BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

No 11 of 2011

BETWEEN

AUTO-GUADELOUPE INVESTISSEMENT S.A. APPLICANT

AND

COLUMBUS ACQUISITIONS INC. FIRST RESPONDENT
COLUMBUS HOLDINGS FRANCE S.A.S SECOND RESPONDENT
CARIBBEAN FIBER HOLDINGS LP THIRD RESPONDENT

Before the Honourable Marston C. D. Gibson, Chief Justice; the Honourable Peter D. H. Williams and the Honourable Sandra P. Mason, Justices of Appeal.

2011: 18 December
2012: 28 September
2012: 19 October

Mr. Garth Patterson Q.C. with Ms. Alana Gore for the Applicant
Mr. Andrew Thornhill and Ms. Shontelle Murrell of Messrs George Walton Payne and Co., for the First and Second Respondents
Sir Henry Forde Q.C. with Mr. Ramon Alleyne and Ms. Shena-ann Ince of Messrs Clarke Gittens Farmer for the Third Respondent

DECISION

GIBSON CJ and MASON, JA:

Introduction

This matter provides the Court its first opportunity to state the procedure which, pending amendment of the ***International Commercial Arbitration Act, Cap 110 B***

("**ICAA**"**)** and/or the ***Supreme Court (Civil Procedure) Rules* 2008**, as amended in 2009, ("CPR"), should be followed by parties to an international commercial arbitration who seek to challenge the jurisdiction or award of the arbitrator under the **ICAA**. It focuses attention on the **ICAA** and the CPR neither of which, as will soon become clear, provides any procedural guidelines for such a challenge. On 2 October, 2012, an urgent application by the applicant for a stay of the arbitration was denied by this Court (***Gibson CJ***).

Factual and Procedural Background

[2] In or around July 2008, extensive negotiations commenced between Columbus Acquisitions Inc, ("CAI"), a company with principal offices in Bridgetown, Barbados, and Columbus Holdings France SAS ("CHF"), a company with registered office in Paris, France, on the one hand, and Auto-Guadeloupe Investissement SA (AGI), a company with registered offices in Pointe-a-Pitre, Guadeloupe, and Caribbean Fiber Holdings LP (CFHL), a company whose registered agent is located in Delaware, United States, on the other. CAI and CHF desired to purchase from AGI and CFHL all the assets of a company called Global Caribbean Fiber SAS (GCF). On 3 March 2009, the parties entered into a Memorandum of Terms ("the MOT") which was to govern their negotiations for the sale of GCF. There had been a prior Memorandum of Terms between the parties in November 2008 but nothing

turns on that for present purposes save to say that it contained, like the MOT, a choice of jurisdiction clause selecting Barbados.

[3] The MOT also contained an arbitration clause providing for the appointment of a single arbitrator to resolve any disputes arising under its terms. The negotiations culminated in CAI and CHF entering into an agreement for sale with AGI and CFHL on 17 April 2009. However, less than a month later, in May 2009, AGI informed CAI and CHF that it would not proceed with the transaction.

[4] On 19 July 2009, CAI and CHF filed a demand for arbitration against AGI and CFHL pursuant to the rules of the International Centre for Dispute Resolutions ("ICDR"). The arbitration demand sought various items of relief including specific performance and damages for AGI's refusal to consummate the sale of GCF. In a statement of defence and cross claim filed 12 August 2009, CFHL also sought specific performance and damages against AGI.

[5] All the parties agreed that Mr Henri Alvarez QC, a Canadian attorney with offices in Vancouver, British Columbia, would be the sole arbitrator to determine the dispute. In November 2009, the arbitrator issued a procedural order ("the Order"), to which all the parties again agreed, setting out the timetable for the filing and exchange of documents. The Order also stated

that the issue of damages would be heard separately from the issues of liability and specific performance. No issue regarding the arbitrator's jurisdiction was raised at this time by any party.

[6] On 19 March 2011, having heard the parties, the arbitrator made a partial award on liability finding, *inter alia,* that AGI had breached the agreement of 17 April 2009 to sell GCF. The arbitrator then indicated that he would assess the damages for AGI's breach in the second phase of the arbitration.

[7] On 3 June 2011, AGI filed an objection to the arbitrator's jurisdiction to determine the issue of damages. After receiving submissions from all parties, the arbitrator issued a partial award on jurisdiction on 19 July 2011 stating that he had jurisdiction to determine the issues that the parties had previously agreed would be reserved for the second phase of the arbitration.

