JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 98 OF 2007

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MISS JUSTICE G. SMITH, J.A. (Ag.)

BETWEEN	WILLOWOOD LAKES LIMITED	APPELLANT
AND	THE BOARD OF TRUSTEES OF THE KINGSTON PORT WORKERS SUPERANNUATION FUND	RESPONDENT

Ian Wilkinson and Miss Sashawah Grant instructed by Ian G. Wilkinson & Co. for the Appellant.

Courtney Bailey and Jermaine Spence instructed by DunnCox for the Respondent.

October 21, 22, 2008 and July 2, 2009

SMITH, J.A.:

1. This is an appeal against the decision of Brooks J. delivered on August 7, 2007 in which he granted the Respondent's application to strike out the Appellant's statement of case and awarded costs to the Respondent.

2. The Appellant is a limited liability company duly incorporated under the laws of Jamaica with offices at 4 Holborn Road, Kingston 10. The Respondent Board of Trustees was appointed under and by virtue of the Port Workers (Superannuation Fund) Act and is the registered holder of parcels of land

comprised in Certificate of Titles registered at Vol. 962 Folio 49 and Vol. 984 Folio 127 of the Register Book of Titles (the property). The property is located on the Norman Manley Boulevard, Negril, Westmoreland.

Background Facts

3. By a Lease Agreement dated August 1, 2000, the Respondent leased to the Appellant the said property for an initial period of three (3) years.

Clause 5 (4) of the Lease provided:

> "The landlord shall grant to the tenant an extension in the term of the lease for at least a further three (3) years on expiry of the existing lease under the same terms and conditions of the existing lease and for such other subsequent terms as the parties may mutually agree".

4. Clause 6 (3) provides for the reference of any dispute in respect of the lease to an Arbitrator in accordance with the Arbitration Act.

5. Three (3) months before the expiry of the lease, the Appellant advised the Respondent of its decision to renew the lease. The Respondent refused to grant the extension. Consequently a dispute arose.

6. The parties agreed to appoint Dr. the Honourable Lloyd Barnett, O.J., an Attorney-at-Law, as the sole Arbitrator to settle the dispute.

7. After all the documentation required to commence the hearing was submitted to the Arbitrator but before the hearing commenced, the Respondent offered to sell the property to the Appellant at market value. The offer was accepted. The parties agreed that the market value or sale price would be based on a valuation to be prepared by D.C. Tavares & Finson Realty Ltd. (the Valuator). It was also agreed that DunnCox, the Respondent's Attorneys-at-Law, would instruct the Valuator to prepare a market appraisal of the unimproved land and an appraisal of the total value of the land.

8. In October, 2005, the valuation was completed. It was discovered by the parties that the valuation did not contain an appraisal of the unimproved market value of the land. This deficiency was pointed out to the Valuator who promised to prepare an addendum with the omitted information.

9. However, in light of the parties' agreement for sale, they agreed to amend the original Terms of Reference given to the Arbitrator. The Arbitrator was provided with new Terms of Reference concerning the unimproved value of the said property.

The Arbitration Proceedings

10. Under the revised Terms of Reference the Arbitrator was informed that the Appellant had agreed to purchase the property. Accordingly, the Arbitrator was asked to:

(1) Fix the sale price of the said property based on his interpretation of the Valuation Reports prepared by D.C. Tavares & Finson Realty Company Limited for the purposes of establishing the market price of the property;

(2) Award that the Appellant is to pay the said sale price within a stated period, failing which the Claimant will be entitled to re-enter and take possession of the property and the Appellant will surrender the said property to the Claimant without any further claim against the Claimant, save and except for any entitlement arising under paragraph 3 hereof;

(3) In the event that the Claimant decides to take over the building and other improvements to the property, as it is entitled to do or not to do, the Arbitrator to determine whether the Claimant is to be required to compensate the Appellant for the value of its improvements of the aforesaid property upon its surrender under paragraph 2 above and if so make a finding as to the amount of such compensation to be paid to the Appellant upon surrender of the said property to the Claimant in the event the Appellant fails to pay the sale price fixed by the Arbitrator within the period stated by the Arbitrator, as provided under paragraph 2 above; and

(4) Consider and determine whether the improvements/works done by the Appellant on the property should be taken into consideration in arriving at the sale price under paragraph 1 above.

