[2012] JMCA Civ 37

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 43/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**ROSE HALL RESORT, L.P.**	**APPELLANT**
AND	**THE RITZ CARLTON HOTEL COMPANY OF JAMAICA LIMITED**	**RESPONDENT**

Dr Lloyd Barnett and Weiden Daley instructed by Hart Muirhead Fatta for the appellant

Allan Wood QC, Mrs Maliaca Wong and Mrs Alexis Robinson instructed by Myers Fletcher and Gordon for the respondent

11, 12 and 13 April 2011 and 20 July 2012

PANTON P

[1] I agree with my learned sister, Norma McIntosh JA that this appeal should be dismissed. She has substantially expressed reasons that I share in arriving at this decision.

PHILLIPS JA

[2] I also agree with my learned sister and have nothing further I wish to add.

McINTOSH JA

[3] A decision of Jones J delivered in the Supreme Court on 29 March 2010 has given rise to this appeal which was filed on 1 April 2010 with a total of 33 grounds, based on 20 challenges to the learned judge's findings of fact and law, contained in his written reasons for judgment. At its core is the appellant's claim to a right to recover, from the respondent, possession of its property known as Ritz Carlton Golf & Spa Resort and the adjacent golf course (hereafter referred to as the Resort), which is situated in Rose Hall, Jamaica. The respondent had come into possession of the Resort by virtue of an Operating Agreement (the Agreement) entered into by the parties on 6 July 1998 whereby the appellant permitted the respondent to operate and manage the Resort, for a fee, over an initial period of 25 years.

[4] The Agreement included provisions for its early termination, the relevant sections being (i) section 3.3.1 which provided for termination upon the occurrence of certain stated events, including what was termed an "Event of Default"; (ii) section 3.3.2 which set out the "Conditions to Termination" whether for reason of the default of the Operator or for reason other than default of the Operator; (iii) section 11.1 dealing with what constituted events of default; and (iv) section 11.2 which provided the remedies available to the non-defaulting party. There was also a side letter dated 6 July 1998 which formed part of the Agreement and which provided for termination without cause.

[5] It was the contention of the appellant that the respondent defaulted on the Agreement by failing to properly operate the hotel and accordingly, it served several

notices on the respondent alleging various acts of default which the respondent denied. The parties had agreed that the law governing their Agreement would be the law of the State of Georgia in the United States of America and had also agreed, in section 13.6, that any dispute, controversy or claim arising out of or relating to the Agreement should be settled by arbitration. Accordingly, on 1 July 2009, the appellant submitted a Demand for Arbitration to the American Arbitration Association. It sought from the arbitrators an award of damages and declaratory judgment, "consistent with Georgia law … to recognize Rose Hall's right to terminate the Management Agreement for cause without payment of any penalty/fees for early termination pursuant to sections 3.3.1, 11.1 and 11.2 of the Management Agreement".

[6] In the said demand for arbitration, the appellant also reserved "its rights to terminate the Operating Agreement prior to obtaining such declaratory relief, and to seek any additional relief that may be necessary to effectuate its right to possession of its property in the event that it elects to terminate" (paragraph 43). It further sought a declaration that the respondent is not entitled to redemption of any equity interest in the event that it "elects to exercise its termination rights arising from the respondent's default, consistent with section 3.3.2 of the Management Agreement" (paragraph 44). So it was that on 3 September 2009, just two months after submitting the Demand for Arbitration and before the arbitration process was complete, the appellant purported to terminate the Agreement, with immediate effect, by serving a termination notice on the respondent, requiring it to vacate and deliver up possession of the Resort by 12:01 am

on 1 October 2009. The respondent did not comply, however and remains in possession of the Resort.

[7] In its further efforts to regain possession of the Resort, the appellant sought the assistance of the courts in the United States of America with jurisdiction over the Agreement and, when those efforts failed (as those courts took the view that the matter was subject to arbitration and should await the outcome of the arbitration proceedings), the appellant turned next to the Jamaican court, in an application dated 20 October 2009, seeking an interim injunction for the respondent to deliver up possession of the Resort. The respondent met this application with its own application dated 2 November 2009, seeking a stay of the injunction on the basis that the appellant's application was in breach of their agreement to arbitrate any difference arising from their legal relationship, in accordance with section 3 of *The Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001* (the Act) which gives effect to Article ll (3) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention). These were the two applications which the learned judge had for his consideration on 24 November 2009 and on 29 March 2010 he made the following orders:

> "1. [Appellant's] Notice of Application for Court Orders dated 20th October 2009 is stayed pending the completion of the arbitration proceedings between itself and the [Respondent].
>
> 2. Costs in the cause. Special Costs Certificate for two (2) Counsel."

