06 MAY 2014

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 391 of 2011

BETWEEN:

STEVE'S BUILDING WORKS LIMITED **APPELLANT**

AND

MILLENNIUM HEIGHTS DEVELOPMENT LIMITED **RESPONDENT**

Before Dr. the Hon. Madam Justice Sonia Richards, Judge of the High Court.

2011: October 03

2014: May 06

Mr. Dustin Delany, Attorney-at-Law, for the Appellant.

Mr. Barry L.V. Gale, Q.C. and Mrs. Zarina Khan, Attorneys-at-law, for the Respondent.

DECISION

The Factual Background

[1] Steve's Building Works Limited ("SBWL"), and Millennium Heights Development Limited ("MHDL"), entered into a building contract dated 08 January, 1999, for the construction of Phase 1 of the Millennium Heights

Development. Differences arose between the parties, and, by a court order, Mr. Henry Taylor was appointed as the arbitrator under the contract. Mr. Taylor made and published his arbitration award on 09 February, 2011.

[2] By a fixed date claim form filed on 11 March, 2011, SBWL sought the following relief from the High Court:

(1) the setting aside of the arbitrator's award pursuant to section 26(1) of the Arbitration Act Cap. 110 ("the Act");

(2) an order for a stay of proceedings on or pursuant to the arbitrator's decision dated 09 February, 2011, pursuant to the Supreme Court (Civil Procedure) Rules, 2008 ("the CPR"), Rule 60.3(a);

(3) the removal of the arbitrator pursuant to section 16(1) of the Act, and entitlement to other remedies available under that provision;

(4) the removal of the arbitrator pursuant to section 16 (2) of the Act, and entitlement to other remedies available under that provision; and

(5) the appointment of a new sole arbitrator pursuant to section 28(2)(a) of the Act; or, in the alternative, an order under section

28(2)(b) of the Act, that the arbitration agreement shall cease to have effect with respect to the dispute referred.

[3] Grounds of appeal were also filed together with the fixed date claim form. Although this document mentions the grounds of appeal at paragraph 4, it contains extensive background data that is akin to affidavit evidence. The grounds of appeal are that:

(1) the arbitrator's decision lacked foundation in fact;

(2) the arbitrator's decision lack foundation in law;

(3) the arbitrator misconducted himself during the course of the proceedings; and

(4) the arbitrator misconducted the proceedings; and

(5) the arbitration award was improperly procured.

[4] Thereafter, on 18 April 2011, MHDL filed a Notice of Application supported by the affidavit of Mr. Barry Gale, Q.C. In that Application MHDL applied for orders striking out SBWL's claim with costs. The grounds of the application are that:

(1) the High Court has no jurisdiction to hear an appeal from an arbitrator's award pursuant to the Act;

(2) the Act does not provide for an appeal to the High Court from an award made by an arbitrator in Barbados; and

(3) the Application to the High Court by way of an appeal is misconceived and/or an abuse of the process of the Court.

[5] On 10 June, 2011, SBWL filed a Notice of Application with an accompanying Affidavit. An Amended Notice of Application was filed by SBWL on 15 June, 2011. By virtue of this particular amended application, SBWL seeks the following orders:

(1) that the MHDL's application be struck out;

(2) that a default judgment be entered in favour of SBWL; or alternatively that final summary judgment or judgment on admissions be entered in favour of SBWL; or alternatively that MHDL be precluded from taking part in the hearing of the appeal;

(3) that MHDL pays SBWL's costs; and

(4) such further orders as this Court thinks just.

There are, therefore, two applications before the Court for consideration.

MHDL's Submissions

[6] MHDL contends that the Act does not confer any rights of appeal to the High Court. It was argued that the Act refers to the making of an application to the High Court, which does not translate into a right of appeal to the High Court. Any reference in clause 9.5 of the contract to a right of appeal is

illusory, because this clause refers to the U.K. arbitration legislation and not to the Barbados Act. The Court was invited to find that it has no jurisdiction to entertain an appeal brought by SBWL under Part 60 of the CPR.

[7] For convenience, the Court will refer briefly to SBWL's reliance on clause 9(5) of the contract. This clause does not assist SBWL. It appears to refer to 1979 U.K. arbitration legislation within the context of a contract that declares that its proper law is the law of Barbados. Additionally, the parties by their various pleadings accepted that the challenged arbitration was conducted under the aegis of the Barbados Act. Therefore, the Court sees no need to embark on an expansive interpretation of the contract, similar to that exercise recently undertaken by the Court of Appeal in **E.Phil & Sons A/S (Denmark) v. Brondum A/S (Denmark)** (Civil Appeal No. 24 of 2012; decision 23 October, 2013).