[8] On 18 August, 2011, AGI first sought relief in this Court by way of Fixed Date Claim Form pursuant to section 19 (8) of the **ICAA**. On 21 November, 2011, AGI filed an Amended Fixed Date Claim Form and Statement of Claim, seeking the following relief:

> "(a) An order that the partial award on liability of the arbitrator be set aside under s 47 (2) (a) (v) and s. 47 (2) (b) (ii) of the International Commercial Arbitration Act 2007-45 on the ground that the composition of the tribunal and the arbitral proceedings were contrary to the parties agreement and/or the award offended Barbados' public policy.
>
> (b) That in the event that the applicant's challenge to the arbitrator before the administering authority were to be unsuccessful before the hearing of the application, that the applicant seeks pursuant to ss 15 (3) and 16 (4) of the Act to challenge the sole arbitrator on the ground that there are

> circumstances that give rise to justifiable doubts as to the independence and impartiality of the Arbitrator."

The Instant Application

[9] On 21 September 2011, CAI and CHF filed, *in limine*, a notice of application seeking, *inter alia*, an order that AGI's action be dismissed as being incompetent on the basis that AGI had failed to comply with the provisions of rule 62.3 of the ***Civil Procedure Rules (CPR) 2008*** for the commencement of appeals.

[10] On 27 October 2011, CFHL sought to be added as a party to CAI's and CFH's application. In its *in limine* submissions, CFHL asked this court to determine whether AGI had violated the procedural requirements set out in the Act for this matter to be heard before the Court of Appeal. It, too, sought dismissal of AGI's fixed date claim form and statement of claim for failure to comply with Rule 62.3 of the CPR. For present purposes, CAI, CHF and CFHL will be denominated "the respondents."

The Respondents' Submissions

[11] The respondents contend that, while s. 19 (8) of the **ICAA** does not specify the procedure by which proceedings could commence before the Court of Appeal, it is to the CPR that any applicant should refer in order to determine the procedure for commencing a matter before the court. They refer to Parts

61 and 62**,** the two provisions of the CPR which set out the manner in which proceedings were to be properly brought before the Court of Appeal and argue that AGI should attract the consequences of its failure given that it did not avail itself of the correct avenues for justice. They conclude that, in light of AGI's fundamental failure to comply with the mandatory provisions of the CPR, there is no discretion to allow the application to proceed and AGI is therefore statute-barred from initiating new compliant proceedings.

[12] In its reply, AGI argues that neither Part 61 nor 62 of the CPR was applicable in these circumstances and that recourse could be found in Part 8 of the CPR which provided the standard provisions for commencing claims. AGI states that Part 62 was not relevant since its application was not an appeal but, rather, a *sui generis* statutory application which would go directly before the Court of Appeal. There were, it stated, three reasons why its application had to be seen as seeking an independent determination rather than an appeal. First, the language of the **ICAA** supported an independent determination and, secondly, the weight of authority interpreting the equivalent provision of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on which the Act was based required the court to make an independent decision. Thirdly and most importantly, AGI contends, is the "principle that a court should not accord

any deference to the jurisdictional determination of an arbitral tribunal whose authority is purported at best".

[13] AGI further submits that applications under the **ICAA** did not fit into the expected procedural framework. What is certain is that the applications had to be brought before the Court of Appeal and, AGI argues, it was justified in commencing proceedings under Part 8 of the CPR, the section governing commencement of proceedings before the court. If there was any procedural error, then the court, pursuant to the CPR's overriding objective, could rectify the same under Rule 26.4 and permit the application to proceed.

[14] The third respondent and the applicant have both made supplemental submissions before us focussed mainly on whether or not the application before the court was an appeal. CFHL argues, additionally, that AGI's position that the words 'decide the matter' meant that its application was not an appeal is at variance with established authority and ignored the nature of an appeal as set forth in the provisions of Part 62 of the CPR.

Discussion

[15] The main issue for our determination is the proper procedure to initiate a proceeding before the Court of Appeal under the **ICAA**. As a corollary, the supplemental issue arises whether, in the circumstances, AGI, in using a form other than one designated for commencing proceedings in this Court

has committed so egregious a procedural error as to require the conclusion that it is now statute-barred for proceeding further. For the reasons which follow, we find that the applicant did indeed fall into error in its commencement of the instant proceeding by Fixed Date Claim Form but that, in the absence of any clearly defined procedural guidance for such a proceeding either in the **ICAA** or the CPR, the application should be deemed properly filed and so not statute-barred.

[16] S. 9 of the **ICAA**, as the marginal note indicates, provides for both the High Court and the Court of Appeal "to perform certain functions of arbitration assistance and supervision" set out in several sections of the **ICAA**. Hence, s. 14 permits recourse to the High Court for the appointment of an arbitrator where, in one or more of the situations enunciated in ss. 14 (3) (a) (ii), (3) (b), or (4), an arbitrator has not been appointed. The High Court's discretion in making the appointment is to be guided by considerations set forth in s. 14 (6) and s. 14 (5) provides peremptorily that the court's decision to make an appointment in the circumstances outlined in subsections (3) and (4) "is not subject to an appeal."