11. The parties agreed that the terms of the lease should be taken into account and the following additional documents were submitted for the Arbitrator's perusal:

(1) Valuation Report dated October 24, 2005 and prepared by D.C. Tavares & Finson Realty Ltd.

(2) Addendum to Valuation Report of October 24, 2005 prepared by D.C. Tavares & Finson Realty Ltd. dated October 31, 2005.

(3) Copy letter dated October 31, 2005 from D.C. Tavares & Finson Realty Ltd. to DunnCox.

(4) Copy letter dated October 31, 2005 from DunnCox to D.C. Tavares & Finson Realty Ltd.

(5) Copy Bills of Quantities for Construction of Entertainment Complex at Willowood Lakes Limited dated March 2001 and prepared by Melvin Ashwood.

12. The learned Arbitrator, in a closely considered decision, made the following award:

(1) The sale price is fixed at US$2,225,000.00.

(2) The Respondent (now the Appellant) shall pay to the Claimant the said sale price as follows:

(1) 15% on or before July 31, 2006.

(2) the balance on or before November 30, 2006.

(3) The Respondent shall remain liable to pay the rental under the lease until completion of the sale.

(4) The said sale price shall be reduced by US$150,000 being the value of the buildings and amenities for which the Respondent is entitled to be compensated.

(5) The Respondent shall not be entitled to an abatement of the purchase price or the payment of any compensation for "site works' which relate to making the land buildable.

(6) Time shall be of the essence in respect of the Respondent's obligation to pay the deposit and balance of the purchase price and on its failure to comply with this obligation the Claimant shall be entitled to cancel the sale, whereupon the Claimant will be under an obligation to pay the said sum of US$150,000 less any arrears of rental to the Respondent.

(7) The Respondent shall prepare a Form of Sales Agreement embodying the terms of this award and submit it to the Arbitrator for approval.

The Application to Set Aside the Award

13. The Appellant was not satisfied with the arbitration award. Consequently, on January 24, 2007 the Appellant filed a Fixed Date Claim in the Supreme Court seeking to nullify or set aside the Arbitrator's Award. In this Claim the Appellant sought inter alia:

(i) A declaration that the Arbitrator erred in fixing the sale price of the unimproved value of the land at US$2,225,000.00.

(ii) An order fixing the sale price at which the Appellant is to purchase the said land from the Respondent.

(iii) A declaration that the Arbitrator failed to consider properly the several valuation reports and in particular the Addendum for the Appraisal Report dated October 24, 2005.

(iv) A declaration that the Arbitrator erred in his finding that the sum of US$150,000.00 was "the value of the buildings and amenities for which the Appellant is entitled to be compensated".

(v) A declaration that the sum stated in (iv) above should be US$950,000.00

(vi) An order that the Respondent shall compensate the Appellant in the sum of US$950,000.00 should the Appellant fail to pay the sale price as fixed by the Court.

(vii) A declaration that the learned Arbitrator failed to consider properly the effect of clause 6 (3) of the Lease Agreement dated August 1, 2000.

Application to Strike Out Appellant's Statement of Case for Setting Aside the Award

14. On June 18, 2007 the Respondent filed a Notice of Application for Court Orders to strike out the Appellant's statement of case. The grounds on which this application was made were:

(1) The Claimant's (now the Appellant's) statement of case did not disclose any reasonable ground for bringing a claim.

(2) The Claimant's statement of case failed to disclose any basis either under section 12 (2) of the Arbitration Act or under the Court's inherent jurisdiction for the setting aside of the Arbitration Award.

15. Faced with this formidable challenge to its claim the Appellant on June 27, 2008 filed an Amended Fixed Date Claim Form. In paragraph 1 of this amended claim, the Appellant averred that the Award was bad on its face. In paragraphs 2 and 3 it is asserted that the Arbitrator "misconducted himself and/or fell into error by failing to consider properly" the several valuation reports (paragaph 2) and the Bills of Quantities (paragraph 3).

16. Apart from these specific averments the statement of case essentially remained the same. The amendment was clearly an attempt to bring it within the purview of the Court's inherent power to set aside an award and section 12 (2) of the Arbitration Act. This subsection states:

> "Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured the Court may set the award aside".

