintiff's evidence, decided that the word "agreement" in the AHA had its ordinary non-technical meaning. Therefore, as the plaintiff had at least agreed to grant the defendant a licence, the matter fell to be decided by arbitration and the court had no jurisdiction. On appeal, it was held that the court, and

the court alone, had jurisdiction to determine whether a transaction was an agreement under the AHA in the sense of being a contract for valuable consideration enforceable by law. Therefore, the county judge should have continued the hearing to determine the applicability of the AHA as distinct from its operation. The matter was, therefore, remitted to the county judge to hear further evidence to determine whether an agreement existed or not, which would settle whether the court or an arbitrator had jurisdiction to decide the matter.

[56] Interestingly, the point was raised from the bench during arguments, that in the instant case, the learned trial judge was not himself asked to settle the question of whether the arbitrator would have jurisdiction; the challenge was limited to whether or not the arbitrator should be appointed.

[57] The answer to MIL's position on this issue was carefully nuanced by Mr Braham on behalf of BMSL. He acknowledged that the court always has the power when asked to determine the question of an arbitrator's jurisdiction. He, however, argued that the court could either choose to do so, or leave the issue for the determination of the arbitrator, in circumstances such as exists in the instant case, where the answer to the jurisdictional question will involve the resolution of several factual issues, including technical matters, some of which may require the taking of oral evidence.

[58] Support for this view is found in Chitty on Contracts, 31st Ed, Vol II, Specific Contracts, at page 162 where it is stated:

> "6. JURISDICTION OF THE ARBITRAL TRIBUNAL

> 32-097 **Tribunal can rule on its own jurisdiction.** English law has always taken the view that the arbitral tribunal cannot be the final adjudicator of its own jurisdiction. The final decision as to the substantive jurisdiction of the tribunal rests with the court. However, there is no reason why the tribunal should not have the power, subject to review by the court, to rule on its own jurisdiction. Indeed, such a power (often referred to as the principle of '*kompetenz-kompetenz*') has been generally recognized in other legal systems. It had also been recognised by English law before the 1996 [Arbitration] Act, but section 30 of the Act puts this on a statutory basis. Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement; (b) whether the tribunal is properly constituted; and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. …"

[59] Mr Braham noted that section 30 of the 1996 English Arbitration Act is similar to section 19(1) of the Arbitration Act, 2017, which expressly provides that the arbitral tribunal may rule on its own jurisdiction. Therefore, the implication is that just as the 1996 English Arbitration Act codified the common law, so has section 19(1) of the Arbitration Act, 2017.

[60] The first instance decision of **Christopher Brown** also accords with the position advanced by Queen's Counsel for BMSL. In this case, arbitrators appointed pursuant to the plaintiff's and defendant's submission, contained in a contract between them, made an award ordering the defendants to pay a sum of money to the plaintiffs. The plaintiffs brought an action to recover the award which they alleged the defendants had wrongfully failed to pay. In their defence, the defendants alleged the contract was not binding as

the parties had never been ad idem, from which it would follow that the submission based on the contract was also not binding, thus the award was valueless. Devlin J held that, arbitrators whose jurisdiction is challenged are entitled to make their own inquiries into the question of whether or not they have jurisdiction in order to determine their own course of action, although the result of their inquiry can have no effect on the rights of the parties. At page 693 he stated:

> "It is clear that at the beginning of any arbitration one side or the other may challenge the jurisdiction of the arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties-because that they cannot do-but for the purpose of satisfying themselves, as a preliminary matter whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever on the rights of the parties."