[17] Sections 16 (4), 17, 19 and 47 (2) relate to functions which shall be performed by the Court of Appeal, and the amended Fixed Date Claim From refers specifically to ss. 16 (4), 19 (8) and 47 (2). Under s. 16 (1), the parties

to an international commercial agreement "are free to agree on a procedure for challenging an arbitrator" and subsections (2) and (3) permit a reference of the challenge to an arbitral tribunal. If the challenge is unsuccessful, the matter may be referred to the Court of Appeal to decide on the challenge under subsection (4) and, again, the Court of Appeal's "decision is not subject to an appeal." Notably, subsection (5) provides that during the pendency of a reference to the Court of Appeal under subsection (4), "the tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award." Section 17 permits a reference to the Court of Appeal "to decide on the termination of the mandate" of an arbitrator where a controversy arises as to whether he or she became "*de facto* or *de jure* unable to perform the functions of the arbitrator" or "for other reasons fail[ed] to act without undue delay." The nine subsections of s. 19 comprise Part IV of the Act which is entitled "*Jurisdiction of Arbitral Tribunal*." Subsection (8) of s. 19 provides as follows:

> If the tribunal rules as a preliminary question that it has jurisdiction, any party may, within 30 days after having received notice of that ruling, request the Court of Appeal *to decide the matter*, which decision is not subject to an appeal.

(Emphasis supplied).

[18] S. 47 (2) provides several grounds upon which an arbitral award may be set aside by the Court of Appeal including where a party to the arbitration agreement was under some incapacity or where the court finds that "the award is in conflict with the public policy of Barbados." In none of the provisions of the **ICAA** which direct a reference to the High Court or the Court of Appeal is there any procedural guidance as to how proceedings before either Court must be commenced.

[19] The same is true of the CPR which provides for two methods by which matters can be commenced before this court, found in Parts 61 and 62. Part 61 provides for either the High Court or the Court of Appeal to determine *(a)* a case stated; *(b)* a question of law referred to it by a Minister; Magistrate; Judge of a tribunal, a tribunal or other person; or *(c)* an application for an order directing a Minister, Magistrate, Judge of a tribunal, a tribunal or other person to refer a question of law to the court by way of case stated. The order to state a case or to determine a case must be commenced via fixed date claim form (Form 2) as per the provisions of this Rule.

[20] The respondents note, and we agree, that AGI had neither applied for an order directing the arbitrator to state a case that the court should determine nor had it sought an order referring a question of law to the court. Since the

application did not comprehensively address the findings of the arbitrator on his partial award of jurisdiction nor suggest how the arbitrator erred in these findings, it was clear that AGI had not sought relief within the purview of Part 61. AGI concedes that the Fixed Date Claim Form which it filed was not the form found in Part 61.

[21] The second route to the Court of Appeal is via Part 62 of the CPR, which deals with appeals to the Court of Appeal from *(a)* the High Court; *(b)* a Magistrate's court; or *(c)* a tribunal. Rule 62.3 provides that "an appeal is brought by filing a notice of appeal in Form 20 at the Registry" and Rule 62.4 of the CPR prescribes the contents of a notice of appeal under the provisions of Part 62. Hence, Parts 61 and 62 constitute the only two methods for commencing a proceeding in this Court. Neither Part 61 nor 62 refers specifically to arbitrations of any kind, domestic or international.

[22] Nonetheless, we agree with the respondents' collective contention that the relevant provisions which AGI should have adhered to were the provisions of Part 62. That raises the consequential issue whether AGI's application ought to be dismissed. The respondents refer to the dicta of ***Barrow JA*** in the Antiguan case of ***Beach Properties Barbuda Ltd et al v Larus Master Fund Ltd* (*Civil Appeal decided 17 September 2007)*** where there was a

failure to state grounds in an application for an injunction in accordance with the relevant provisions. His Lordship stated:

> This is a completely unacceptable practice. It is an abuse of the process of the court that should attract condign consequences. One objective of requiring that the application must state its grounds is to focus the thinking of lawyers.

[23] Another decision cited to us was the English case of ***Re Pritchard, Deceased [1963] Ch 502*****.** There, an originating summons was sealed in the local district registry rather than in the Central Office as required by the UK **Rules of the Supreme Court Order 54 (4 B)** which provided that an "originating summons shall be sealed in the Central Office and when so sealed shall be deemed to be issued". ***Upjohn LJ*** held at pp. 526- 527:

> "Accordingly it was not issued in accordance with the only relevant rule of the Supreme Court (Ord. 54, r. 4B) and so for the purposes of sections 225 no proceedings have been commenced. There has been a fundamental failure to comply with the requirements of the statute relating to the issue of proceedings; it was not a mere irregularity."

Concurring with the sentiments of ***Upjohn LJ***, ***Danckwerts LJ*** (at 528) observed that "[t]he originating summons in this case, therefore, is a nullity and has no operation. . . [t]he defect cannot be cured."

