[2019] JMCA Civ 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 27/2017

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS SINCLAIR-HAYNES JA
THE HON MR JUSTICE PUSEY JA (AG)

BETWEEN	**FINANCE AND CAPITAL LIMITED**	**APPELLANT**
AND	**HIAECO HEALTH INVESTMENTS & EDUCATIONAL CO**	**1ST RESPONDENT**
AND	**DR NEVILLE GRAHAM**	**2ND RESPONDENT**

Written submissions filed by Nigel Jones and Company for the appellant

Written submissions filed by Knight Junor and Samuels for the respondents

2 November 2018 and 3 April 2019

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

BROOKS JA

[1] I have had the privilege of reading, in draft, the judgment of my learned brother, Pusey JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

SINCLAIR-HAYNES JA

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

PUSEY JA (AG)

[3] This appeal challenges the following orders made by Laing J on 25 November 2016:

> "1. The claim herein is stayed pending arbitration being completed;
>
> 2. Costs of the application to the Defendants to be taxed if not agreed."

Background

[4] On 30 July 2014 the appellant and the first respondent entered into a lease agreement for the rental of premises situated at 8 Waterloo Avenue, Kingston 10. The second respondent signed the lease on behalf of the first respondent, in his capacity as a director of the first respondent and in his personal capacity as the guarantor for the first respondent. The lease was granted for a fixed term of five years. There was no termination clause. The lease agreement provided for, amongst other things, the settlement of certain disputes through arbitration.

[5] On or about 8 March 2016 the second respondent wrote to the appellant indicating that the first respondent was terminating the lease effective 1 April 2016. Thereafter there was a series of letters between the parties in which the appellant indicated that there was no provision in the lease for early termination, demanded the

then outstanding rent, indicated that it was not accepting the termination of the lease and pointed out that the rent would continue to accrue.

[6] The respondents' position was that the first respondent was experiencing financial difficulties. They made a number of attempts to deliver the key for the premises to the appellant. In a letter dated 4 April 2016 the key was enclosed in a letter received by the appellant. The appellant responded indicating that the return of the key did not terminate the lease. It indicated that its retention of the key was solely for the protection of the premises.

[7] Thereafter, the parties' representatives entered into discussions in an attempt to arrive at an agreement to properly terminate the lease. The parties were unable to reach a consensus. In April 2016, the first respondent sent two letters to the appellant and enclosed a cheque for $3,589,250.00 as representing the General Consumption Tax (GCT) for the months of February and March 2016 and the rental and GCT for the month of April 2016.

[8] The appellant, in response, wrote to the respondents and again stated its refusal to accept the unilateral termination of the lease and maintained that the respondents were liable for breach of contract. Later, by way of another letter dated 30 June 2016 the appellant demanded that the second respondent immediately pay the outstanding sums.

[9] On 17 August 2016 the appellant filed a claim for the rent due and owing plus GCT or in the alternative for damages for breach of the lease agreement.

[10] On 5 October 2016 the respondents filed an application to have the appellant's claim struck out on the basis that the court did not have jurisdiction to try the claim or alternatively that the claim be stayed pending the completion of arbitration. The application was made, inter alia, on the ground that the lease agreement on which the claim was based has an arbitration clause which contemplates that the issues which the claimant seeks to have resolved should be resolved at arbitration. The learned judge granted the application in the terms of the orders stated at paragraph [3] above.

Grounds of appeal

[11] The appellant relies on the following grounds of appeal:

> "a) The learned judge erred as a matter of fact and/or law in finding that the claim is within the scope of the arbitration clause in circumstances where the claim is in effect for damages for breach of contract which is not one of the matters agreed to be referred to arbitration therein;
>
> b) The learned judge erred as a matter of fact and/or law and/or wrongly exercised his discretion in refusing to accept the [Appellant's] submissions based on **Leighton Chin-Hing v Wisynco Group Limited** [2013] JMCA Civ 19 decision that a claim which is in effect a claim for damages for breach of contract which does not apply to cesser or abatement of rent would not fall within the arbitration clause;
>
> c) The learned judge erred as a matter of fact and/or law and/or wrongly exercised his discretion in refusing to accept the [Appellant's] submissions that the **Leighton Chin-Hing v Wisynco Group Limited** [2013] JMCA Civ 19 decision was distinguishable to the instant case."

[12] The respondents filed a counter-notice of appeal asking for the learned judge's decision to be affirmed. The counter-notice did not, however, conform with the requirements of rule 2.3(3) of the Court of Appeal Rules 2002, in that it did not stipulate that the affirmation should be on grounds other than those relied on by the learned judge. There is, therefore, no reason to give the counter-notice any separate consideration.

Appellant's Submissions

Ground a

[13] The appellant submitted that when the lease is read in its entirety it can only be taken to mean that the parties intended to allow the appellant to have recourse to the courts to claim for unpaid rent and damages.