This effectively granted the respondent's application for a stay and left the appellant's application to be dealt with in due course.

The appeal

[8] As previously noted, the appellant listed 33 grounds in its notice of appeal. They were not argued seriatim, however, the appellant opting instead to adopt what can best be described as an umbrella approach to them. In essence, the appellant complained that the learned judge made errors of fact and law in coming to his conclusions, in that the issue of the appellant's right to possession of the Resort was never before the arbitrators as this was an issue that was within the exclusive jurisdiction of the Jamaican court, being dependent upon Jamaican laws relating to property and proprietary rights and not on the contract between the parties. The learned judge therefore erred in not dealing with the appellant's application and granting the respondent's application for a stay. In the circumstances, the appellant asks this court to set aside the learned judge's order staying its application and grant an order "that the respondent shall within seven (7) days vacate and deliver up to the appellant possession of the [Resort]" with costs both here and in the court below.

The respondent's counter-appeal

[9] The respondent filed a counter notice of appeal in which it contended that the decision of the learned judge should be affirmed. It stated that there was a substantial dispute between the parties in relation to the appellant's purported termination of the Agreement which was not in accordance with the procedure expressly agreed by the parties. Further, the dispute had been referred to arbitration as required by the terms

of the Agreement and the order of the learned trial judge that there should be a mandatory stay, pending the decision of the arbitrators, should be affirmed as it was a correct order pursuant to section 3 of the Act.

The arguments

[10] The first order sought by Dr Barnett, for the appellant, was to set aside the order of Jones J staying its application for an "injunction to vacate and deliver up possession" of its property, namely, the Resort, pending the outcome of the arbitration proceedings. Dr Barnett accepts, however, that that order of the learned judge has ceased to exist inasmuch as the arbitrators have now handed down their award. That notwithstanding, it was his contention that the learned judge erred in concluding that as the dispute between the parties had been referred to arbitration, the appellant's application had to await the outcome of the arbitral proceedings since the decision of the arbitrators could not have affected the appellant's substantive claim in the Jamaican court. Dr Barnett submitted that the appellant's claim before the arbitrators was separate and distinct from its claim in the Supreme Court, the former being for damages and declaratory judgment and the latter for recovery of possession, which was a claim within the exclusive jurisdiction of the Jamaican court. The foreign arbitrators had no jurisdiction to determine the appellant's claim for possession of the Resort, as its owner, counsel submitted and their award showed that they did not purport to do so.

[11] It was Dr Barnett's contention that in deciding to grant the stay the learned trial judge did not deal with the appellant's right to recover possession of the Resort and the question now was whether in law the arbitral award could be interpreted as being

capable of depriving the owner of Jamaican land of its right to possession of that land or whether it was limited to a pronouncement of the contractual rights of the parties with respect to their Agreement. Dr Barnett submitted that the claim for recovery of possession was not a matter in respect of which the parties made an agreement. What is being sought in this case, Dr Barnett submitted, is the giving effect to the ownership of property and not the enforcement of contractual rights which may properly be dealt with by a claim for damages. He contended that the appellant's right to possession was dependent upon the general law of property and proprietary rights in Jamaica and not upon contract. Further, counsel submitted, as the arbitrators had no jurisdiction over land in Jamaica they could not legally pronounce upon the appellant's right to possession of the Resort. The Jamaican court was the only forum with the jurisdiction to grant an effective remedy on the matter of the appellant's claim, Dr Barnett contended, so that even if the arbitrators had purported to pronounce upon the right to possession of Jamaican land, the Jamaican court would neither recognize nor enforce such an award. Counsel referred to the text *Private International Law,* by G.C. Cheshire, 6th Edition, page 588 and a line of authorities including cases such as ***Roberdeau v Rous*** (1738) 26 ER 342; ***Whittaker v Forbes*** [1892] 2 QB 358; ***Desousa v Same*** [1892] 2 QB 358; ***Duke v Ardler*** [1932] SCR 734 and ***Jubert v Church Commissioners for England*** [1952] SC 160, submitting that the Jamaican court would not enforce any award which fell outside of the jurisdiction of the arbitrators as that would be contrary to Article V of the Act and the provisions of section 6(1)(a)(ii) and 3(a) of the *Judgments (Foreign) (Reciprocal Enforcement) Act.* Therefore, the learned judge should have refused the respondent's application for a stay, Dr Barnett

argued and should instead have considered and granted the appellant's application for an injunction.

