In The Supreme Court of Bermuda

CIVIL JURISDICTION
2017: No. 262

IN THE MATTER OF THE ARBITRATION ACT 1986

AND IN THE MATTER OF THE MUNICIPALITIES AMENDMENT ACT 2013

AND IN THE MATTER OF THE MUNICIPALITIES AMENDMENT ACT 2014

BETWEEN:

THE MINISTER OF TOURISM, TRANSPORT AND MUNICIPALITIES

Applicant

-v-

(1) THE ALLIED TRUST

(2) ALLIED DEVELOPMENT PARTNERS LIMITED

Respondents

REASONS FOR DECISION

(in Court[1])

Statutory arbitration under section 14 of the Municipalities Amendment Act 2013- application for order under section 39 of Arbitration Act 1986 terminating arbitration

Date of Decision: November 16, 2017
Date of Judgment: December 1, 2017
Mrs Jennifer Haworth and Mr Alan Dunch of MJM Limited for the Applicants
Mr Michael MacLean (assisted by Mr Llewellyn Peniston as his McKenzie Friend), a shareholder of the 2nd Respondent, appeared in person

[1] The present Judgment was circulated to counsel without a hearing to hand down judgment in order to save costs.

Background

1. By an Originating Summons issued on July 18, 2017, the Minister sought "*an order pursuant to section 39 of the Arbitration Act 1986 for the termination of arbitration proceedings ('the Arbitration') commenced by the Respondents under the provisions of section 14 of the Municipalities Amendment Act 2013 ('the MAA 2013') and in which the Respondents claimed compensation from the Government of Bermuda arising out of the voiding of certain agreements entered into between the Respondents and the Corporation of Hamilton ('the Corporation') in December 2013.*"[2]

2. After an initial hearing on August 31, 2017 at which the Respondents did not appear, but at which Hellman J directed that the Applicant should file a supplementary Affidavit, the matter was mentioned on September 14, 2017 before me. Mr Johnston appeared for the Respondents and indicated that the application was opposed. Directions were ordered which required, *inter alia*, responsive evidence to be filed by the Respondents within 14 days and skeleton arguments to be exchanged in advance of the hearing. The Respondents did not comply with these directions.

3. The Respondents (in particular the 2nd Respondent) did not effectively appear at the scheduled hearing of the present application on November 16, 2017, either. I say that because Order 5 rule 6 provides as follows:

> "*(2)Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any such proceedings otherwise than by an attorney.*"[3]

4. Mr Michael MacLean, known to the Court as a person who has previously instructed counsel on behalf of the Respondents in other proceedings, appeared and requested the Court to allow Mr Llewellyn Peniston assist him as a McKenzie Friend. Mr Johnston was no longer available to act on the Respondents' behalf. Noting two other sometime 'McKenzie Friends' at the back of the Court, and with no strong objection from Ms Haworth, I permitted Mr Peniston to assist Mr McLean with the issue of whether the Court should grant an adjournment to afford the Respondents an opportunity to retain fresh counsel.

5. In the event, after I confirmed that any Order made on the present application would not, without more, extinguish the Respondents' rights under the outstanding limb of their constitutional application in relation to the cancellation of their contract with the

[2] The same abbreviations adopted in the Originating Summons are adopted for the purposes of the present Judgment.
[3] Order 5 rule 6(1) provides that a trustee or any other person suing in a representative capacity may appear in person. It was unclear whether Mr MacLean qualified under this rule.

Corporation[4], no adjournment application was pursued. I accordingly granted the Applicants the relief sought on their Originating Summons and I now give reasons for the decision to grant an Order on November 16, 2017 in the following terms:

> "*1. Pursuant to section 39 of the Arbitration Act 1986, the arbitration commenced by the Respondents under the provisions of section 14 of the Municipalities Amendment Act 2013 and in which the Respondents claimed compensation from the Government of Bermuda arising out of the voiding of certain agreements entered into between the Respondents and the Corporation of Hamilton ('the Corporation') in December 2013 is hereby terminated.*
>
> *2. Costs are hereby awarded in favour of the Applicant to be taxed if not agreed.*"

The statutory jurisdiction to dismiss arbitration proceedings

6. The Arbitration Act 1986 ("the Act") applies to domestic arbitrations and the Bermuda International Conciliation and Arbitration Act 1993 applies to international commercial arbitrations. Section 39 of the Act provides as follows:

> "***Delay in prosecuting claims***
> *39 (1) In every arbitration agreement, unless the contrary be expressly provided therein, there is an implied term that in the event of a difference arising which is capable of settlement by arbitration it shall be the duty of the claimant to exercise due diligence in the prosecution of his claim.*
>
> *(2) Where there has been undue delay by a claimant in instituting or prosecuting his claim pursuant to an arbitration agreement, then, on the application of the arbitrator or umpire or of any party to the arbitration proceedings, the Court may make an order terminating the arbitration proceedings and prohibiting the claimant from commencing further arbitration proceedings in respect of any matter which was the subject of the terminated proceedings.*
>
> *(3) The Court shall not make an order under subsection (2) unless it is satisfied that—*

[4] *Allied Trust-v-Attorney-General for Bermuda and Minister of Home Affairs* [2015] Bda LR 81, where this Court concluded:

> "*98. The Respondents' strike out application is allowed to the extent set out in paragraphs 83 to 92 above. The Applicants can no longer seek to challenge the validity of the voiding of the Agreements and may only seek constitutional relief with a view to obtaining adequate compensation. Such relief can only be pursued on the basis that, having exhausted their statutory remedies in the Arbitration under the 2013 Act, the relief obtained falls short of the constitutional standard or they are for other reasons entitled to additional constitutional compensatory relief.*"

(a) the delay has been intentional and vexatious; or

(b) there has been inordinate and inexcusable delay on the part of the claimant or his advisers; and that—

(i) the delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the arbitration proceedings, or

(ii) the delay is such as is likely to cause or to have caused serious prejudice to the other parties to the arbitration proceedings either as between themselves and the claimant or between each other or between them and a third party…."

