IN THE SUPREME COURT OF THE TURKS AND CAICOS ISLANDS

Case No CL 145/09

AND IN THE MATTER OF THE ARBITRATION ORDINANCE (CAP. 47)

AND IN THE MATTER OF AN ARBITRATION

BETWEEN

APOLLO DEVELOPMENTS LTD

PLAINTIFF
(Respondent in the Arbitration)

-AND-

JACA TCI LTD.

DEFENDANT
(Claimant in the Arbitration)

Hearing: 9th October 2009
Decision: 9th October 2009
Written Reasons Circulated: 26th October 2009

For the Plaintiff: Ms Monique Allan – Saunders & Co
For the Defendant: Mr Stephen Wilson – Miller Simon O'Sullivan

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REASONS FOR DECISION

THE APPLICATION

1. This application was originally brought by an Originating Summons filed on 24th July 2009. The orders that the Plaintiff, Apollo Developments Ltd ("Apollo"), are seeking under that Summons are that:

(i) The Defendant, JACA TCI Ltd ("JACA"), do give security for the Plaintiff's costs of the arbitration pursuant to Section 72 of the Companies' Ordinance (Cap.122) within 14 days.

(ii) All proceedings in the arbitration be stayed until JACA has given security if ordered.

2. This application is opposed by JACA for a number of reasons, including a contention that this Court does not have jurisdiction.

PRELIMINARY ISSUE

3. The question the Court had to determine, before considering whether to give any directions, was whether the Court had the jurisdiction to make an order for security for costs in the circumstances of this case. If the answer was yes, the Court would then, at a later hearing, have to decide whether it should exercise its discretion to do so. If the answer to that was also yes, the Court would then need to decide the amount.

4. On 9th October 2009 the Court ordered that the Originating Summons be dismissed. I stated that I would give written reasons for my order and do so now. On 9th October 2009 I also ordered that the Plaintiff do pay the Defendant's costs and at that time gave contemporaneous reasons for that decision.

BACKGROUND

5. The arbitration relates to various disputes between the parties arising under a building contract dated 21st May 2007 ("The Agreement"). For the purpose of this ruling there is no need to set out in any detail the nature of these disputes.

6. In Paragraph 35 of the Agreement the parties agreed that a mediator and/or arbitrator should be appointed to negotiate a settlement of any dispute.

7. Paragraph 35 (6) of the Agreement under the side heading "Dispute Resolution" states that "....the Law of the Turks & Caicos Islands shall be the proper Law of this Contract (unless the Law of some other country is substituted therefore in this Contract)." Importantly, the Paragraph then continues: "....in particular the provisions of the Arbitration Ordinance 1974 shall apply to any arbitration under this Contract wherever the same, or any part of it, shall be conducted."

8. Paragraph 38 of the Agreement, under the heading "Law Governing," states that "This contract shall be construed by and in accordance with the Law of the Turks & Caicos Islands so that all questions and matters arising there from, whatever procedure or substantive character shall be determined by the said law which shall be deemed to be the proper Law of the Contract."

9. On the 9th July 2009 the Learned Arbitrator ruled that neither Section 13(1) of the Arbitration Ordinance nor the Rules of the Supreme Court 2000 applied to the arbitration. The Arbitrator rightly concluded that he had not been appointed under Part II of the Arbitration Ordinance. The contention that the Rules applied, as the Arbitrator's appointment was made pursuant to an order of the Court and because Section 13(1) deemed him to be an officer of the Court required to conduct the reference in such manner as may be prescribed by rules of Court, was rejected. The Arbitrator rightly ruled that he was appointed by order of the Court under Section 6(2) and this appears in Part 1 of the Ordinance. The Learned Arbitrator set out his various orders and directions in Procedural Order No.1 dated 10th July 2009.

THE DEFENDANT'S CASE

10. Mr Wilson, on behalf of JACA, contends that Section 72 Companies Ordinance does not give this Court the jurisdiction to make an order for security for costs of the arbitration proceedings. It is contended that arbitration proceedings are not an action, suit or legal proceedings. However, it is conceded by Mr Wilson that there may, having regard to Australian case authorities, be a possible argument on the issue as to whether they amount to legal proceedings.