[24] Contrary to the respondents' contentions, in our judgment, those decisions are inapposite since, in both, the applicants had ignored a clearly defined procedural roadmap. On the instant facts, the problem has been created by the absence of any roadmap, defined or otherwise, in the **ICAA** or the CPR.

[25] Much was made by AGI of the procedure to be undertaken in the Court of Appeal and, indeed, by describing the procedure, AGI concluded that the form to be used could not be Form 20 which is to be used when commencing an appeal.

[26] We believe that the gravamen of AGI's argument, and its error, is the perception of what is involved in an appeal, even though, technically, the application before us and the procedure involved is not an appeal. A number of authorities were cited to us but we need refer only to the Singapore case of ***PT Tugu Pratama Indonesia v Magma Nusantara Ltd [2003] 4 SLR 257***, where ***Judith Prakash J*** opined as follows:

> "[The respondent] says that [the applicant] cannot make the argument because it was not raised in the statement of defence filed in the arbitration. [The respondent] did not push this contention in its oral arguments and rightly so because I see no reason why my consideration of this issue is to be limited by what was pleaded by the parties in the arbitration proceedings. This hearing under article 16 (3) is not by way of appeal against the decision of the tribunal. The relevant portion of art.16 (3) reads "*if the arbitration tribunal rules as a preliminary question that it has jurisdiction, any party may request... the court... to decide the matter*.
>
> Accordingly, the court makes an independent determination on the issue of jurisdiction and is not constrained in any way by the findings or the reasoning of the tribunal. In the same ways, parties are not limited to rehearsing before the court the contentions put before the tribunal but are entitled to put forward new arguments on the issue and the court is entitled to hear these."

[27] But even during an appeal *stricto sensu*, an appellate court is not limited in its determination to the facts found by the tribunal below. This is a narrow, misperceived view supported neither by the CPR nor the authorities cited.

CPR Rule 62.5 (1) provides, in ordinary civil appeals, that "[a]n appeal to the court shall be by way of rehearing." Moreover, Rule 62.23 deals with the admission in the Court of Appeal of "fresh evidence", described in 62.23 (1) as "evidence in proceedings on an appeal additional to evidence in the court below."

[28] The concept is not new nor, indeed, limited to civil appeals. Even in the area of criminal appeals, s. 29 (1) of the ***Criminal Appeal Act, Cap. 113A*** permits this Court, where "necessary or expedient in the interests of justice," to admit fresh evidence, either real or testimonial and confers, in s. 29 (1) (b) the power "to order any witness who would have been a compellable witness at the trial to attend and be examined before the Court, whether or not he was called at the trial." In ***Lacey v Attorney General (Qld) [2011] HCA 10 at para [94],*** the High Court of Australia stated that "[t]he word 'appeal' covers a variety of processes, and the list of them is not closed.

[29] Accordingly, we hold that, while the review of the facts and the law which is required when a party challenges a jurisdictional determination of an arbitrator under s. 19 (8) of the **ICAA** may be a *de novo* review, this is not incompatible with the power of review exercised by a Court of Appeal. The parties would be entitled to put forward new arguments on this issue and we would, in the exercise of our discretion in an appropriate case, be willing to

hear them. Hence, the nomenclature of "appeal" or, as our concurring brother denominates it, an "originating procedure", is not determinative of what occurs in the Court of Appeal and, consequently, does not support AGI's contention that appellate forms and procedures are inapplicable.

The Fixed Date Claim Form and Part 8 of the CPR

[30] We must consider whether Part 8 of the CPR with regard to the commencement of proceedings before the court in general is of any help. AGI commenced proceedings under Part 8 for three reasons. First, that Part 8 was broad in scope in that it provided a procedural framework for the commencement of proceedings before the courts; secondly, that Part 8 was flexible in permitting specification on the claim form of "any remedy that the applicant is seeking" including the declaratory relief sought; and thirdly, that all of the procedural requirements laid down in Part 8 were complied with and the application was therefore a valid and subsisting one.

Discussion

[31] In our judgment, AGI's triple-bases for utilising Part 8 all lack merit. Rule 8.1 (5) provides that a Fixed Date Claim Form must be used *(a)* in proceedings for possession of land; *(b)* in claims arising out of hire-purchase or credit sale agreements; *(c)* whenever it is required by a rule or practice direction and *(d)* where by any enactment proceedings are required to be

commenced by originating summons or motion. The proceeding in this matter does not fit into any of the categories described in Rule 8.1 (5).

[32] The clear domino effect of an excessively narrow conception of "appeal" led AGI to avoid Part 62 and Form 20 of the CPR, which govern appeals, and to utilise a form which, by its very language, precludes its applicability to any arbitration, much less one governed by the **ICAA**, and which led to the High Court and not to the Court of Appeal. It follows, therefore, that AGI had indeed commenced the proceedings before us in the wrong way since the rule nowhere mentions either domestic or international arbitration.