[61] Though initially cited by Queen's Counsel for BMSL, both parties embraced the authority of **Ashville**, the most recent English authority referred to by either party. In

Ashville, a construction contract between a contractor and building owner contained an arbitration clause which provided that any dispute or difference between the parties "as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith" was to be referred to arbitration. Following a dispute that arose between the parties, the matter was referred by the contractor to arbitration alleging mistakes and misrepresentation and asking the arbitrator to rectify the contract and award damages. The owner asserted that the arbitrator did not have the jurisdiction to hear and determine those issues. The issue of jurisdiction having been referred to the court, the judge held that the disputes between the parties had arisen either 'as to the construction' of the contract or 'in connection' with it and therefore the arbitrator had jurisdiction. On appeal by the owner, it was held that:

> "The question whether a dispute between the parties to a contract fell within an agreement to arbitrate was primarily a question of construction of the arbitration clause itself in the circumstances of the particular case. On the true construction of the clause in question the disputes between the parties over a mistake made by one or both parties at the time the contract was entered into or over a misrepresentation or negligent misstatement made by the owner were disputes arising 'in connection' with the contract and therefore fell within the scope of the arbitrator's jurisdiction under the arbitration clause. Furthermore, there was nothing in that clause which precluded the arbitrator from granting rectification or awarding damages if such allegations were made out. The owner's appeal would therefore be dismissed."

[62] It is, therefore, critical that the terms of the arbitration clauses under which the arbitrator was appointed are examined. In Margin Agreement 1, that clause stipulated that "…all controversies which may arise between us concerning any transaction or the

construction, performance or breach of this or any other agreement between us, whether entered into prior, on or subsequent to the date hereof shall be determined by arbitration…". The arbitration clause in Margin Agreement 2 was worded slightly differently stating that "…all disputes, differences or controversies which may arise between us concerning any transaction or the construction, performance or breach of this or any other agreement between us, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration…".

[63] Counsel for MIL submitted that the learned trial judge erred in finding that the parties had manifested a desire to have all disagreements determined by arbitration. He advanced that, if that was the intention, the clause would have been worded widely, for example, like the one in **Produce Brokers** which read:

> "All disputes from time to time arising out of this contract including any question of law appearing in the proceedings…shall be referred to arbitration according to the rules endorsed on this contract…"

[64] The clause in the instant case, he submitted, would then have provided:

> "The undersigned agrees, and by carrying an account for the undersigned, Mayberry agrees, that all disputes, differences or controversies which may arise between us concerning this or any other agreement between us, whether entered into prior, on or subsequent to the date hereof shall be…"

[65] With the exception of the specific reference to the determination of questions of law in the **Produce Brokers** case, both the clause in that case and the clauses in the

instant case, are demonstrably broad. It is does not appear to this court that the alternative formulation proffered by counsel for MIL would necessarily be any wider than what actually exists in the clauses under consideration.

[66] Each word in an arbitration clause has to be examined to determine its meaning. As stated by May LJ in **Ashville** at page 581, '[i]n seeking to construe a clause in a contract…[t]he exercise which has to be undertaken is to determine what the words used mean". Concerning the clauses in the instant case, both counsel acknowledged that "transaction", which is mentioned in both arbitral clauses, is wider than "agreement". Both arbitral clauses also speak to "controversies", with the second agreement adding also "disputes" and "differences". Significantly, both agreements indicated that referrals could be made in respect of "…any transaction or the construction, performance or breach of this or any other agreement between us, **whether entered into prior, on or subsequent to the date hereof**". (Emphasis added.)

[67] In the instant case, it is appreciated that the contention of MIL is that there is disagreement concerning whether there exists an operative settlement agreement arrived at in 2010, without which the arbitrator would have no jurisdiction and, in any event, the claims of BMSL would be statute barred. I will address the issue of the limitation defence later. At this point however, I note that the position adopted by counsel for MIL makes inadequate allowance for i) the fact that "transaction" is wider than "agreement" and ii) more fundamentally, that neither party disputes the validity of the arbitral clauses, as distinct from their applicability.

