IN THE HIGH COURT OF FIJI
CIVIL JURISDICTION
AT SUVA

Civil Action No. 86 of 2018

IN THE MATTER of the Arbitration Act of Fiji Cap 38 Section 12(2) and High Court Rules 1988 Order 73

AND

IN THE MATTER of an Arbitration between Carpenters Properties Limited (Claimant); David Zundel (First Respondent) and Robyn Ferrier-Watson (Second Respondent) pursuant to an Arbitration Agreement dated the 17th day of March, 2017

AND

IN THE MATTER of an Arbitration Ruling made by Arbitrator Jiten Singh dated the 9th day of March, 2018 ("Award")

AND

IN THE MATTER of an application by the Applicants (original Respondents) David Zundel and Robyn Ferrier-Watson to set aside the said Award.

BETWEEN	:	JUDITH ANN ZUNDEL on behalf of DAVID WILLIAM ZUNDEL
		FIRST APPLICANT
AND	:	ROBYN FERRIER-WATSON
		SECOND APPLICANT
AND	:	CARPENTERS PROPERTIES LIMITED
		FIRST RESPONDENT
AND	:	JITEN SINGH
		SECOND RESPONDENT

CORAM	:	The Hon. Mr. Justice David Alfred
COUNSEL	:	Ms. M. Muir for the First and Second Applicants
		Mr. S. J. Stanton, Mr. S. Sharma with him, for the First Respondent
		Ms. K. Maharaj for the Second Respondent
Date of Hearing	:	9 October 2018
Date of Judgment	:	21 January 2019

JUDGMENT

1. This is the Applicants' Notice of Originating Motion (OM) applying for the following relief:

   (1) An order the Arbitration Award (Award) made by the Second Respondent (Arbitrator) dated 9 March 2018 be set aside.
   (2) A declaration that the Memorandum of Agreement (Agreement) regarding the Sale and Purchase of the shares of Watson Bros Limited dated 7 January 2006 is not binding on the vendors.
   (3) An order that the registration/enforcement of the Award be stayed until the determination of the application to set aside the Award.

2. At the outset I shall state the following. A declaration as sought above shall not be granted as it does not arise from the award. An order for stay shall not be granted as the Application has been determined here.

3. The grounds of the application are contained in:

   (a) Section 12(2) Arbitration Act 1965 (Act)
   (b) Arbitration Agreement dated 17 March 2017 between the Applicants and the First Respondent.
   (c) Order 73 of the High Court Rules (HCR).

4. The grounds of the application are "because the Award erred in law Errors of law on the face of the Award" and are as follows:

   (1) The Arbitrator erred in law by finding clause 29 of the Agreement is a condition precedent to the performance of the terms and conditions of the Agreement, when clause 29 provides the Agreement is not binding on the vendors until it is satisfied and complied with.

   (2) The Arbitrator having found implicitly that the First Respondent had not complied with clause 29 of the Agreement, erred in law by ordering the parties to proceed to settlement and specifically perform the Agreement within 9 weeks of the date of the Award.

   (3) The Arbitrator erred in law by ordering the equitable remedy of specific performance and setting a settlement date for the Agreement after more than 10 years of non-compliance and non-performance of clause 29 of the Agreement by the First Respondent.

(4) The Arbitrator erred in law by holding that the First Respondent could accept an offer of conditional approval under clause 29 after the offer had been withdrawn.

(5) The Arbitrator erred in law in disregarding the vendors' Notice of Disapproval and implying an additional term of contact into clause 29 after the First Respondent had already had more than 7 years to complete its obligations under clause 29.

(6) The Applicants seek a stay on the registration/enforcement of the Award.

5. This Application is supported by the affidavit of the First Applicant who essentially deposes that she seeks, to have the Award entirely set aside on account of errors of law in respect of the clause 29 issue. The First Respondent has not performed under clause 29 so the Agreement is not binding on the vendors.

6. The hearing commenced with Ms Muir submitting. She said the substantive matter is the application to set aside the Award under s.12(2) of the Act, not the Arbitrator, for errors of law. It is crucial that the general plans were disclosed and approved by the vendors before the Agreement is binding upon them. She said clause 29 is a condition precedent to formation of the contract. The plans were disclosed to the vendors but disapproved by them in 2015, and thus the Agreement came to an end. Equity does not assist the tardy and the First Respondent slept on its rights. The vendors withdrew their offer before the First Respondent purported to accept it.

7. Mr Stanton then submitted. He said a notice of disapproval is not tantamount to a notice of termination. The Applicants' Counsel consented to specific performance on 4 September 2009. The vendors never did any of what they could do under clause 13(a) to (d) when the purchaser defaulted. There was no error of law. Declaratory relief is not available here. The Arbitrator thought the notice of disapproval was ineffectual. Laches was never an issue in the arbitration. The parties proceeded on the basis that they consented to specific performance. There was no error of law so this Court cannot interfere. Ms Muir has not shown what legal proposition is erroneous.