[12] Dr Barnett advanced several arguments together with supporting authorities, the essence of which was that there was a well-established principle of private international law that foreign arbitrators have no jurisdiction over real property in Jamaica. He further submitted that the appellant as owner of the Resort was entitled to recover its possession even if that led to a breach of its contractual obligations and an award of damages against it. In that event, he contended that the court needed to make a determination as to whether recovery of possession was the appropriate remedy for the appellant and critical to that determination was the nature of their Agreement and their relationship.

[13] The Agreement required a high level of interchange between the parties, Dr Barnett submitted, with their co-operation and willingness to work together being critical to the continuation of the effective operation of the Resort. However, affidavit evidence has shown that their relationship has deteriorated, counsel submitted and the trust and confidence necessary to the effective continuation of an agreement which gives to the "Operator" the authority to incur expenses on behalf of the "Owner", operate bank accounts, make plans and determine future investments, have been replaced by acrimony. It was Dr Barnett's contention that compulsion in the form of what in effect would be specific performance of that agreement cannot create harmony and is undesirable in circumstances where a financial remedy is appropriate since the initial and predominant objective of the Agreement was commercial. Unquestionably,

the principles relating to interlocutory injunctions are relevant to the circumstances of this case, counsel submitted and he referred to several authorities including ***Cornwall Holdings Corporation v International Hotels Limited*** (1995) 52 WIR 280; ***Kaymart Limited v K-Mart Corp.*** (1998) 35 JLR 617 and ***National Commercial Bank Jamaica Limited v Olint Corp Limited*** Privy Council Appeal No 61 of 2008, delivered on 28 April 2009, in support of this submission. As all the factors that would justify the grant of that relief are present in the instant case, counsel argued, the court should allow the appeal, and grant the injunction sought until trial or further order of the court, with costs to the appellant.

[14] On the other hand, counsel for the respondent, Mr Wood QC, argued that the dispute between the parties which led to the referral to arbitration was one with contractual obligations, coming within the agreement between the parties to arbitrate a dispute arising from a commercial relationship within the scope of the New York Convention, which has the force of law under the Act. In the circumstances, learned Queen's Counsel argued, in order to give effect to the agreement of the parties, the Act and the New York Convention, the appellant's application for an injunction was correctly stayed by the learned judge, pending the outcome of the arbitration proceedings. Mr Wood argued that where the parties have made an agreement in writing to submit their difference to arbitration, a stay is mandatory unless the party opposing it can show that the agreement is "null and void inoperative or incapable of being performed". The appellant accepted the arbitration provisions as being valid and enforceable and, in fact,

counsel submitted, the arbitral proceedings were initiated by the appellant, thereby activating the arbitration agreement.

[15] Learned Queen's Counsel referred to several authorities which support the decision of the learned judge to grant the respondent's application for a stay, including the case of ***Citadelle Line S.A. v The Owners of Motor Vessel Texana*** (1977) 16 JLR 1 where the contract between the parties contained a foreign arbitration clause. This, counsel contended, was prior to Jamaica becoming a party to the New York Convention and the statutory power to stay an action set out in section 5 of the Act was not applicable to foreign arbitration. Nonetheless, Carey J (as he then was) held that the court had an inherent power to grant a stay and that to decline to give effect to the clear agreement of the parties would be to by-pass the method they agreed upon for settling their disputes and further held that the court would ordinarily grant such a stay unless a strong case for not doing so is shown.

[16] Mr Wood QC also advanced the arguments as summarized below:

(a) The appellant maintained a right to relief in the arbitration to regain possession of the Resort on the basis that the Agreement had been properly terminated and the issues in the fixed date claim form filed by the appellant in the Supreme Court turned on whether the Agreement had been terminated. Participation in the arbitration process and the submission of the very question subsequently

raised in the action is conduct that constitutes a waiver of any right to object to a stay pending the arbitration.