17. Brooks J. in granting the application to strike out the Appellant's statement of case made the following findings:

> (1) That there had been no allegation of misconduct made against the Arbitrator, as a result section 12 (2) of the Arbitration Act did not apply.
>
> (2) That there was no error of law or fact appearing on the face of the award.
>
> (3) That the reference to the Arbitrator was purely one of construction and thus the Appellant was not entitled to challenge it.
>
> (4) That it was not permissible for a Court to substitute its own views for that of the Arbitrator as requested by the Appellant.

On Appeal

18. Before us Mr. Wilkinson argued four (4) grounds on behalf of the Appellant – the 4th is a supplemental ground:

> (1) The learned judge erred in law in striking out the Appellant's claim.
>
> (2) The learned judge erred in law in finding or ruling that:
>
> > "... there has been no allegation of misconduct made against the learned arbitrator. As a result section 12 (2) of the Arbitration Act does not apply" (see page 10 of the Judgment)

(3) The learned judge erred in finding or ruling that the Arbitrator provided reasons for his findings.

(4) The learned judge erred in failing to consider, or consider properly the amended Fixed Date Claim Form filed on the 27th June, 2007 and the affidavit of Elworth Williams in support thereof.

Striking out of the Statement of Case

19. In grounds 1 and 2 the Appellant challenges Brooks J's conclusions that:

(1) there was no allegation of misconduct made against the Arbitrator;

(2) there was no error of law or fact appearing on the face of the award and

(3) the reference to the Arbitrator was purely one of construction.

20. Mr. Wilkinson for the Appellant submitted that striking out is appropriate and should be limited to plain and obvious cases where the claim is bound to fail. He contended that a cursory examination of the Amended Fixed Date Claim Form and supporting affidavit clearly showed that the Appellant had an arguable case. He submitted that as long as the statement of claim including any particulars disclosed some cause of action or some question fit to be decided by the Court, whether it is a question of law or fact or mixed law and fact, the action should be allowed to proceed. In support of these submissions, he cited **Harris v Bolt Burdon** (2000) L.T.L Feb. 2, 2002 C.A. **Three Rivers District Council v Bank of England** (No. 3) (2003) 2 AC 1 at 96-97.

21. Counsel for the Appellant also submitted that where there were other sanctions available for preventing prejudice to a litigant striking out is not appropriate. For this he relied on **Whittaker v Soper** (2001) EWCA Civ. 1462 among others. Mr. Wilkinson further submitted that the Arbitrator failed to consider properly all the relevant documents in setting a sale price and that such failure constitutes an error of law on the face of the award.

22. It is also the contention of Counsel for the Appellant that the failure of the Arbitrator to consider properly all the relevant documents also constituted misconduct on the part of the Arbitrator. In this regard Counsel referred to Russell on the Law of Arbitration 16th Edition; **Champsey Bhara & Co. v Jivraj Balloo Spinning and Weaving Co. Ltd.** (1923) AC 480 and **Absalom Ltd. v Great Western Garden Village Society** (1933) A.C. 592 at 611.

23. Mr. Bailey for Respondent submitted that the learned judge's statement of law in relation to the exercise of the Court's jurisdiction to strike out a statement of case as not disclosing any reasonable ground for bringing a claim was correct. Counsel for the Respondent referred to Rules 1.1. 1.2 and 26. 3 (1) (c) of the Civil Procedure Rules (CPR) and to the **Three Rivers District Council** case (supra) at p. 294 and submitted that the most important consideration in the exercise of the Court's jurisdiction to strike out a claim is that justice should be done. Justice, he said, is to be considered not only from the perspective of the claimant but also that of the defendant.

24. It is the contention of Mr. Bailey that the Arbitrator's award is final and binding on the parties – section 4 (h) of the Arbitration Act (the Act). Such an award, he said, can only be set aside by this Court (i) pursuant to section 12 (2) of the Act and (ii) by virtue of its inherent power where the award is bad on its face – **ICWI v G.G. Records** (1987) 24 JLR 351 and **National Sugar Co. Ltd. and others v American International Underwriters (Ja.) Ltd. and others** (1991) 28 JLR 276.