[33] In our view, the correct method of commencing proceedings before this Court under s. 19 of the **ICAA** is by the use of Form 20 with modifications *mutatis mutandis* applicable to the review of arbitral awards. This leaves for our consideration, the respondents' contention that the use of the Fixed Date Claim Form by AGI was fatal to the application.

Was the use of the wrong form fatal?

[34] We commence this segment with the axiom that, under CPR Rule 26.4, we have a discretion to rectify errors of procedure (see, ***Steele v Mooney and others [2005] 2 All ER 256)***. We note that the respondents had argued, citing the CPR Part 20, that AGI was statute-barred under the provisions of the **ICAA** from commencing new proceedings. However, the respondents'

reliance on Part 20 of the CPR is misconceived since that Part relates to changes to the statement of case and not to commencement of proceedings.

[35] Section 19 (8) of the **ICAA**, as set forth above, provides that any party may, within 30 days after receiving the notice of a preliminary ruling by an arbitral tribunal that it has jurisdiction, "request that the Court of Appeal decide the matter." What we must decide is whether the applicant had made a valid request despite the use of the wrong form. The respondents contend, citing ***Vendryes v Keane & Keane [2011] JMCA Civ 15, per Harris JA*** and ***Steward v Stoley et al [2011] JMCA Civ 28, per Morrison JA***, that a party to these proceedings could not expect the court to sanction non-compliance with provisions of the CPR by exercising its powers under the overriding objective (**see, CPR Rules 1.1 and 1.2**) when the plain meaning of the relevant rule was not followed.

[36] However, we respectfully adopt the language of ***Barrow JA*** in ***Craig Reeves v Platinum Trading Management Limited HCVAP 2007/022*** (decided 25 February 2008) where his Lordship observed:

> I have spent time considering the degree of non-compliance involved in this case because I wish to make the point that it is not every instance of non-compliance that will result in sanctions, express or implied. And where there is a sanction it will not usually be dismissal of the appeal, which must be an exceptional course, because the object of the rules is to bring cases to trial rather than to deny them a trial. It will sometimes be the case that non-compliance is so trifling that the court is justified in rectifying the error in a summary manner…

[37] In our judgement, even though AGI commenced proceedings by way of the wrong form, it nevertheless commenced proceedings timely, and the "non-compliance [was] so trifling" as to justify only a rectification and not a dismissal. Hence, we find it appropriate to invoke our general power under Rule 26.4 of the CPR to rectify errors of procedure. In an era when access to justice is an unquestionable desideratum, particularly in light of the overriding objective stated in Rule 1.1 "to enable the court to deal with cases justly", we must, in construing the CPR, always prefer substance to form in regulating access to the courts.

Disposal

[38] Accordingly, we deem the filing by AGI to be completed for the purposes of this case only and direct that it is to file any further papers in this matter using Form 20 within 14 days of the date of our decision. The respondents are to file their defences within 14 days of service on them of the applicant's further filings or, if none, within 28 days of the date of this decision.

[39] For all the above reasons, we decline to exercise our discretion in favour of the respondents and, while agreeing with several of their contentions, in the result we refuse their application to dismiss AGI's application.

[40] We make no order as to costs at this time, reserving our decision for the ultimate determination of this matter after the hearing of the substantive

issues involving the allegations of the arbitrator's lack of jurisdiction and the absence of impartiality.

[41] As far as concerns the delay in issuing this judgment, we express our regret and agree with ***Peter Williams JA*** that "expeditious resolution of commercial disputes yields a net benefit not just to the litigants but to the economy of Barbados" (***per Hayton J*** in ***Sea Haven Inc. v Dyrud***, **79 *WIR 132***, at para. [7]). We would note, however, that this undeniable need for expeditious determination of actions and appeals ought not to be limited to commercial actions alone. It is essential in all proceedings before our courts, of whatever kind, so that, as often as humanly possible, the time period between reservation and delivery of judgment can be measured in months and not longer periods as is occasionally the case (***see, Colby v Felix Enterprises et al, Civ. App. No. 30/06*; *Colby v Felix Enterprises et al,* CCJ *Appeal No. CV 7/10, per Hayton J, at paras. [3] to [4]***). Finally, we wish to express our profound gratitude to all counsel for their assistance, and their patience, in this novel and engaging matter.

Chief Justice

Justice of Appeal

PETER WILLIAMS JA: CONCURRING DECISION

I. INTRODUCTION AND BACKGROUND

[42] This is the first reference to the Court of Appeal on international commercial arbitration. International commercial arbitration has become a well recognised and effective means of resolving complex and expensive commercial disputes. Barbados is a recent addition to the number of countries that wish to be active participants in the international arbitral process. Effective participation requires the courts to dispose of references expertly and expeditiously.