(b) Where the New York Convention has force of law, as it does in Jamaica, its provisions must be applied consistently and a stay becomes compulsory unless the arbitration agreement is found to be "null and void inoperative or incapable of being performed" and he referred to Mustill & Boyd's *Commercial Arbitration*, 2nd Edition pages 464 and 465 where the meaning of those words was considered.

(c) The appellant's argument that the stay ought not to have been granted was based upon an incomplete formulation of the general principle of private international law that claims to possession or title to real property fall within the exclusive jurisdiction of the courts of the country in which the land is situate as there is a well- established exception to that rule where the claim is based on a contract or equity between the parties that either does not involve a dispute as to title, or as to which, the dispute as to title or possession is incidental. The leading case on this point was ***British South Africa Co v Companhia de Mocambique*** [1893] AC 602 in which it was clear that the basis for the decision of the House of Lords that the

English courts did not have jurisdiction was that the claim concerned a dispute as to the title to foreign land and it was held that that was not a matter on which English courts ought to adjudicate. The **Mocambique** case has been considered in a number of subsequent cases which have found that the principle is limited to disputed claims to title to foreign land and that where no question of title arises or where it is only incidental to a contract personal to the parties, there is nothing to exclude jurisdiction. He also referred to ***St Pierre v South American Stores (Gath and Chaves) Ltd*** [1936] I KB 382; ***Tito v Waddell (No 2)*** [1977] Ch 106 (demonstrating that where title for possession is merely a collateral issue that arises in an *in personam* claim founded on contract, a foreign court would be recognized as having jurisdiction where the parties have submitted to the jurisdiction); and ***Pattni v Ali*** [2007] 2 AC 85) (which although relating to shares, counsel submitted, is equally applicable to land). The respondent has never challenged the appellant's ownership of the Resort so it was clear that there was no dispute as to title in the instant case.

(However, Dr Barnett in his response maintained that not only is it arguable that the arbitral award as a foreign award is not capable of determining possession of or title to Jamaican land, it is also consistent with centuries of authorities and English and Commonwealth authorities have not indicated that those principles are no longer applicable.)

[17] Learned Queen's Counsel invited the court to consider whether, in all the circumstances, this appeal is now an abuse of process. He argued that the court should dismiss the appeal or strike it out and strike out the claim in the court below as it made no sense to re-litigate the matter which has been fully ventilated before this court. He contended that it would be a waste of valuable judicial time to have the matter rehashed in the court below. Even if the arbitration award went beyond what it should, to determine a question of title and possession of Jamaican land (and the respondent denies that it did), on the actual contractual issues it is a determination which is conclusive of their contractual rights and the parties are bound by that determination. (Indeed, it is noted that Dr Barnett did accept that the award is binding on the parties unless it is set aside by the court and there was no application before the court to that effect). It was counsel's contention that as the award was a Convention award, by section 4(2) of the Act, there is a statutory bar to re-litigating the very claims and issues determined by the award. There is, accordingly, an issue estoppel or res judicata and even in the absence of a formal defence the court can, on its own motion, as a preliminary issue, strike out the action as an abuse of process. He found support for this submission in the wide powers under part 26 of the new Supreme Court Civil

Procedure Rules 2002, (the CPR) and rule 2.15(a) of the Court of Appeal Rules 2002 (the CAR). Counsel submitted that if the court is satisfied that it has everything before it and that there is nothing to stop recognition of the award, then the court is asked to exercise its powers to bring an end to the litigation and he supported this submission with a reference to ***Dallal v Bank Mellat*** [1986] 2 WLR 745.

Analysis

[18] It is clear that this appeal turns on a determination as to whether the agreement made by the parties to refer their dispute to arbitration required the appellant to await the decision of the arbitration proceedings before pursuing its application for an injunction, or whether, as owner of the Resort, it was entitled to have its application heard since that involved its right to recover possession under the general law of property and proprietary rights in Jamaica, as a separate issue from the claim submitted to the arbitrators. The former is the stance of the respondent while the latter is the position maintained by the appellant. To my mind, however, that distinction is more apparent than real as in both instances the issue revolved around the rights, as between the parties, to possession of the Resort. The learned trial judge clearly rejected the distinction and, in my view, correctly found that the submission to the arbitrators was not about possession of Jamaican land but rather the rights as between the parties in the arbitration to the possession of Jamaican land.