25. Counsel for the Respondent submitted, with force, that the alleged acts of misconduct do not fall within the definition of misconduct under s. 12 (2) of the Act. Further, he argued, there is no error of law or of fact on the face of the award. The Appellant, Counsel contended, seeks to challenge the award on the basis that the Appellant disagrees with the Arbitrator's interpretation of the valuation reports and other documents placed before him. This is not permissible, he submitted. In this regard reference was made to Russell on Arbitration 18th ed., p. 367.

26. The jurisdiction of the Supreme Court to strike out a statement of case in appropriate circumstances is indisputable. Rule 26.3 (1) (c) of the CPR, to which Brooks J. referred, states:

> "In addition to any other powers under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court –
>
> (c) ...

> (h) ...
>
> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
>
> (d) ...

27. In the **Three Rivers District Council** case Lord Hope in considering the discretion of a Court to summarily strike out a claim said at para 94:

> "For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly ..."

As Brooks J. correctly stated, the authorities show that the power to strike out should be exercised only in plain and obvious cases where there is no point in having a trial. In the words of Lord Hope (in the **Three Rivers District Council** case) "it is designed to deal with cases that are not fit for trial at all". Thus, on the hearing of the Respondent's application to strike out, the critical question which Brooks J. had to consider was whether or not the Appellant's statement of case for the setting aside of the award was "fit for trial". There is no doubt that the learned judge addressed his mind to this critical issue.

28. The crucial question upon this appeal is whether or not the learned judge correctly addressed the issue and applied the relevant principles in exercising his discretion. To deal with this, it is necessary to examine the nature of an award of arbitration. Section 4 (h) of the Act states:

> "4. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the following paragraphs as far as they are applicable to the reference under submission –
>
> (a) ...
>
> ...
>
> (h) the award to be made by the Arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively;
>
> ..."

"The general rule is that, as the parties choose their own arbitrator to be the judge in the disputes between them, they cannot, when the award is good on its face, object to his decision either upon the law or the facts" – Russell on the Law of Arbitration 18th Ed. at p 367.

29. However, section 12 (2) of the Act, as we have seen (paragraph 16) empowers the Court to set aside the award if the Arbitrator has misconducted himself or if the award has been improperly procured. In addition the Court has an inherent power to set aside an award that is bad on its face. In the **National Sugar Co. Ltd.** case (supra), this Court recognized the limits of a superior court's powers to interfere with arbitration awards. The Court referred to its statement in **Marley and Plant Ltd. v Mutual Housing Services Ltd.** SCCA. Nos. 3, 4 and 5/87 delivered Feb. 5, 1988: "The jurisdiction of the Supreme Court to set aside the award of an Arbitrator is circumscribed because the parties have chosen their

own tribunal and the findings of an Arbitrator expressed or necessarily implied are not to be disturbed save in certain well defined circumstances".

30. The essential burden of Mr. Wilkinson's challenge to the award of the Arbitrator is misconduct on the part of the Arbitrator and error of law on the face of the award.

31. In determining whether or not Brooks J. erred in striking out the Appellant's statement of case, it is necessary, in my judgment, to set out in full the Appellant's claim in its Amended Fixed Date Claim Form.

1. An Order that the Arbitration Award obtained on the 17th day of May, 2006 be set aside as being bad on its face;

2. An Order that the Arbitration Award obtained on the 17th day of May, 2006 be set aside as, among other things, the Arbitrator misconducted himself and/or fell into error by failing to consider properly the several valuation reports prepared by DC Tavares & Finson Realty Limited dated January, 2003, 24th of October, 2005 and 31st of October, 2005;

3. An Order that the Arbitration Award obtained on the 17th day of May, 2006 be set aside as, among other things, the Arbitrator misconducted himself and/or fell into error by failing to consider properly the Bills of Quantities for the Construction of Entertainment Complex at Willowood Lakes Limited prepared by Melvin Ashwood, Certified Quantity Surveyor, dated March, 2001;

4. Further or alternatively, a Declaration that the learned Arbitrator, Dr. Lloyd Barnett, O.J. erred in fixing the sale price of the unimproved value of the lands comprised in Certificate of Title registered at Volume 962 Folio 49 and Volume 984 Folio 127, respectively, of the Register Book of Titles (hereafter called "the said land") at US $ 2,225,000.00;

5. Further or alternatively, a Declaration that the correct sale price for the unimproved value of the said land is between US$1,300,000.00 and US $1,400,000.00.