[14] The appellant also cited the cases of **Jennings and Anor v Kelly** [1940] AC 206 and **In the matter of the Stamp Act (CAP 212) and another v The Financial Secretary** [2008] ECSCJ No 4 in explaining the role and function of the proviso to the arbitration clause in the lease and the fact that the proviso qualifies or controls the meaning or scope of the words preceding it.

[15] The appellant contended that the claim for rental and damages for breach of contract do not fall within the arbitration clause.

Ground b

[16] The appellant contended that, based on the definition of abatement and cesser of rent accepted in the judgment of Sinclair-Haynes J (as she then was) in **Leighton**

Chin-Hing v Wisynco Group Limited [2013] JMCC Comm 3, there would be no need for the court to deal with any issues concerning cesser and abatement of rent in resolving the matter.

[17] They also relied on Phillips JA's reasoning (with which the other members of the panel agreed) in **Leighton Chin-Hing v Wisynco Group Limited** [2013] JMCA Civ 19 and went on to argue that nothing in the claim as filed would give rise to any issue concerning cesser or abatement of rent.

[18] The appellant argued further that the agreement excluded from arbitration, claims relating to rent.

Ground c

[19] The appellant submitted that the result in **Chin-Hing** was distinguishable from the present case as one of the issues argued in that case was that the lease was frustrated. The appellant contended that the evidence in support of the respondents' application for a stay did not disclose any issue which it believes should be referred to arbitration.

[20] The appellant also argued that there is no clause in the lease for early termination; and that the fact that the first respondent returned the keys did not terminate their obligations under the lease. In support of this submission, the appellant relied on Smith JA's approval of the characteristics of a lease for a fixed period, and the principles in relation to termination, in **Brady and Chen Ltd v Devon House Development Ltd** [2010] JMCA Civ 33.

[21] Further, the appellant argued that its retention of the keys did not indicate that the appellant had accepted any attempt to surrender the lease and the respondents never alleged that the lease had been surrendered.

[22] In addition, the appellant argued that unlike in **Chin-Hing**, the respondents have not asserted anything whereby an issue relating to cesser or abatement of rent, an interpretation of any clause in the agreement or any question of rights or liabilities, could arise. The appellants argued that, in order to justify the stay, the respondents must raise issues that justified the granting of the stay.

[23] The appellant submitted that section 5 of the Arbitration Act allows a party to an arbitration agreement to seek a stay where the other party commences legal proceedings in respect of any matter agreed to be referred to arbitration. If the matter falls outside the arbitration clause, it was argued, the mere fact that there is such a clause is not enough to allow the referral. The cases of **Douglas Wright T/A Douglas Wright Associates v The Bank of Nova Scotia Ltd** (1994) 31 JLR 351 and **Dome Petroleum Ltd v Burrard Yarrows Corporation**, Supreme Court of British Colombia, judgment delivered 11 October 1983, Vancouver No C834743 were cited in support of this submission.

[24] It was argued that, in **Chin-Hing**, the court had found that there was evidence before it which demonstrated that there were issues joined between the parties which fell within the arbitration clause. The appellant argued that the clause in **Chin-Hing** is different from the clause in the instant case which is in relation to the "rent reserved

and other monies payable". The **Chin-Hing** case, the appellant pointed out, did not include a reference to "other monies payable". The appellant argued that these additional words were deliberately included to capture sums payable which could not be properly called rent.

Respondents' submissions

[25] The respondents submitted that the claim in the instant case was similar to the one filed in **Chin-Hing** which was also a claim for outstanding rent and breach of contract, in relation to a fixed term lease.

[26] The respondents accepted that based on the definition of cesser and abatement of rent in **Chin-Hing** the claim filed in this case, as was found in **Chin-Hing**, did not involve the cesser or abatement of rent.

[27] The respondents also argued that the payment of rent was no longer relevant as they had already given up possession of the premises before the expiration of the fixed lease and therefore, the monies payable, if any, would be in the form of damages for breach. The respondents submitted that this was the approach taken in **Chin-Hing**.

[28] A key issue in the claim, the respondents argued, would be whether the termination of the lease agreement was lawful. The respondents relied on the dictum of Phillips JA in **Chin-Hing** to argue that a dispute regarding the termination of the lease does not come within the scope of "rent hereby reserved" and would therefore fall within the purview of the arbitration clause. This court's decision, in that case, it was

argued, impliedly indicated that such an issue was not considered a "dispute or matter touching or with respect to the rent hereby reserved".

[29] The respondents argued that the words "other moneys payable as aforesaid" appearing at the end of the clause were referring to moneys payable under the lease agreement. They went on to submit that damages for breach of contract is not payable under the lease agreement.