7. Section 39 falls within Part III of the Act and section 43 provides that Part III applies to statutory arbitrations. The statutory basis for the Arbitration is found in the following provisions of section 14 of the MAA 2013:

"(7) *Any person interested in land which is the subject of an agreement who is aggrieved by the voiding of the agreement under this section shall notify the Minister in writing, within 21 days after such voiding, of the person's estate and interest in the land and of the claim made by the person in respect of the land.*

(8) If a person, within the 21 day period referred to in subsection (7), notifies the Minister of the person's estate or interest in the land which is the subject of the agreement and of the claim made by the person in respect of the land, the person may, before the expiration of 42 days after the voiding under this section, agree with the Minister upon the amount of compensation to be paid by the Government for the estate or interest belonging to him, or which he has power to sell, or for any damage which may be sustained by him by reason of the execution of any works.

(9)If any person who notifies the Minister in accordance with subsection (8) fails to agree with the Minister, before the expiration of 42 days after the voiding under this section, upon the amount of compensation to be paid by the Government for the estate or interest belonging to him, or which he has power to sell, or for any damage which may be sustained by him by reason of the execution of any works, the question of compensation shall be referred by the Minister to arbitration.
(10) Sections 10, 11, 12, 13, 14 and 15 of the Acquisition of Land Act 1970 shall apply to any question referred to arbitration, and the reference in section 14(4)(c) of that Act to "the notice to treat under section 5" shall be construed as a reference to the voiding of the agreement under this section."

The Respondents' impugned failure to diligently prosecute their claim

8. Not only was the present application unopposed. Mr MacLean conceded that there was no realistic prospect of funding being found to prosecute the arbitration proceedings even if an adjournment were granted for this purpose. In these

circumstances, it is only necessary to describe the uncontested history of the Arbitration in very broad outline terms:

- on December 21, 2013, the Corporation entered into a Development Agreement with the 2nd Respondent in relation to the Hamilton Waterfront and granted a ground lease to the 1st Respondent;

- on March 25, 2014, the Legislature voided the two agreements under section 14(4) of the MAA 2013;

- on May 5, 2014, the Respondents requested the Governor to constitute an arbitration tribunal under section 14(9) of the MAA 2013 as read with section 10(1) of the Acquisition of Land Act 1970 to determine their compensation claim;

- the Tribunal was duly appointed and directions were ordered by the Chairman Mr Geoffrey Bell QC on September 26, 2014. Pleadings were exchanged and evidence was due to be exchanged on February 27, 2017 with a substantive hearing scheduled for July 6, 2015;

- on February 11, 2015 the Respondents issued an Originating Summons seeking constitutional relief resulting in the Arbitration being stayed;

- the Respondents' Originating Summons was substantially struck out on August 24, 2015. They filed an application for leave to appeal on or about September 8, 2015 and obtained leave to appeal from me on November 20, 2015;

- on March 4, 2016 the Court of Appeal ordered that unless security for costs was paid into Court by March 31, 2016 the Respondents' appeal would be dismissed. The security for costs was not posted and the appeal was dismissed;

- on May 10, 2016 when the Tribunal had scheduled directions hearing, the Respondents' attorneys advised the Tribunal that their clients had insufficient funds to adequately participate in the proceedings;

- the Respondents last took steps to actively prosecute the dispute they referred to arbitration in or about February, 2015.

9. The history of the Arbitration, and the failure of the Respondents to diligently prosecute their claim, was described in the Affidavit of then Minister and Senator Michael Fahy. The prejudice flowing from this neglect was deposed to by Permanent Secretary Mr Randolph Rochester. Grounds advanced included:

    - concerns about the availability of the Tribunal members and witnesses in the event of a lengthy delay;

    - concerns about the ability to develop the Hamilton Waterfront Property in light of the Respondents having alluded to having a proprietary claim;

    - the need for finality.

Findings: grounds for terminating the Arbitration

10. Ms Haworth explained that the present application was prompted not just by the Respondents' delay, but also by the fact that the Tribunal was not confident that its powers extended to dismissing the claim for want of prosecution. That reticence is quite understandable. The facts of the present case, by the time of the hearing of the Applicant's Originating Summons, served to highlight the need for the jurisdiction conferred by section 39 of the Act. The undisputed facts were that:

    (1) the Respondents had failed to prosecute the arbitration for more than 2 ½ years, with some of the delay attributable to the pursuit of an unmeritorious constitutional claim which was substantially dismissed;

    (2) the Respondents admitted to the Tribunal in May 2016 that they lacked the resources to pursue their claim;

    (3) the Respondents failed to appear to oppose the application to terminate the Arbitration, and their principal conceded that there was no realistic prospect of the claim being further pursued.

40. These facts made out a strong foundation for a finding that the Arbitration should be terminated under section 39(2) of the Act because the Respondents had been guilty of intentional and vexatious delay for the purposes of section 39(3)(a) of the Act. In these circumstances I found it unnecessary to consider the alternative ground for termination based on prejudice (section 39(3)(b)), which to my mind was not as clearly made out. For these reasons I terminated the Arbitration on November 16, 2017.

Dated this 1st day of December 2017 _____

IAN RC KAWALEY CJ