[68] On the face of these clauses, the parties agreed between themselves to have all controversies (Margin Agreement 1), and all controversies, disputes and differences (Margin Agreement 2), in relation to those margin agreements and future agreements determined by arbitration. That is what I understood Batts J to mean when he said at paragraph 3 of his judgment that "[t]he dispute between the parties concern contracts which are called 'margin agreements'"; and at paragraph 11 where he stated that "[i]n this matter, there is no doubt or confusion as to the extent of the intended arbitrator's jurisdiction. The clause says he is to determine all disputes present and future with respect to the existing agreement and any others to be entered into". The learned judge was saying no more than that the parties had clearly established a mechanism within the agreements they had signed, concerning how they would address disputes. The learned judge was not suggesting it was settled that the arbitrator would necessarily find that he had jurisdiction to conduct the arbitration once seised of the matter. Neither did the learned judge fail to appreciate that central to the determination of that point, would be the question of whether or not a settlement agreement had come into and remained in force.

[69] This, in a context where the learned judge in considering the submission that the claim was time barred, stated at paragraph 8:

> "… It will be in the context of making that determination that the arbitrator may be required to consider if the subsequent exchange of correspondence created a new arrangement, agreement or acknowledgement."

[70] And later at paragraph 11:

> "… If there is a settlement agreement, and a dispute as to its performance, that also will be a matter for the arbitrator to resolve."

[71] The learned judge was merely saying, with which I agree, that based on the wording of the arbitral clauses, it was clear the arbitrator would at least be able to determine if the issues before him fell within his jurisdiction. The determination by the arbitrator, if he has jurisdiction, will be dependent on what facts are established and found proved. Each arbitral clause in this case, therefore, created a "right to refer" to arbitration, once, on its face, the dispute between the parties emanates from matters flowing from the signed agreements. The arbitrator will, however, have to determine, based on the terms of the arbitral clauses, after hearing evidence and submissions, whether the matter referred to him actually falls within his "adjudicatory jurisdiction".

[72] It therefore appears that Mr Braham's submissions on this point are well founded. To succeed, counsel for MIL would have to show not that the learned trial judge could have declined to appoint the arbitrator, but that he should have, and that the exercise of his discretion to appoint the arbitrator was therefore, plainly wrong. Even before the passage of the new Arbitration Act in 2017, the common law position was that while the final determination of the jurisdiction of an arbitrator is for the court, there were circumstances in which it was appropriate for the preliminary determination of that issue to be made by the arbitrator himself — that determination always being subject to the final verdict of the court. The weight of the authorities cited before this court supports that conclusion. With the exception of the case of **Goldsack v Shore**, in all the other

cases, the issue of the arbitrator's jurisdiction was raised after the arbitration, during court proceedings challenging the arbitral award.

[73] The court also has to be alive to the intention of the parties at the time they contract and seek to give expression to that intention. Earl Loreburn in **Produce Brokers** stated at page 320:

> "Parties have a right to prefer what some may consider the imperfect though expeditious wisdom of arbitrators to the slower and more costly justice of His Majesty's Courts."

[74] The arbitrator appointed in this case is a learned retired judge of great acumen and experience. There is therefore no reason to suppose his wisdom would be any less sagacious than that of the courts. With that caveat, the quotation is apt. The pragmatic reality recognised by Earl Loreburn in 1916 still exists today. Accordingly, it is useful to also quote, as did the learned trial judge in his judgment, the opinion of the Caribbean Court of Justice in the case of **Belize Natural Energy Ltd v Maranco Ltd**, paragraph 16, where the court stated:

> "The Court recognises that arbitration is an increasingly preferred method of resolving complex commercial disputes and that it rests in the key principle of party autonomy. Parties to an arbitration agreement make the conscious decision to prefer the prompt, expedient, and final settlement of their disputes through the arbitral process rather than the often protracted process of court adjudication. As it is sometimes put, they choose finality over legality."

[75] The court should, therefore, be slow to assume jurisdiction to the exclusion of an arbitrator, in a circumstance such as this, when the evidence discloses that the parties' intention at the time of contracting provided for arbitration to settle disputes between them. Of course, the court should not decline jurisdiction if it is clear that the arbitrator has no jurisdiction based on the relevant arbitral clause and the nature of the dispute.