8. Ms Maharaj said she maintained a neutral position and so would remain mute.

9. Ms Muir replied that there was no notice of termination of the contract. The error by the Arbitrator was in saying there was acceptance. She said there was a breach of clause 29 and this is the error of law. There was no provisions for the First Respondent to get a second shot.

10. At the conclusion of the arguments I said I would take time for consideration. Having done so, I shall now deliver my decision.

11. I shall start with s.12(2) of the Act which reads "where an arbitrator or umpire has misconducted himself or herself, or an arbitration or award has been improperly procured, the court may set the award aside".

12. The draftsmen of this section clearly had only 2 situations in contemplation: the first is the arbitrator misconducted himself; the second is the award was improperly procured.

13. Dealing with the first, the crucial words are "misconducted himself". The Oxford Dictionary of Law , 9th edn, defines "misconduct" as "Incorrect or erroneous conduct". The Concise Oxford English Dictionary, 12th edn, defines "misconduct oneself" as "behave in an improper manner."

14. Turning to the second situation, the Oxford Dictionary defines "improper" as "not in accordance with accepted standards of behaviour" and "procure" as 1."obtain 2. persuade or cause to do something, cause to happen". Here the Applicants are not alleging this.

15. It is clear from the OM and Counsel's submission that the Applicants are confining themselves to alleged errors of law on the face of the Award. In fact the OM make it crystal clear the Award "should be set aside by this Honourable Court because the Award erred in law".

16. If this is indeed the Applicants' contention then they have erred in not resorting to the special case procedure available to them under s.15 of the Act.

17. The (Fijian) Act is "on the like matter" as the English Arbitration Act 1950 which has been replaced by the Arbitration Act 1979. By s.1(1) of the 1979 Act the Court has ceased to have jurisdiction to set aside or remit an award in an arbitration agreement on the ground of errors of law or fact on the face of the award (see para 73/2/2 of the White Book, 1995, 1. But for our present

purposes, we can apply the guidelines laid down by the English Court of Appeal in Halfdan Grieg v Sterling Corpn [1973] 2 All ER 1074 which state "As a matter of general principle, the discretion (conferred by s.21(1) of the 1950 Act on an arbitrator or umpire to state an award in the form of a special case, and on the High Court to direct a special case to be stated) should be exercised whenever the proved or admitted facts gave rise to a point of law which was real and substantial, such as to be open to serious argument and appropriate for decision by a court of law; the point should be clear cut and capable of being accurately stated as a point of law, and be a point of law of such importance that its resolution was necessary for the proper determination of the case; when parties agreed to arbitrate it was (by virtue of s21) on the assumption that a point of law in a proper case could be referred to the courts."

I note s.21(1) above has the same effect as s15 of the Act.

18. The Applicants have made clause 29 to be the crux of this Application, and every error they allege the Arbitrator has committed is they contend an error of law. But, I reiterate, the Applicants failed to refer the clause 29 points of law to the court, as a special case.

19. Be that as it may, I shall for the sake of completeness consider if what is contended by the Applicants could come within the ambit of the Arbitrator misconducting himself.

20. Instances of misconduct by an arbitrator are comprehensively set out in para 622, Halsbury's Laws of England, 4th edn, Volume 2, 1973, as follows:

(1) If the arbitrator fails to decide all the matters referred to him.

(2) If by his award, the arbitrator purports to decide matters which have not been included in the agreement of reference.

(3) If the award is inconsistent or is uncertain or ambiguous or there is an admitted or clear beyond any reasonable doubt mistake of fact.

(4) If there is irregularity in the proceedings.

(5) If the arbitrator has failed to act fairly towards both parties.

(6) If the arbitrator refuses to state a special case himself or allow an opportunity of applying to the court for an order directing the statement of a special case.

(7) If the arbitrator delegates any part of his authority to a stranger, or to one of the parties or to a co-arbitrator.

(8) If the arbitrator accepts the hospitality of one of the parties offered with the intention of influencing his decision.

(9) If the arbitrator acquires an interest in the subject matter of the reference or is otherwise an interested party.

(10) If the arbitrator takes a bribe from either party.

"In each of the foregoing cases the arbitrator or umpire has misconducted himself, and the court has power to set aside his award."

21. Going through the Applicants' grounds for seeking the setting aside of the Award, it is as clear as daylight that none of them can even remotely or at all be considered as misconduct. None of the cases cited by Counsel for the Applicants can assist their case that an error on the face of the award is misconduct by the Arbitrator. Thus it is inexpedient to mention these authorities in this judgment. Suffice it to say that the Applicants have failed to show there were any misconduct by the Arbitrator. The Notice of Originating Motion filed on 28 March 2018 is therefore dismissed.

22. In the result, (noting an order for stay until this determination is now redundant),

(1) An order to set aside the Arbitration Award dated 9 March 2018 is refused.

(2) A declaration, that the Memorandum of Agreement dated 7 January 2006 is not binding on the Vendors, is not granted.

(3) The First and Second Applicants are ordered to pay costs summarily assessed, at $2,000 to the First Respondent and at $1,000 to the Second Respondent.

Delivered at Suva this **21st** day of **January 2019.**

David Alfred
JUDGE
High Court of Fiji