6. Further, or alternatively, an Order fixing the sale price at which the Claimant is to purchase the said land from the Defendant;

7. An Order that the sale price arrived at by this Honourable Court is to be paid by the Claimant to the Defendant in full within six months of the date of the Order herein failing which the Defendant shall be entitled to re-enter forthwith and take possession of the said land;

8. A Declaration that the learned Arbitrator failed to consider properly the several valuation reports by DC Tavares & Finson Realty Limited dated January, 2003, 24th of October, 2005 and 31st of October, 2005 respectively;

9. Further, a Declaration that the learned Arbitrator failed to consider properly the valuation outlined in the Addendum to the Valuation Report prepared by DC Tavares & Finson Realty Limited dated the 31st of October, 2005 in arriving at the price for the unimproved value of the said land;

10. Further, or alternatively, a Declaration that the value of the buildings and amenities and other works done by the Claimant on the said land shall be between US$750,000.00 and US$1,050,000.00;

11. An Order that the Defendant shall compensate the Claimant in the sum of US$900,000.00, payable at the time that the Defendant re-enters the said land should the Claimant fail to pay the aforesaid sale price for the unimproved land as ordered by this Honourable Court.

12. A Declaration that the learned Arbitrator failed to consider properly the Bills of Quantities for the Construction of Entertainment Complex at Willowood Lakes Limited prepared by Melvin Ashwood, Certified Quantity Surveyor, dated March, 2001 in assessing the Claimant's contribution to the appreciation of the unimproved value of the said land between the date of commencement of possession to the date of the Arbitrator's ruling on the 17th of May, 2006;

13. A Declaration that the learned Arbitrator erred in ruling that the sum of US$150,000.00 was "the value of the buildings and amenities for which the Claimant is entitled to be compensated";

14. A Declaration that the facilities for which the Claimant is entitled to be compensated are those described at clause 6(3) of the Lease Agreement dated the 1st of August, 2000;

15. A Declaration that the learned Arbitrator failed to consider properly the effect of clause 6(3) of the Lease Agreement dated the 1st of August, 2000 in relation to compensation to the Claimant for its contribution to the appreciation of the unimproved value of the said land;

16. An Order that the Claimant is to remain in possession of the said land until the determination of the instant matter;

17. An order for all the necessary or consequential accounts and enquiries to be done;

18. Costs;

19. Liberty to apply, and

20. Such further or other relief as may be just.

32. I now turn to the question of misconduct. In this regard Brooks J. said: "I find that I may quickly dispose of the question of misconduct. There has been no allegation of misconduct made against the learned arbitrator. As a result section 12 (2) of the Arbitration Act does not apply".

33. Mr. Wilkinson, in his oral submissions, took the learned judge to task in respect of the above statement. He submitted that it is clear that the learned judge did not consider the Amended Fixed Date Claim Form and the affidavit evidence of Mr. Elworth Williams in support. It seems to me that there is merit in

this contention. In paragraphs 2 and 3, the Appellant alleges that the Arbitrator "misconducted himself... by failing to consider properly the several valuation reports" and "the Bills of Quantities" respectively. It is not correct to say, as the learned judge did, that there is no allegation of misconduct. It appears from the references by the judge to various paragraphs of the claim at page 12 of his judgment that the learned judge inadvertently had before him the original Fixed Date Claim Form. In these circumstances, it is, I think open to this Court to take a fresh look at the alleged acts of misconduct on the part of the Arbitrator with a view to determining whether such acts might fall within the definition of misconduct as contemplated by s. 12 (2) of the Act. See Rule 2.15 of the Court of Appeal Rules (CAR).

34. According to the learned author of Russell on Arbitration, the term misconduct in this context would appear to be used in its widest sense, perhaps even including mistake in law or fact admitted by the Arbitrator – see p. 349. At paragraph 378 op. cit it is stated that "Misconduct is often used in a technical sense as denoting irregularity and not moral turpitude. But the term also covers cases where there is a breach of natural justice".