[43] A preliminary procedural point has been raised objecting to the reference. It is necessary to state only the briefest background in order to understand and determine the merits of the objection. The dispute in the case concerns the alleged sale and purchase of the assets of Global Caribbean Fiber S.A. (GCF), a French company which operates a fiber optic network in the Caribbean. The alleged agreement is referred to as the Transaction. The purchase price of the assets was to have been US$120 million, subject to specified adjustments. Auto-Guadeloupe Investissement S.A. (AGI), the applicant, a French company, holds 60% of the issued share capital of GCF. Caribbean Fiber Holdings L.P. (CFH), the third respondent, a Delaware limited partnership, holds the other 40% of the shares of GCF. AGI and

CFH were therefore the vendors of the assets of GCF. The purchasers were Columbus Acquisitions Inc. (CAI), the first respondent, a Barbados company and Columbus Holdings France S.A. (CHF), the second respondent, a French company. Both companies are subsidiaries of Columbus International Inc. (CII), a Barbados international company that operates a wide range of telecommunications services including undersea and terrestrial fibre optic cable networks. The parties and other legal entities are part of complex international company structures which do not have to be described in this decision.

[44] Obviously, the terms of such a Transaction were subject to extensive negotiations. Two key documents were involved: the Sale and Purchase Agreement (SPA) and Memorandum of Terms (MOT) or term sheet. The SPA was to be executed by the vendors and purchasers as the definitive agreement together with the other transaction agreements and documents, collectively referred to as the Transaction Documents. In the interim, on 10 November 2008, the MOT was executed by the parties as a first agreement whereby they agreed to negotiate in good faith and use all commercially reasonable efforts to reach agreement. The parties paid deposits to be held in escrow on agreed terms. The Transaction was not completed by 31 December 2008 as stipulated by the parties in the MOT and

they agreed in two Renewed MOTs to extend the final date for completion of the Transaction to 17 April 2009. The purchasers CAI and CHF claimed that on that date the vendors CFH and AGI had agreed on all terms and conditions of the Transaction and on the final terms of the SPA. It is alleged that the parties' representatives agreed to the Renewed MOT's formal execution requirements and congratulated each other on the successful conclusion of the agreed terms of the Transaction. The parties agreed to execute the signature pages of the SPA which were to be held in escrow pending finalisation of the Transaction Documents. The parties, except AGI, executed the signature pages. However, on 26 May 2009, AGI notified the other parties of its decision not to proceed with the Transaction.

II. ARBITRATION

[45] The MOT contained a dispute resolution clause which provided for all disputes, questions or claims relating to the Transaction to be determined by arbitration under and applying the laws of Barbados, the Governing Jurisdiction. The MOT provided that the arbitration should be conducted before a single arbitrator.

[46] On 10 January 2009, CAI and CHF, the Columbus companies submitted their demand for arbitration against the 60% shareholder AGI; CFH the 40% shareholder which signed the SPA was made a nominal respondent to the

arbitration. The relief sought was a declaration that the parties entered into a binding agreement to the Transaction. AGI also submitted counterclaims against the Columbus companies. The arbitration duly took place in New York by a single Canadian QC arbitrator. The parties had agreed to bifurcate the issues relating to damages from the other issues in dispute. On 27 March 2011, the arbitrator made a Partial Award on Liability. He held that the parties entered into a binding agreement to the Transaction on 17 April 2009 and that AGI breached the parties' agreement to proceed with the Transaction. He denied the Columbus companies and CFH specific performance of the Transaction.

[47] On 19 July 2001, the arbitrator made a Partial Award on Jurisdiction in which he declared that he had jurisdiction to determine the outstanding claims for damages relating to breach of the 17 April 2009 agreement. He also held that he had jurisdiction to determine the claims of both parties and the damages for breach of the obligations contained in the Non Disclosure Agreement. AGI was dissatisfied with this Award and therefore sought relief against the same by reference to the Court of Appeal.

IV. REFERENCES TO COURT OF APPEAL

(a) International Commercial Arbitration Act, 2007-45

[48] The ***International Commercial Arbitration Act, 2007-45*** (the ***Act***) came into operation on 19 January 2009 and is an Act to make provision for international commercial arbitration. Under the ***Act*** the Court of Appeal and the High Court are designated to perform certain functions of arbitration assistance and supervision to the extent stipulated: ***sections 8*** and ***9***.

[49] In this matter three sections of the ***Act*** are engaged in respect of the claims referred to the Court:

> (i) First, the challenge under ***section 19(8)*** of the ***Act*** to the Partial Award on Jurisdiction in relation to damages;
>
> (ii) Secondly, the challenge under ***section 47(2)*** of the ***Act*** to set aside the Partial Award on Liability on the ground of lack of impartiality and failure to make proper disclosure by the arbitrator; and
>
> (iii) Thirdly, the challenge under ***section 16(4)*** of the ***Act*** to the impartiality and independence of the arbitrator.