11. Mr Wilson submitted that there must be an enabling provision giving the Court power to make an order for security for costs before it can interfere with the Arbitration Agreement. Mr Wilson carefully took the Court through the development of the law concerning the courts' jurisdiction to make orders for security for costs of arbitrations in England and Wales. Mr Wilson relied upon the general law set out in the various cases and upon which there was found to be "no controversy" in Bank Mellat V Helliniki Techniki S.A. [1984] 1 Q.B. 291 (CA) and S.A. Coppee Lavalin N.V. v Ken-Ren Chemicals and Fertilizers Ltd (In Liquidation in Kenya) [1995] 1 AC 38 (HL). Mr Wilson submits that the Arbitration Ordinance does not contain a similar enabling provision to that found and introduced in the relevant legislation governing arbitrations in England and Wales since 1934.

12. Mr Wilson submits that the Legislature at the time of drafting the Ordinance in 1974 would have been aware of the specific provisions concerning security for costs in the then current legislation in England and Wales. However, the Ordinance was still drafted with no like provision and Mr Wilson states that it appears that the intention of the Legislature was to have "an eye on the 1889 Act rather than the 1934 and 1950 Acts."

13. Mr Wilson informed the Court that there had been detailed negotiations about dispute resolution and enforcement at the time that the Agreement was drawn up. It is submitted that, despite this, the parties did not choose to place in the Agreement any provision specifically giving the Court or the Arbitrator the power to order security for costs of the arbitration. Mr Wilson contends that paragraph 38 of the Agreement is a standard Choice of Law Clause and does no more than oblige the parties and the Arbitrator to apply the laws of the Turks and Caicos Islands. Mr Wilson submits that paragraph 38 does not by itself create a new power to grant security for costs in arbitration proceedings. It is contended that if the parties had wished to specifically reserve the right to apply for security for costs it would have been specifically set out in the Agreement

THE PLAINTIFF'S CASE

14. Ms Allan contends, and I accept, that arbitration falls within "or other legal proceedings."[1] Ms Allan then goes on to submit for three reasons that this Court has the jurisdiction to make an order for security for costs under Section 72.

15. It is submitted that Section 13(1) gives the Court jurisdiction to make all orders and directions that it could make in respect to an action against it. This submission issue was made to the Arbitrator in July 2009. It is clear that the reference to the Arbitrator is not a reference under an order of Court, it is a reference by agreement under an arbitration agreement. The issue that the Court had to determine was the identity or appointment of arbitrator and this was not a referral. I find great merit in the Ruling of the Learned Arbitrator and the submissions made to this Court do not detract me from that view. Section 13(1) does not give the Court the jurisdiction to make an order for security for costs in these circumstances.

16. Ms Allan relies upon Section 72 Companies Ordinance and submits that there is no requirement for a separate enabling provision. Ms Allan did not produce case law to counter the established precedent set out in the cases presented by Mr Wilson. It appears that Ms Allan was not submitting that the English cases were wrongly decided but that they did not apply to the matter before me.

17. Ms Allan submitted that, if she was unable to rely upon Section 72, there was a wide Choice of Law Clause at Paragraph 38 of the Agreement.[2] This appears to be the submission made with most force by Ms Allan. Ms Allan contended that the clause confers upon the Court the jurisdiction to decide procedural issues in accordance with the Court's own procedures. It is submitted that the provision is a specifically empowering provision entitling the Court to make an order for security and other procedural issues which may arise in connection with an arbitration. Ms Allan argues that the application for security for costs is a "procedural aspect" of the arbitration and therefore is covered by this Clause. It is submitted that in this section

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[1] Johnson and Ors v Macri and Marcellino Pty Ltd- No. 12256 of 1990 -Supreme Court of New South Wales Commercial Division.

[2] See paragraph 7 above.

21. The issue is whether this Court has jurisdiction in the matter. If the Court does not, then Section 72 does not apply. The current position in the Turks and Caicos Islands is akin to that in England and Wales prior to 1934. In 1934 the Arbitration Act was passed in England and Wales. Section 8(1) and Schedule 1 of that Act extended the existing power to order security for costs in favour of a defendant in actions in the courts to arbitrations. Prior to 1934 the Courts in England and Wales did not have an inherent power to order security for costs in arbitration matters. The general law which provides the background to this issue was rightly viewed as being without substantial controversy by Lord Kerr in Bank Mellat v Hellinki Techniki S.A [1984] 1 Q.B. 291 (CA) at para G page 300. In Coppee Lavalin N.V. v Ken-Ren Chemicals and Fertilizers Ltd (In Liquidation in Kenya) [1995] 1 AC 38 Lord Mustill stated that Kerr L.J set out "the general law in an entirely uncontroversial manner."