In an earlier edition the learned author of Russell on Arbitration gave the following as the main heads under which an award may be set aside for misconduct of the Arbitrator:

(a) Proceeding ex parte without sufficient cause.

(b) Excluding persons entitled to be present.

(c) Improperly rejecting or receiving evidence

(d) Improper delegation of duties – see the 16th Ed at p. 309

35. In **Haigh v Haigh** (1861) English Reports Vol. XLV p 838 a case decided before the power to set aside for "misconduct" was made statutory, Turner, LJ. made the following statement which I think is still applicable:

> "The parties have chosen him (the arbitrator) to be their judge, and have agreed to abide by his determination, and by that determination, if fairly and properly made, they must be content to be bound; but on the other hand, arbitrators, like other judges, are bound, where they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice..."

36. It is in the context of the foregoing that the question as to whether or not the Appellant's allegation of misconduct is bound to fail, must be examined.

37. Because the basis of the allegation of misconduct relates to the alleged failure of the judge to consider certain documents and in the light of ground 4 in which the Appellant complains that the learned judge failed to consider or consider properly the Amended Claim Form, it is necessary and convenient, at this point, to compare the amended claim with the original one. Paragraph 1 of the amended claim is new. In paragraphs 2 and 3 thereof, allegations of misconduct are made for the first time. However the omissions relied upon as

constituting misconduct in paragraphs 2 and 3 of the amended claim are identical to the omissions complained of in paragraphs 5 and 10 of the original claim in which the Appellant sought Declarations. Paragraphs 4, 5, 6 and 7 of the amended claim are the same as paragraphs 1, 2, 3 and 4 of the original, respectively. Paragraphs 8 and 9 of the amended claim are the same as paragraph 5 of the original claim. Paragraphs 10 to 20 are the same as paragraphs 6, 7, 8, 10-12, 14 and 15-18 of the original claim respectively. It is clear from this that apart from paragraph 1 and the allegations of misconduct in paragraphs 2 and 3, the Amended Fixed Date Claim Form and the original claim are the same in their averments.

38. Having compared the amended and the original claims, I am constrained to say at this point that there is merit in the submissions of Mr. Bailey, that as the learned judge did in fact consider the substance of the allegations relied upon by the Appellant in its amended statement of case as amounting to misconduct by the Arbitrator, and did not find in these allegations any basis on which the Arbitrator's award could be challenged and therefore any reasonable ground for bringing the claim to set aside the award, the Appellant's ground 2 does not provide a basis for challenging the learned judge's decision.

39. It is now only necessary to consider the allegations in the affidavit. Mr. Elworth Williams in his affidavit sworn to on the 24th January, 2007 but filed on the

27 June 2007 after referring to the many documents placed before the Arbitrator said:

> "29. That inspite of these facts on the 17th of May, 2006 the Arbitrator misconducted himself and awarded inter alia, a sale price of U.S. $2,225,000.00. -
>
> 30. That I have been advised by my attorneys-at-law and do verily believe that this award is not supported by the evidence presented during the Arbitration.
>
> 31. That the Arbitrator came to this erroneous conclusion because he failed to consider properly the several valuation reports..."

40. The substance of the above paragraphs of Mr. Williams' affidavit, which in my opinion is more argument than evidence, constitutes the basis for Mr. Wilkinson's submission before Brooks J. (and which was repeated in this Court) that the documents referred to, should be examined by the Court. In answer to this contention the learned judge stated, correctly in my view, that:

> "The flaw in Mr. Wilkinson's submission in my view, is that, Willowood, in supporting its claim, has to show that the learned arbitrator was asked to do more than interpret the documents referred to him. If he were not, then even though Willowood, and perhaps a Court, may disagree with the theory which the learned arbitrator utilised in arriving at his award, the Court is not permitted to substitute its own view".