SBWL's Submissions

[8] SBWL argued that sections 16, 26 and 28 of the Act are supportive of a right of appeal to the High Court. Part 60 of the CPR was said to buttress that right. Further, any right which MHDL might have had, to challenge the jurisdiction of this Court, was lost when MHDL failed to file an acknowledgment of service within the time stipulated by the CPR.

The Legislative Matrix

[9] The Act came into force in Barbados on 15 August, 1958. It is modelled on the U.K. Arbitration Act of 1950, and contains 40 sections. Several of these sections invoke the jurisdiction of the High Court. In fact, the majority of these sections contain multiple references to the role of the High Court in arbitration proceedings. For example, section 3 permits the High Court to grant leave revoking the authority of an arbitrator or umpire. The powers of the High Court may be invoked mainly in three areas, namely, pre-arbitration, during arbitration and post the arbitration award.

[10] The fixed date claim form mentions five provisions of the Act. These are sections 16(1) and 16(2), section 26(1), and sections 28(2)(a) and 28(2)(b). These provisions state as follows:

> "16(1) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable despatch in entering on and proceeding with the reference and making an award, and an arbitrator or umpire who is removed by the Court under this subsection shall not be entitled to receive any remuneration in respect of his services.
>
> (2) Where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him.
>
> 26(1) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside.

> 28(2) Where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the Court, or a sole arbitrator or all the arbitrators or an umpire who has entered on the reference is or are removed by the Court, the Court may, on application of any party to the arbitration agreement either –
>
> (a) appoint a person to act as sole arbitrator in place of the person or persons removed; or
>
> (b) order that the arbitration agreement shall cease to have effect with respect to the dispute referred.".

[11] By sections 2 of the Act, "Court" means "the High Court or a Judge". Clearly the Act confers jurisdiction on the High Court with respect to local arbitrations. However, nowhere in the Act is the High Court jurisdiction said to be exercisable by way of an appeal to this Court. There is a single reference to an appeal court, and this is in relation to an appeal to the Court of Appeal under section 24 of the Act. (See S.24(3)).

[12] The question then is how are the powers and jurisdictions of the High Court under the Act to be invoked? More particularly, this Court is being asked to decide whether the SBWL's method of invoking that jurisdiction, by way of a Part 60 appeal under the CPR, has caused it to commit "so egregious a procedural error" that it should be driven from the seat of justice. (See

Auto-Guadeloupe Investissement S.A. v. Columbus Acquisitions Inc. et al (CA B'dos No. 11 of 2011; decision 19 October, 2012 at para. [15]).

Invoking the Court's Jurisdiction: CPR Rule 8.1(5)

[13] SBWL sought to access the High Court by way of an appeal under Part 60 of the CPR. Rule 60.2(1) of the CPR provides for appeals under Part 60 to be initiated by issuing a fixed date claim in Form 2 of the prescribed forms. Rule 8.1(5) of the CPR stipulates the four circumstances in which 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 its use is required by a rule or practice direction; and

(d) whereby any enactment proceedings are required to be commenced by originating summons or motion.

(1) Rules 8.1(5)(a) and (b)

[14] The proceedings before the Court do not relate to the possession of land; and they do not arise out of hire-purchase or credit sale agreements. Therefore, neither Rules 8.1(5)(a) nor (b) are relevant to the applications now before the Court.

(2) Rule 8.1(5) (c)

[15] Is there a rule or practice direction that requires the use of a fixed date claim form for applications to the High Court under the Act? No relevant practice direction was brought to the attention of the Court . And the reference to "a rule" must be within the context of the CPR, bearing in mind that no rules were made under section 40 the Act. (See para. [34] infra).

[16] The Court of Appeal noted in the **Auto-Guadeloupe** case, that neither Part 61 nor 62 of the CPR specifically referred to domestic or international arbitrations. (Judgment at para. [21]). This Court has scoured the CPR and found no comprehensive procedural rules relating to domestic arbitrations contained therein. The Court must enquire whether there is a "roadmap, defined or otherwise" in the CPR, directing the procedure for invoking the jurisdiction of the High Court in domestic arbitration proceedings. (See **Auto-Guadeloupe,** supra, at para. [24]) of the judgment).

[17] SBWL believes that the appropriate roadmap is to be found in Part 60 of the CPR. This Part speaks to appeals to the High Court, which are initiated by issuing a fixed date claim form. (Rule 60.2(c)). The scope of Part 60 is articulated in Rule 60.1 as follows:

> "(1) This Part deals with appeals to the High Court from any tribunal or person under any enactment other than an appeal by way of case stated.

(2) In this Part

"appellant" means any person challenging the decision of a tribunal or person under this Part;

"clerk to the tribunal" means the clerk, secretary or other person responsible for the administration of the tribunal;

"decision" means the order, determination, decision or award appealed against; and

"tribunal" means any tribunal other than a court of law established under an enactment.