[30] It was submitted that the dispute is within a valid and subsisting arbitration clause and that as a result this court ought not to find that Laing J erred in either fact or law in exercising his discretion.

Analysis

[31] In assessing whether or not the learned judge was correct in the exercise of his discretion this court has to apply the principles laid down in **Hadmor Productions Limited v Hamilton** [1983] AC 191. In his oft-cited speech, Lord Diplock gave helpful guidance as to the approach that an appellate court should take in examining such decisions on appeal. The principles to be extracted from that case are that the primary function of an appellate court is one of review. Therefore, this court has no jurisdiction to disturb the decision of a judge exercising his or her discretion unless the learned judge had misunderstood or misapplied the law or the evidence. Or, where there was such a change in circumstances after the order was made that the judge would have acceded to an application to vary it.

[32] Lord Diplock also stated that in circumstances where the reasons are 'sketchy', the decision may be set aside if it is found to be aberrant, although no errors have been identified. I am of the view that this would also apply to cases where the reasons for the decision were not provided.

[33] These principles have been accepted and applied in this court and were admirably restated by Morrison JA (as he then was) in **Attorney General of Jamaica v John MacKay** [2012] JMCA App 2.

[34] In the instant appeal there are no reasons from the learned judge, and so this court will have to examine the circumstances of the case from the perspective of what the judge at first instance was required to do; in order to determine whether or not his decision was "aberrant and should be set aside".

[35] The main issue for determination in this appeal is whether or not the dispute between the parties is one that should be referred to arbitration or be dealt with before the court in the usual way. In the light of the grounds of appeal and the submissions, the following issues will have to be determined in order to resolve the main issue identified:

1. Whether the dispute between the parties fell within the scope of the arbitration clause; and

2. Whether or not the reasoning and decision in **Chin-Hing** are applicable to this case.

[36] The resolution of these issues will depend largely on the interpretation of clause 6(12) (the arbitration clause) of the lease agreement. It states as follows:

> "In the case of any dispute or questions whatsoever arising between the parties hereto with respect to the cesser or abatement of rent or other moneys payable as aforesaid and to the construction or effect of this instrument or any clause or thing herein contained or the rights duties or liabilities of either party under this agreement or otherwise in connection with the forgoing the matter in dispute shall be settled by reference to a panel of not less than two arbitrators, to be selected from the list of Arbitrators at the Dispute Resolution Foundation agreed by the Lessor and Lesseen [sic] **provided that this clause shall not apply or be deemed to apply to any dispute or matter touching or with respect to the rent thereby reserved or other monies payable hereunder save with regards such cesser or abatement or [sic] rent or other moneys payable as aforesaid**." (Emphasis added)

Whether the dispute between the parties fell within the scope of the arbitration clause

[37] Firstly, it is important to note that the clause did not mandate that all disputes be referred to arbitration. Where rental is concerned, it states that only disputes concerning cesser or the abatement of rent may be referred to arbitration. And that for the avoidance of doubt, disputes concerning the rent reserved that did not relate to cesser and abatement of rent were specifically excluded.

[38] It is important to assess and determine the nature of the claim filed in order to determine whether or not it fell within the arbitration clause and so should be referred to arbitration.

[39] The claim filed was for outstanding rent due and owing, or in the alternative, damages for breach of contract. The issues that would have to be considered in order to resolve the dispute between the parties at the trial would be:

i. What is the law in respect of early termination in relation to fixed term leases; and

ii. What is the entitlement of a landlord in relation to damages for a breach due to early termination.

Cesser and abatement of rent are clearly defined in law; and as the respondents rightly accepted, they do not arise for consideration in the circumstances of this case. It is not necessary for this court to make any further comment on these issues in relation to the instant appeal.

[40] The arbitration clause also specifically excludes a claim for rental from being liable to referral to arbitration at the insistence of any one party. It is also fair to say that a claim for damages for the rental for the unexpired period of the lease would also be excluded from the ambit of the arbitration clause. In **Chin Hing**, Phillips JA made an important link between the rent reserved and a claim for damages in respect of such rent. She said at paragraph [26] of her judgment:

> "I also agree with the respondent that regardless of the name given to the relief sought, if the lease is valid, damages would be the appropriate remedy to be awarded to the appellant. It is true that if there is a breach of a contract a party may elect to continue the contract and may recover damages for the breach. **But, in my view, where the**

> **breach is of a fixed term lease and involves giving up possession of the property before the expiration of the term, there is no further occupation and rent, properly speaking, would no longer apply.** The lessor may, however, be entitled to the amount that would be payable under the lease, save and except for the existence of any circumstance rendering the lease void, **but the lease having been brought to an end and there is no longer possession of the premises, any amount payable would be in the form of damages for breach, to be calculated by reference to the amount payable for rent**." (Emphasis supplied)

[41] Bearing in mind that connection, the clause "touching or with respect to the rent thereby reserved", would exclude from arbitration, a claim for damages "calculated by reference to the rental". It is not necessary for there to be a construction of the contract in order to determine liability in this case.