[19] In seeking to maintain the distinction Dr Barnett had argued that the Act and the New York Convention acknowledged a separation of interests in submissions to arbitration so that matters which fell outside of the jurisdiction of the arbitrators such as

recovery of possession of land by operation of Jamaican law could be separately treated. This was based upon Article V of the Act which provides that recognition and enforcement of the award may be refused at the request of the party against whom it has been invoked only if that party furnishes the competent authority where the recognition and enforcement is sought with proof of certain matters, the one relevant to these proceedings being at (c), which required proof:

> " that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced."

This case was not concerned with any application for refusal of recognition and enforcement of the arbitral award for which a request would have to be made by the party against whom the award was made.

[20] How then should the learned judge have treated with the applications before him? Should he have proceeded to consider and grant an application for an injunction which would give possession to the appellant at the same time that the appellant was awaiting a determination of the issue of its entitlement to possession that it had submitted for the arbitrators' decision? In ***Channel Tunnel Group Ltd v Balfour Beatty Construction*** [1993] 2 WLR 262, a case cited by both parties, Lord Mustill, who delivered the main judgment of the court expressed the opinion that where the parties made the choice to refer their dispute to arbitration they should abide by their decision. This, Lord Mustill said:

> "[was] in accordance not only with the presumption exemplified in the English cases …. that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking quite beside the point…The purpose of interim measures of protection … is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute."

[21] What is clearly to be distilled from Lord Mustill's judgment is that in circumstances where the parties are awaiting the outcome of arbitration proceedings and the applicant for an interim injunction is merely seeking from the court what the arbitrators have been asked to decide, the court would not be justified in granting the interim injunction and would be inclined to grant a stay. I adopt that reasoning as being applicable to the circumstances of this case.

[22] At paragraph [35] of his judgment the learned judge had this to say:

> "This court takes the view that where the action brought by [the appellant] is within the terms of the arbitration provisions, (as I have found) *Article II(3)* of the [New York Convention] is clearly relevant. *Article II(3)* requires the court to 'refer the parties to arbitration' in respect of a matter which falls within the Article. Where this is so, a stay on any other proceeding brought by either party, is obligatory. To evade the statutory process [the appellant] …would have to show that 'the agreement is null and void inoperative or incapable of being performed'. If they [sic] were able to establish this then a stay would be refused by the court."

It is useful, it seems to me, to set out below the provision of Article II(3), in full:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

In the instant case, it is of significance that it was not the court that referred the matter to arbitration but the appellant itself.

[23] I accept as well founded the submission of learned Queen's Counsel that in order to give effect to the arbitration clause in the Agreement as well as the provisions in the Act and the New York Convention the judge was obliged to grant a stay pending the outcome of the arbitral process unless the appellant could show that the arbitration agreement was "null and void inoperative or incapable of being performed". Clearly such a challenge could not be successfully mounted by the appellant. I am in agreement with Mr Wood that in initiating the arbitration process, thereby invoking the arbitration agreement, the appellant must be taken to have accepted its provisions as being valid and enforceable.

[24] The agreement fell within the scope of section 3 of the Act which reads as follows:

> "3 - (1) Subject to subsection (2), the Convention shall have the force of law in Jamaica.
>
> (2) The provisions of the Convention shall apply
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(a) to any award where reciprocal provisions have been made in relation to the recognition and enforcement of such an award made in the territory of a State party to the Convention; and

(b) to any difference which may arise out of any legal relationship, whether or not contractual, which in Jamaica is a commercial relationship.

(3) …"

Section 2 simply identifies "the Convention" as that "done in New York on the 10th day of June 1958". The respondent's right to seek the stay, which is not in issue, is in accordance with the provisions of section 5 of the *Arbitration Act* of 1900. The appellant had submitted to the jurisdiction of the arbitrators and participated in the arbitration process, referring for the arbitrators' consideration the very question subsequently raised in the Jamaican court, namely whether the appellant had lawfully terminated the Agreement by virtue of which the respondent held possession and operated the Resort. It seems to me that there is merit in the submission of learned Queen's Counsel that in so conducting itself the appellant had waived any right to object to a stay pending the arbitration.