[50] It is instructive to quote the wording of the sections of the ***Act*** engaged by the references. First, under ***section 19(8),*** if the tribunal rules as a preliminary question that it has jurisdiction any party may "**request** the Court of Appeal **to decide the matter**". Secondly, under ***section 47(2)***, "**by an application**" the arbitral award may be set aside by the Court of Appeal

where the composition of the tribunal was not in accordance with the agreement of the parties, namely, that the arbitrator would make full disclosure and be impartial. Thirdly, under ***section 16(4)***, where the impartiality and independence of the arbitrator has been unsuccessfully challenged, the challenging party may "**request** the Court of Appeal **to decide on the challenge**". It should be noted that in none of the statutory provisions for reference to the Court of Appeal is the reference described as an appeal. The role of the Barbados Courts and the Caribbean Court of Justice to intervene under the ***Act*** is discussed in an article on the ***Act***, "***International Commercial Arbitration in Barbados***" by ***Jonathan Haydn-Williams***, (2011) 77 Arbitration, Issue 2, 184.

(b) The proceedings

[51] On 18 August 2011, AGI filed in the Registration Office of the Supreme Court of Judicature a Fixed Date Claim Form (Form 2) and a Statement of Claim against CI and CHF, the Columbus companies and CFH. The Form and Statement of Claim were stamped as filed in the Registry and as received by the Court of Appeal. The relief sought by the claimant was that under ***section 19(8)*** of the ***Act*** against the Jurisdiction Award made on 19 July 2011 and for an order that the arbitrator has no jurisdiction as a sole arbitrator to determine the damages under the MOT but that any damages

must be determined by three arbitrators in accordance with the terms of the SPA. No issues arise in relation to the filing of the Form: it was filed within the 30 day stipulated period and received by the Court of Appeal.

[52] On 21 September 2011, the Columbus companies filed a Notice of Application seeking an order that the application be dismissed as being incompetent because the applicant had failed to file a Notice of Appeal (Form 20).

[53] On 27 October 2011, CFH filed a Notice of Application to be added as a party to the application of the Columbus companies and for an order that the applicant's Form 2 claim and Statement of Claim be struck out as being irregular and that the "appeal" be dismissed.

[54] On 25 November 2011, AGI filed an Amended Fixed Date Claim Form and Amended Statement of Claim to take account of circumstances that came to light since the filing of the original Form and Statement of Claim and to request further relief. The circumstances alleged were that the sole arbitrator was an equity partner of a Canadian law firm and at the time that he was appointed arbitrator, the firm was representing an adverse party affected by the arbitration, in an ongoing commercially significant transaction. These and other similar circumstances were the basis of the second and third related applications under ***section 47(2)*** to set aside the Award on Liability

because of lack of impartiality and of disclosure of the arbitrator and under ***section 16(4)*** to the challenge of the arbitrator in relation to his impartiality and independence.

(c) Supreme Court (Civil Procedure) Rules, 2008

[55] ***Part 8*** of the ***Supreme Court (Civil Procedure) Rules, 2008 (CPR)*** states, "How to Start Proceedings". A claim form in Form 1 must be used for starting proceedings. A similar Form 2 must be used in relation to four cases which are not applicable in this case: possession of land, hire-purchase or credit sale agreements, matters required by rule or practice direction and matters required by originating summons or motion. ***Part 62*** of the ***CPR*** states, "How to appeal". A claim form in Form 20 must be used for bringing an appeal.

[56] The ***CPR*** do not provide any specific Form to be used in references of the ***Act***. Form 1 is, for example, specified to be used for the beginning of admiralty proceedings *in personam.* There are two other Parts of the ***CPR*** that are relevant to these proceedings. ***Part 20*** provides for changes or amendments to the statement of case, which is defined to include the claim and pleadings. A new claim and presumably claim form can be substituted in place of the existing one if the claim arises out of the same or substantially the same facts. ***Part 26*** is also crucial to these proceedings

because it gives the Court general power to rectify matters where there has been a procedural error. The equivalent English rule is in Part 3.10 referred to below. ***Rule 26.4*** reads as follows:

> "(2) An error of procedure or failure to comply with a rule, practice direction or court direction or order does not invalidate any step taken in proceedings, unless the court so orders.
> (3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to rectify the order or failure."

(d) Discussion

[57] The issue for the Court to determine is whether Form 2 was the more appropriate form for commencing the proceedings as the applicant contends or whether Form 20 was more appropriate as the respondents contend. The respondents further contend that the applicant is now out of time to file a Form 20 application and that the proceedings should be dismissed.