41. In a letter signed by both parties in which the revised Terms of Reference were set out, the Arbitrator was asked "to fix the sale price of the said property

based on his interpretation of the Valuation Reports prepared by D.C. Tavares & Finson Realty Company Limited for the purposes of establishing the market price of the property". The reference to the arbitrator clearly involved his interpretation of the specific Valuation Reports. He was not asked to do anything more than to fix the sale price based on his interpretation of the documents. In the **National Sugar Co**. case, this Court in dealing with an award which emanated from a reference which related to a matter of construction said (p 278 F-H):

> "The approach of this Court as indeed of Edwards J., to this award can be informed by the dicta of Lord Cave, L.C. in Kelanton Government v Duff Development Co. Ltd. (1923) All E.R. (Rep.) 349. The learned Lord Chancellor having held that the reference in the case before their Lordships' House related to a matter of construction, continued thus at pages 354-355."
>
> "If this be so, I think it follows that, unless it appears on the face of the award that the Arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it, and no doubt a question of construction is generally speaking – a question of law. <u>But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion</u>. If it appears by the award that the arbitrator has proceeded illegally for instance, that he has decided on evidence which in law is not admissible, or on principles of construction which the law does not countenance then there is error in law which may be ground for setting aside the award, but the mere dissent of the court from the

> arbitrator's conclusion on construction is not enough for that purpose". (Emphasis supplied)

42. It is clear that the Appellant in his claim, to set aside the award seeks to have the Court examine the documents and to substitute its own conclusion for that of the Arbitrator. The authorities show that this is not permissible. Upon the authorities, the Appellant would have a reasonable chance of success if there were some evidence which if accepted might show that the Arbitrator in setting the sale price took into consideration documents which he was not required to interpret or omitted to consider any relevant documents or applied principles of construction which the law does not countenance. The allegation of misconduct in Mr. Williams' affidavit, at paragraph 29, does not, in my judgment, fall within the definition of misconduct as contemplated by s. 12 (2) of the Act.

43. The other mention of misconduct by Mr. Williams appears in paragraph 33 of his second affidavit. In this paragraph he states:

> 33. "That the Arbitrator further misconducted himself when he improperly rejected the evidence in the Bills of Quantities for the Construction of Entertainment Complex at Willowood Lakes Limited prepared by Melvin Ashwood, Certified Quantity Surveyor, dated March 2001 in assessing the compensation due to the Claimant for the infrastructural works and development undertaken on the said land and so the award should be set aside".

44. The learned Arbitrator in paragraphs 11-19 considered the relevance of the Bills of Quantities in the assessment of what compensation should be given to the lessees for their improvements of the property. It is certainly not correct to say that he improperly rejected the evidence in the Bills of Quantities. The Arbitrator was required to determine whether the Respondent should be required to compensate the Appellant for the improvements to the property, and if so, to make a finding as to the amount of such compensation to be paid upon surrender of the property. If he decides that the Bills of Quantities are not helpful in this exercise, that by itself would not constitute misconduct. Unless the Appellant can show that there is an error of law or fact on the face of the award, it cannot be set aside by the Court. The parties, having chosen their own Arbitrator to be the judge in the disputes between them, cannot, when the award is good on its face, object to his decision, on the basis that they do not agree with it, either upon the law or the facts – see **Government of Kelantan v Duff** (supra). In my view this allegation of misconduct is bound to fail also.

Error of Law or Fact

45. In addition to the provisions of s. 12 (2) of the Act, the Court has jurisdiction to set aside an arbitration award that is bad on its face, either as involving an apparent error in fact or law. In **Champsey Bhara & Co. v Jivraj Balloo Spinning and weaving Co. Ltd.** (supra) it was held by their Lordships' Board that:

> "An award of arbitration can be set aside on the ground of error of law on the face of the award only

> when in the award or in a document incorporated with it, as for instance a note appended by the arbitrator stating the reasons for his decision, there is found some legal proposition which is the basis of the award and which is erroneous."

46. Now, there is no complaint that the learned judge failed to consider the question of error on the face of the award. Indeed the learned judge spent some time addressing this issue. The Appellant is challenging the judge's findings on this issue. The Appellant is not challenging the award on the basis of an error of fact on the face of the award. The allegation is that there is an error of law on the face of the award. The learned judge in considering the error on the face of the award issue dealt with the Appellant's complaint that the Arbitrator failed to consider certain documents which were placed before him.

