In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011 No: 254

JOHN BUCHANAN

PLAINTIFF

-v-

TOM LAWRENCE

DEFENDANT

EX TEMPORE RULING

(in Chambers)

Date of hearing: July 27, 2012

Mr. Alan Dunch, MJM Limited, for the Plaintiff

Mr. Martin Ouwehand, Appleby (Bermuda) Ltd, for the Defendant

Introductory

1. In this case the Plaintiff issued a Specially Indorsed Writ of Summons on August 3, 2011against the Defendant. The complaint relates to the Plaintiff's attempts to recover a £27,000 fee paid to The Finest Golf Clubs of the World Limited, a United Kingdom company involved in the world of golf.

2. The claim asserts that, following a meeting at Harry's Bar in the City of Hamilton, the Defendant promised personally to refund the £27,000 initiation fee. Paragraph 10 of the Statement of Claim starts off by referring to the "*express representation by the Defendant that he continued to speak exclusively for and on behalf of the Eden Club, in his capacity as its Executive Director*". It then proceeds to allege that a second agreement was entered into and confirmed in a subsequent email in which the Defendant agreed to refund the initiation fee.

3. The matter before the Court is an application to stay the present action on the grounds that it is brought in breach of an arbitration clause. This application was brought by way of Summons issued on September 26, 2011. It seeks, in substance, the following relief:

> "*…an Order that… this action be stayed and referred to arbitration pursuant to Article 8 of the Model Law in force by virtue of the Bermuda International Conciliation and Arbitration Act 1993.*"

The Arbitration Agreement and its application to the present dispute

4. It was common ground between the parties that the membership contract contains an arbitration clause providing for arbitration in London of the following categories of disputes:

> "*Each and every dispute, claim or other matter of disagreement between and among the Club, its officers, directors, affiliates and any Club member or applicant or Membership relating to or arising out of the Membership Plan, or Rules and Regulations or any transaction contemplated by the Membership Plan or Rules or Regulations shall only be decided by arbitration in accordance with the commercial arbitration rules of the United Kingdom then in force, except as otherwise provided herein, and no right shall exist to have any such dispute litigated in court or by jury trial…*"

5. The essence of the dispute is whether or not the subject matter of the present civil action is caught by the arbitration clause. Mr. Dunch for the Plaintiff argues that it is plainly not. He relies in part on the Affidavit of the Defendant which seems to suggest that he views the claim as being against him personally. Mr. Ouwehand for the Defendant submits, in reliance on several authorities, that the proper approach for the Court to adopt under article 8 of the Model Law[1] is to grant a stay where there is a *prima facie* case that the relevant dispute is caught by the arbitration clause.

6. I agree that this is the applicable test. It is clear that the UNCITRAL Model Law imposes a very strong policy in favour of arbitration. I was referred to Robert Merkin's '*Arbitration Law*' (Informa Press: London, 2011). At page 8-22 footnote 12,

[1] Article 8 provides:

"(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

there is a list of various jurisdictions (including Model law jurisdictions) and the following statement appears:

> "*This principle has been applied in numerous cases, eg, Kaiser v. Krauss [2003] 122 ACWS (3d) 981 (stay granted where it was not clear whether the parties were bound by the arbitration clause in their capacities as individuals); Instrumenttitehdas Kytola Oy v. Esko Industries Ltd [2003] BSSC 722 (dispute as to whether dispute fell within arbitration clause-stay granted as answer not clear)*…"

7. So I accept the submission by the Defendant that even where there is some doubt as to whether or not the dispute falls within the arbitration clause the policy of the Model Law is to grant a stay. In this case what I consider to be dispositive in deciding the present application is that the argument the arbitration clause does not in fact apply to the Defendant in his personal capacity is in my judgment a very dubious one.

8. The intent of the arbitration clause appears to me (and all I need to find is that it is strongly arguable) is to give officers of the Club the protection of the arbitration clause. If such a clause (which might be likened to a bye-law indemnity clause which protects directors against claims in respect their opposition as directors) were to be construed in the way Mr. Dunch contends for, it is difficult to see how the clause would have any efficacy. In my judgment it is difficult to see a clear legal distinction in this sort of context between a claim against a director *qua* director and a claim against him in his personal capacity, where the pleadings clearly suggest that the only reason why the Plaintiff became involved with the Defendant was because of the Defendant's position as a director.

Conclusion

9. So for these reasons I grant the Defendant's application for a stay.

[After hearing counsel on the Defendant's application for indemnity costs]

10. On balance I think that the appropriate order in this case is costs to be taxed if not agreed on the standard basis. However, Mr. Ouwehand has assisted the Court by bringing to its attention the case of *A -v- B and Others* (No 2) [2007] EWHC 54 (Comm) and in particular paragraph 15 of Colman J's judgment in that case:

> "*The conduct of a party who deliberately ignores an arbitration or a jurisdiction clause so as to derive from its own breach of contract an unjustifiable procedural advantage is in substance acting in a manner which not only constitutes a breach of contract but which misuses the judicial facilities offered by the English courts or a foreign court. In the ordinary way it can therefore normally be characterised as so serious a departure from "the norm" as to require judicial discouragement*

by more stringent means than an order for costs on the standard basis. However, although an order for indemnity costs will usually be appropriate in such cases, there may be exceptional cases where such an order should not be made. Although the requirement that the successful party should establish that the claimed costs were caused to be reasonably incurred (subject to the reversed evidential burden of proof in CPR 44.4(2) (b)) by the breach of the jurisdiction clause or arbitration clause will normally cater for those cases where the true cause of the expenditure on costs is the conduct of the successful party, there may be other cases in which an order for indemnity costs would not be appropriate. Without wishing to confine this flexibility in any way, it is not difficult to envisage that departure from the normal approach might be justified in a case where conduct on the part of the successful party has led the party in breach to believe that the chosen forum can be ignored. Further there may be cases in which the general conduct of the successful party, although not breaking the chain of causation, would nevertheless justify its being deprived of an order for indemnity basis costs. In such cases the need to reflect judicial disapproval of such conduct might justify an order for costs on the standard basis."

11. What this case does indicate is that the usual approach when a party has been found to have deliberately ignored an arbitration clause is for costs to be awarded against them on an indemnity basis when a stay is obtained.

12. Litigants should be warned that the Court is likely to follow this authority and the principles set out therein in future cases.

Dated this 27th day of July 2012, _____

IAN RC KAWALEY CJ