[42] This analysis does not bring the matter to an end, however, because, in **Chin-Hing**, this court came to a different conclusion in very similar, albeit not identical, circumstances. The second major issue will now be assessed.

Whether or not the decision in Chin-Hing is applicable to this case

[43] Both parties dealt extensively with the **Chin-Hing** decision in their respective submissions.

[44] In the **Chin-Hing** case, Sinclair-Haynes J as well as this court were confronted with the issue of the construction of an arbitration clause. Like in the instant appeal, the lessee in that case attempted to terminate the lease before the contracted expiry date and the lessor sued for damages, being the monies representing the rental for the unexpired period of the term. Unlike this case, however, the lessee's inability to use the

premises for the intended purpose was a critical factor. The lessee claimed that the dispute should be referred to arbitration as set out in the lease agreement. Phillips JA found that the nature of the dispute between the parties brought it within the purview of the arbitration clause. She said, in part at paragraph [24] of the judgment:

> "...For whatever reason, whether it was due to the failure to obtain planning permission or the issuance of the stop notice arising from the failure to comply with the building regulations and whether the termination of the lease was lawful and damages payable as a result thereof, these are all issues within the purview of clause 4.8 [the arbitration clause]."

[45] The arbitration clause in **Chin-Hing** is similar in its wording to the clause being considered in the instant appeal except that in that case the last phrase read:

> "...provided that this clause shall not apply or be deemed to apply to any dispute or matter touching or with respect to the rent hereby reserved save with regard such cesser or abatement of rent as aforesaid."

[46] Phillips JA held, at paragraph [23] of her judgment, that Sinclair–Haynes J rightly found that the dispute did not relate to the cesser or abatement of rent.

[47] The learned judge of appeal discussed the possible reasons for termination and found that "[a]lthough counsel for the appellant also contended that the termination of the lease was due to the stop notice issued to the respondent ... there was no evidence of this. However, it is clear that the respondent was not able to use the premises according to part of the stated purpose in the lease" (paragraph [24]). Phillips JA also

held that the validity of the lease at the time the respondent sought to terminate it and vacate the premises was important.

[48] Phillips JA then went on to conclude at paragraph [25] that:

> "... It is my view that the question of the validity of the lease is for the determination of the arbitrator to be made based on the construction of the lease agreement and evidence as to the factual circumstances surrounding the respondent's discontinuance of the construction and [vacating] of the premises."

[49] Although in **Chin-Hing** this court was dealing with the construction of an arbitration clause in a lease agreement and the clause in that case is similar to the clause being considered here except for the crucial addition of the words "or other moneys payable", there are other differences between the cases. In **Chin-Hing,** Phillips JA made a number of crucial findings that led her to conclude that the dispute between the parties came within the scope of the arbitration clause. They include:

a. the issue of the reason for the lessee seeking to terminate was found to be an issue within the purview of the arbitration clause;

b. the fact that the lessee was unable to use the premises for the purpose that was stated in the lease;

c. the true status of the lease was integral to the resolution of the dispute between those parties and that

> the 'question of the validity of the lease [was] for the determination of the arbitrator to be made based on the construction of the lease agreement and evidence as to the factual circumstances surrounding the [lessee's] discontinuance of the construction and [vacating] of the premises".(paragraph [25])

It is for those reasons that this court did not disturb the exercise of discretion by Sinclair-Haynes J in **Chin-Hing**. It seems, however, that Phillips JA was of the view that, absent those peculiar aspects dealing with the reason for the cessation, a different result may have ensued. She made that point at paragraph [26], which has already been quoted above. She took the view that the order for the parties in that case to proceed to arbitration would promote adherence to what they had contracted for.

[50] The differences between the present case and **Chin-Hing** allows for a different result. Unlike the situation in **Chin Hing**, in this case, there is no issue other than the pre-mature delivery up of the leased premises. The appellant's claim is therefore either for rental or damages for breach of contract. Neither falls within the purview of the arbitration clause.

[51] For those reasons it must be found that the learned judge at first instance erred in principle. The decision should therefore be set aside.

Conclusion

[52] In the light of the wording of the arbitration clause the dispute as outlined in the claim falls outside the scope of the arbitration clause. The Learned judge's decision to stay the claim pending arbitration was therefore "abberrant" as the claim filed does not disclose a dispute that should be referred to arbitration based on a proper construction of the arbitration clause.

[53] As a result I am of the view that the appeal should be allowed and the orders made by the learned judge should be set aside, with costs to the appellants to be taxed if not agreed.

BROOKS JA

ORDER

Appeal allowed. Orders of Laing J made on 25 November 2016 set aside. Costs to the appellant to be taxed if not agreed.