47. In paragraph 1 of the Amended Fixed date Claim Form the Appellant avers that the award is bad on its face. In para 32 of his second affidavit Mr. Williams, the Appellant's witness, states:

> "That I have been advised by my Attorney-at-Law, and do verily believe that this failure to consider properly all the relevant documents in setting a sale price for the said land constitutes an error of law on the face of the Award which is material to the decision of the Arbitrator and that this Award is bad on its face and ought to be set aside".

In my judgment this paragraph discloses no reasonable basis for setting aside the award. I say this for the following reasons:

(a) What is clear from Mr. Williams' evidence is that the conclusion that the Arbitrator has failed "to consider properly" the relevant documents is based upon his attorney's disagreement with the Arbitrator's interpretation of the said documents. Assuming, without so finding, that in the Court's view, the Appellant's attorney-at-law has reasonable grounds for disagreeing with the Arbitrator's interpretation of the valuation reports or other documents before him, the Court may not set aside the award on that basis. The Court cannot substitute its own view for that of the Arbitrator. The decision of the Arbitrator cannot be set by the Court only because the Court would itself have come to a different conclusion.

(b) This paragraph, contrary to its purpose, does not identify an apparent error of law on the face of the award in that it does not refer to a legal proposition in the award itself or in a document incorporated thereto, which the Appellant claims to be erroneous and which is the basis for the award – see the **Champsey Bhara** case.

Even though it may be a reasonable inference that the Arbitrator has made a finding which is erroneous in law the Court cannot interfere unless the finding is stated in the award – Russell on Arbitration at p. 367.

(c) Where an Arbitrator makes a mistake either in law or in fact in determining the matter referred, but such mistake does not appear on the face of the award, the award is good not-with-standing the mistake and will not be omitted or set aside – See Russell on Arbitration at p 367.

(d) The Arbitrator was asked to fix the sale price of the property based on his interpretation of the valuation reports and the other documents submitted and to determine whether the Respondent should be required to compensate the Appellant for the value of the improvements of the property and if so to make a finding as to the amount. The Arbitrator gave exact answers to each question in the terms of the submission. Accordingly, even if in so doing an error of law, appears on the face of the award, his award cannot be set aside on the grounds set out in paragraphs 2 and 3 of the Amended fixed Date Claim Form to which, obviously, Mr. Williams refers in para 32 of his affidavit. See **ICWI v GG Records Ltd.** 24 JLR 350.

For the foregoing reasons, in my judgment, there is no merit in grounds 1, 2 and 4. The Declarations and Orders sought in the Amended Claim are bound to fail.

48. In the third ground, Mr. Wilkinson complains that the judge erred in finding or ruling that the Arbitrator provided reasons for his findings. The significance of this complaint is not clear. I did not understand Counsel for the Appellant to be saying that failure to give reasons for the award would constitute misconduct or an error on the face of the award. In any event it is not correct to say that the Arbitrator gave no reasons for his award. Part B of the award is captioned "Reasons for Award" and in paragraphs 7 to 19 the learned Arbitrator carefully set out his reasons. As Brooks J. described it, it was a 'speaking' award. In paragraphs 7 to 13 the learned and experienced Arbitrator examined the 2003 and 2005 Valuation Reports and the correspondence contained in three letters each dated October 31, 2005. At paragraph 14 he reminded himself of the revised Terms of Reference and stated what he understood his task to be. He found that the 2005 appraisal was the relevant one. In paragraphs 15, 16 and 17 he considered the relevance of Clauses 4 (2), 4 (15) and 6 (3) of the Lease to the assessment of what compensation if any, should be given to the lessees of the property. At paragraph 18 he gives his reasons for holding that the Addendum to the valuation which deals with the land in its original state is not applicable. At paragraph 19 he shows how he arrives at the value of the buildings and amenities for which the tenant is to be compensated. I find no merit whatsoever in the complaint.

Conclusion

49. For the reasons given I am of the view that Brooks J. was correct in striking out the Appellant's claim to set aside the award, as the claim disclosed no reasonable prospect of success. Accordingly I would dismiss the appeal with costs to the Respondent.

HARRIS, J.A.

I agree.

SMITH, J.A. (Ag)

I agree.

SMITH, J.A.

ORDER:

The appeal is dismissed with costs to the Respondents to be agreed or taxed.