[25] Mr Wood QC also correctly argued that incidental to the arbitrators' decision on the validity of the termination notice issued by the appellant, must be a finding as to the right to possession of the Resort. If the appellant was successful before the arbitrators then it would regain possession but, if it was unsuccessful, then the respondent would have the right to remain in possession in accordance with their

Agreement. According to learned Queen's Counsel, in claiming in its fixed date claim form that it was entitled to possession, the appellant had to allege that the Agreement was breached. Dr Barnett did not disagree with this and submitted that although termination of the agreement was in breach of contract it was not unlawful and damages would be the effective remedy. Should the learned judge have enforced the arbitration agreement by staying proceedings brought in breach of it? I am firmly of the view that a stay was required in the circumstances of this case to give effect to the arbitration clause in the agreement, the provisions of the Act and the New York Convention.

[26] The stay having been correctly granted, in my opinion, how is the appellant's application before this court for an injunction pending the trial of its substantive claim to be treated and what of the respondent's submission that the court should not only dismiss this appeal but, in exercise of its powers under CPR part 26 (the case management powers of the court) and CAR 2.15(a) (the powers of the court in relation to civil appeals), should strike out the action in the court below as the issues raised have been determined by the arbitrators and cannot be re-litigated? Dealing first with the second question, I am not satisfied that all the material relevant to the appellant's substantive claim has been put before the court sufficient for the court to be in a position to pronounce upon the fate of that claim. For instance, learned Queen's Counsel referred in his submissions to the fixed date claim form filed by the appellant in the Supreme Court, but neither the fixed date claim form nor the supporting documents were included in the record before this court. Further, I am not of the view that the

court heard full arguments relating to the substantive claim. Therefore, I would be reluctant to make a final determination on the appellant's claim in those circumstances.

[27] With regard to the second question concerning how the application for an injunction should be addressed, learned Queen's Counsel had submitted that if the court found that the stay was wrongly granted and that the application for injunction ought to be heard, then the proper course would be for the appellant's application for the injunction to be remitted to the Supreme Court for hearing before another judge in chambers. He submitted that to do otherwise would be to hear evidence which was not heard in the court below, since the learned trial judge did not deal with the application on its merits and this court would therefore not have the benefit of the judge's findings on the merits of the application. In my opinion, however, the result would be the same if the court holds that the stay was correctly granted. The second order sought in this appeal was the subject of the appellant's application before Jones, J namely "that the Respondent shall within seven (7) days vacate and deliver up to the Appellant possession of the [Resort]", and as Dr Barnett submitted, no arguments were heard on that application. Instead it was stayed pending an event which has now occurred and that, to my mind, means that the appellant's application must now proceed in that court. I am of the view that, in these circumstances, this court should not exercise its discretion on an application for the grant of an injunction concerning which no arguments were heard in the court below and no decision yet made, affording to this court the opportunity to review the judge's findings on the merits of the arguments.

Conclusion

[28] In the final analysis, it is my view that the learned trial judge was correct in the approach he took to the applications which were before him. The appellant's application for an injunction had to be stayed pending the arbitrators' determination of the dispute which the appellant had referred to them. Two courts in the United States with jurisdiction over the Agreement came to that conclusion and there was no basis for the Jamaican court to have concluded otherwise. On 31 March 2011 when the arbitrators made their award the stay granted by the learned trial judge ceased to exist and the application thereafter fell to be determined by a judge in chambers in the court below.

[29] Inasmuch as the counter appeal was still before the court I would simply repeat that, for my part, the submissions of learned Queen's Counsel that a stay was mandatory in the face of the arbitration agreement, the Act and the New York Convention were well founded and that the decision of the learned trial judge was to be affirmed.

[30] I would therefore dismiss the appeal and remit the matter to the Supreme Court for the appellant to proceed with its application for an interim injunction requiring the respondent to deliver up possession of the Resort, if so minded. I would also award costs to the respondent to be taxed if not sooner agreed.

PANTON P

ORDER

Appeal dismissed. Matter remitted to the Supreme Court for the appellant to proceed with its application for an interim injunction requiring the respondent to deliver up possession of the resort. Costs to the respondent to be taxed if not sooner agreed.