[58] While appreciative of the extensive submissions and authorities presented by the parties, the issue is not difficult to resolve. Although not cited to us the case of ***Cala Homes (South) Limited v. Chichester District Council [2000] C.P. Rep. 28; [2000] 79 P.&C.R. 430*** is indicative of the approach which this Court should adopt. The case is given prominence in the Civil Procedure White Book Service 2012 under Part 3.10 of the English Civil Procedure Rules dealing with the general power of the court to rectify matters where there has been an error of procedure. In ***Cala Homes*** an

application under the Town and Country Planning Act was filed in the Crown Office when it should have been filed in the Central Office; the wrong claim form was used and it was filed in the wrong office of the Queen's Bench Division. Mr. Robin Purchas Q.C., Deputy Judge of the Queen's Bench Division, held that though the claim form and its filing and issue were in breach of the relevant rules and practice direction that did not, without an order of the court, invalidate the proceedings or their commencement. Since the applicant had made an application to the High Court within the relevant period and the forms used fully set out the basis for the grounds of the application, neither the use of the wrong claim form nor its filing in the wrong office made the application a nullity. The overriding objective of the Rules was best achieved by transferring the proceedings to the Central Office (since renamed the Administrative Court).

[59] The Deputy Judge made some helpful comments on the manner in which the power to rectify procedural errors should be exercised. He stated at various parts of the judgment:

> "I would be reluctant as a matter of principle to accept that what might be fairly regarded as a technicality…disqualified the application as an application…Correction of any defect lies in the discretion of this court. In the exercise of that discretion, the court will seek to give effect to the overriding objective of dealing with the case justly including considerations of expedition and fairness. That is itself the guiding principle underlying the rules as a whole…Thus, to deal justly with

> a…case would generally require the court to include in its consideration the importance of promptness and certainty for good administration."

[60] The instant case is obviously not an appeal in the ordinary sense of a rehearing from a previous decision; it is an originating reference for a determination by three judges of the Court of Appeal pursuant to a request under statutory provisions. The decision of the Court of Appeal in most cases under the ***Act*** is "not subject to appeal"; it is in this context only that the word "appeal" is used. The words "further appeal" are not used, which would indicate that the hearing before the Court of Appeal is not in fact an appeal. However, although the claim is an originating application it has been properly received in the Court of Appeal as required by the ***Act***. Full details of the claim have been set out in the statement of claim and the amended claim so that the respondents and their advisors knew from the outset the nature of the claim. They cannot claim to be significantly prejudiced by the application being filed by the wrong form.

[61] This is plainly a commercial case of considerable importance to the parties in which we should exercise our power under ***Rule 26.4*** to rectify a procedural error. There can in the circumstances of the case be no serious suggestion of culpability or delay on the part of the applicant. It would therefore be wrong to dismiss the applicant's case without a hearing and

thereby deprive the applicant of access to the Court under the ***Act*** especially when the parties have chosen Barbados to be the Governing Jurisdiction.

[62] We are all of the view in the unique circumstances of this case where there is no form tailored to the requirements of the ***Act*** that the existing proceedings should stand and that Form 20 is the most appropriate form to be used in the future in order to commence proceedings in this Court under the ***Act***. The decisive consideration is that this is an application before the Court of Appeal and therefore a Court of Appeal form should be used to facilitate filing in the Court of Appeal Registry. Moreover, the technology used for filing High Court claims in the High Court Registry does not accommodate the filing of applications to the Court of Appeal, which must be filed in the Court of Appeal Registry.

[63] It should be added that nothing that has been stated should be interpreted as expressing any opinion on the substantive issues which still have to be determined.

IV. DISPOSAL

[64] We are in agreement with the manner in which this preliminary objection should be disposed.

[65] We should reserve consideration of the question of the proper order for costs on the disposal of the preliminary point and the determination of the amount

payable until final determination of the substantive issues for the following reasons. A determination of the order for costs and the quantification of the same will further delay the hearing of the case especially as the value of the claim in relation to the preliminary point would have to be determined. Further, there are no submissions on costs or statements of costs before the Court for its consideration. In the circumstances, the most convenient course to adopt would be to determine the costs at the end of the substantive hearing.

[66] These final comments are made by way of guidance in view of the novelty of the case. At a pre-hearing meeting with the parties it was determined that the hearing should deal with the procedural objections brought by the respondents. On 28 November and 13 December 2011, we heard the objections. It is now clear and was reasonably so after the hearing that the procedural point was no more than a technicality in view of the existing ***CPR***. The only real issue therefore that the Court had to decide was the manner in which it should exercise its discretion in favour of the applicant. The commercial importance of the case and the negative financial implications of the delay required that the substantive issues be heard without a hiatus in the proceedings. As the proceedings stand the applicant's substantive matter remains unheard.

[67] It is appropriate in these circumstances to quote from the highest authority over this Court, the Caribbean Court of Justice. In the recent appeal from this Court of ***Sea Haven Inc. v. Dyrud, 79 WIR 132*** at ***[7]***, ***Hayton J*** said:

> "The expeditious resolution of commercial disputes yields a net benefit not just to the litigants but also to the economy of Barbados."

This Court should play a crucial role in contributing to the production of that net benefit.

Justice of Appeal