22. In Hudson Strumpffabrik GmbH v Bentley Engineering Co.Ltd [1962] 2 Q.B. 567 at page 589, Mocatta J clearly found that the Court's jurisdiction derived from a provision in the 1950 Arbitration Act.

23. The Head note in Bilicon Ltd v Fegmay Investments Ltd [1966] 2 QB 587 clearly summarises the uncontroversial approach taken by the Courts. Nield J at page 225 paragraph C stated:

"It is necessary now to consider the position where the proceedings are an arbitration to see what powers of the High Court in this connection are. Such powers derive from Section 12 (6) of the Arbitration Act, 1950, and in material parts that section read:

"The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of – (a) security for costs.... as it has for the purpose of and in relation to an action or matter in the High Court...."

It seems clear to me that this section specifically empowers the High Court to exercise, in relation to arbitration, those powers which the High Court already has in relation to actions or other proceedings in the High Court to make an order for security for costs, and such powers are set out in Order 23, r.1."

At page 227 Paragraph E Nield J went on to state:

".....a judge of the High Court may by virtue of Section 12(6) of the Arbitration Act order security for costs in an arbitration...."

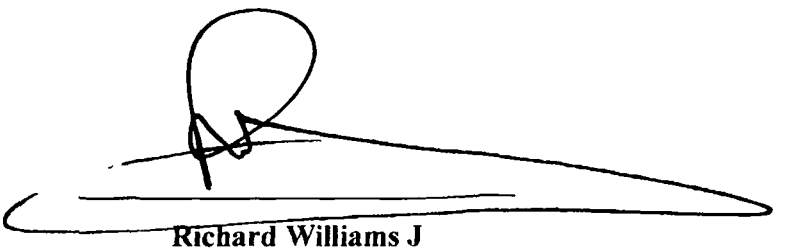
24. It is evident that there is no empowering provision in the Arbitration Ordinance enabling the Supreme Court to order security for costs in an arbitration. To her credit, Ms Allan, at a later stage in her submissions, also appeared to accept the approach of the Courts in England and Wales to be uncontroversial. As a consequence, Miss Allan then moved on and appeared to more forcefully rely upon her contention that, under Paragraph 38 of the Agreement[3], the parties had expressly given the Court the power to make an order for security for costs in an arbitration. It is submitted that the paragraph confers upon the Court the jurisdiction to decide procedural issues in accordance with the Court's own procedures. Ms Allan argues that the application for security for costs is a "procedural aspect" of the arbitration and therefore the parties intended it to be covered by this clause and as a consequence there is no need for a separate legislative empowering provision.

25. Paragraph 38 of the Agreement, when read in conjunction with paragraph 35(6), is a relatively straightforward choice of law clause. The clause obliges the arbitrator, the Court and the parties to apply the laws of the Turks and Caicos Islands as the law governs the contract. It would be wrong to extend the effect of Paragraph 38 to empower the Court to make an order for security for costs in an arbitration. Section 72 Companies Ordinance does give a specific power to the court to order security for costs in an arbitration. The purpose of Section 72 is to empower a Judge of the Supreme Court who has jurisdiction to go outside the conditions laid out in Order 23, r.1 and enable a Court to also order security for costs if a company is insolvent. Paragraph 38 is designed to deal with procedural matters such as evidence, taking of oaths and does not give a judge the requisite jurisdiction required for Section 72. If the parties had intended the Court to have such a power, one would have expected them to clearly state that in the Agreement.

[3] Paragraph 38 is set out at paragraph 8 above

CONCLUSION

26. I find that the Supreme Court does not have the power to order security for costs in relation to an arbitration. Accordingly, I order that the Originating Summons dated 24th July 2009 do stand dismissed with costs to be taxed if not agreed, and paid by the Plaintiff to the Defendant.



Richard Williams J