[76] Finally, on the question of how the jurisdiction or lack thereof of the arbitrator should best be determined in this matter, the point raised from the bench during submissions is also relevant. MIL brought no cross application at the time BMSL applied before Batts J to have the arbitrator appointed, asking either the learned trial judge himself to determine whether the arbitrator would have jurisdiction or requesting that the matter be placed before another court to facilitate that inquiry. It is only on its appeal that MIL has asked that an order for such a determination in the Supreme Court be made if the appeal is successful.

[77] It therefore all comes down to this. It seems logical that as the law provides an option with regard to the venue where an arbitrator's jurisdiction is first determined, it was open to Batts J to appoint the arbitrator. In all the circumstances, I find it was a proper and reasonable exercise of his discretion for him to make the challenged order; this, especially in light of: i) the fact that twice the parties had concluded margin agreements containing arbitration clauses; ii) the scope of the arbitration clauses; iii) the nature and extent of the evidence that will have to be considered to determine jurisdiction; and iv) the fact that there was actually no application before Batts J seeking determination of jurisdiction.

Issue D: Whether the applicability of the limitation defence, that was raised before the arbitrator was appointed, was a matter for the court or the arbitrator to decide? (Grounds 4 and 6)

[78] This issue engages aspects of the complaints made under grounds 4 and 6. The question whether the scope of the arbitral clauses and the state of the law sanctioned the exercise of Batts J's discretion to appoint the arbitrator, despite the challenge to the arbitrator's jurisdiction, was not the only arrow in Mr Spencer's quiver. He additionally submitted that, because the claims of BMSL would be statute barred if it was determined that there was no subsisting settlement agreement concluded in 2010, that was a significant factor which should lead to the finding that the issue of the jurisdiction of the arbitrator should be decided by the court, before the matter went to arbitration. That course of action would forestall the possibility of the arbitrator acting in vain and thus unnecessarily extending the litigation.

[79] This challenge is, however, susceptible to resolution in much the same manner as the primary contention that the arbitrator lacked jurisdiction. As noted by Batts J at paragraph 8 of his judgment:

> "… The Limitation of Actions Act does not go to jurisdiction… It is a statutory defence that is waived if not taken. If the defence is raised before the arbitrator it will therefore be for him to decide, as a mixed question of law and fact, whether the claim is time barred. …"

[80] The arbitrator is therefore better placed than the court to address that issue as well. As submitted by Mr Braham, and recognised by Batts J in his judgment, the limitation defence involves issues of mixed fact and law. The arbitrator will have to decide if a

settlement agreement was arrived at, and if so, is it subsisting or was it ended by virtue of an accepted repudiation? If it was found to be subsisting, it would be open to the arbitrator to find that the settlement agreement incorporated Margin Agreements 1 and 2. If so, no issue of the operation of the Limitation of Actions Act would arise as it is agreed that the Notice of Arbitration Proceedings was served on MIL by BMSL, within six years of that settlement agreement being entered into.

[81] Further, depending on how the evidence unfolds before the arbitrator, it may well be possible for there to be a finding that some aspects of the claim are statute barred while others are not. Therefore, I agree with Mr Braham that it would be inappropriate for the court to foreclose the question of whether MIL could benefit from the limitation defence. That issue, if pleaded, needs to be investigated before the arbitrator through a full examination of the facts and relevant law for it to be determined if that defence applies at all, and if so, to what extent.

Conclusion

[82] MIL has failed to show that the learned trial judge misapprehended the facts, misapplied the law or exercised his discretion injudiciously in making the appointment of R Anderson J (retired) as arbitrator in this matter. The challenge on all the grounds of appeal therefore fails. The appeal should be dismissed, the judgment of Batts J affirmed and costs awarded to BMSL.

PHILLIPS P (AG)

ORDER

1) The appeal is dismissed.

2) The judgment of Batts J in the court below is affirmed.

3) Costs to the respondent here and in the court below to be taxed if not agreed.