(3) This part takes effect subject to any provision in the relevant enactment."

[18] SBWL is seeking the removal and replacement of the arbitrator, and the setting aside of his award. What is noticeable is that the definitions of "appellant" and "decision" in Rule 60.1(2) of the CPR, limit Part 60 proceedings to challenging the order, determination, decision or award of the arbitration tribunal. These definitions do not speak to the removal of the arbitrator. Thus, a deficiency indentified in Order 72 of the 1982 Rules of the Supreme Court, appears to have been replicated in Part 60. (See paras. [37] and [38] infra).

[19] It is section 26(1) of the Act that contemplates the setting aside of an arbitrator's award. And section 26(2) indicates that this jurisdiction is

invoked by way of an application to the Court to set aside the award. These sections make no specific reference to a right of appeal to this Court.

[20] These provisions of the Act may be compared with section 47(1) of the Trade Marks Act, Cap.319, which enacts that:

> "A person aggrieved by the determination of the Director regarding the registration of, or refusal to register, a mark under this Act may appeal to the High Court from that determination within 14 days after the determination is made known to him.".

Section 47(1) makes a specific reference to an appeal to the High Court. And that section may be engaged through the procedural mechanisms in Part 60 of the CPR. The question for this Court is whether the absence of a clear and direct reference to an appeal to the High Court precludes SBWL from invoking Part 60 of the CPR, even if only for the limited purpose of setting aside the arbitrator's award.

[21] There is nothing in Part 60 of the CPR that states explicitly that an appeal includes an application from a tribunal or person under any enactment. However, the definition of an "appellant" in Rule 60.1(2) would include SBWL, because that company is challenging the award of an arbitration tribunal. It should be noted also that an appellant is a person *challenging* the tribunal's decisions, and not a person *appealing* that decision. And the

application to this Court under the Act may be described as a challenge to a tribunal's decision, and to the conduct of the tribunal.

[22] Parliament made a deliberate choice to define "appellant", and also to use the word "challenging" in that definition. The choice of the word "challenging" suggests to this Court that the procedure for invoking the jurisdiction of the High Court, under Part 60 of the CPR, is not restricted to an appeal stricto sensu. This reasoning is supported by the **Auto-Guadeloupe** decision, where the Court of Appeal observed that its jurisdiction was not restricted to the hearing of appeals "in the ordinary sense". (See the CA judgement at para.[28]).

[23] It was Peter Williams J.A. who commented that:

> "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 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....although the claim is an originating application it has been properly received in the Court of Appeal as required by the [International Arbitration Act]". (See **Auto-Guadeloupe**, at paras. [50] and [60] of judgment).

Similarly, appeals under Part 60 of the CPR may not be restricted to the hearing of appeals "in the ordinary sense".

[24] Another perspective is section 34 of the Interpretation Act, Cap.1, which provides that:

> "Where a word is defined in an enactment, other parts of speech and grammatical variations of that word and cognate expressions shall have corresponding meanings in that enactment.".

It follows that the word "appeal" must be defined in accordance with the definition of the word "appellant". In other words, an appeal is a challenge to the decision of a tribunal or person. Furthermore, an application to set aside the decision of an arbitrator is clearly a challenge to the arbitrator's decision. In this case, SBWL is challenging the correctness of the arbitrator's decision, and the manner in which it was made.

[25] Part 60 of the CPR does not include appeals by way of case stated. (See Rule 60.1 (1)). It is Part 61 that is concerned with the procedure for appeals to either the High Court or the Court of Appeal by way of case stated. The prerequisite for invoking the jurisdiction of either Court is that an enactment must exist that gives the Court the power to determine an appeal by way of case stated.

[26] Section 24 of the Act speaks to the statement of a special case, by an arbitrator, for the decision of the High Court. Under Part 61, a case includes a special case. (See Rule 61.1(2)). Therefore, an application to the High

Court under section 24 of the Act must be by way of the appeal procedure in Part 61 of the CPR.

[27] Unlike Part 60 of the CPR, Part 61 offers no definition of an appellant. And neither is there a requirement for documentation filed under Part 61 to cite the enactment and the section that authorise the appeal by way of a case stated. These omissions from Part 61 support the Court's conclusion that all that is required for an appeal to the High Court, by way of a case stated under Part 61, is a power in the governing legislation that permits this Court to determine a case stated. That power need not be couched in the language of a statutory right of appeal.

[28] Can this Court draw the same conclusion in relation to Part 60 of the CPR? MHDL contends that SBWL cannot utilise the Part 60 procedure because the relevant sections of the Act do not give SBWL a statutory right of appeal to the High Court. In addition, it is argued that SBWL is unable to satisfy the requirements of Rule 60.2(2)(c) because there is no enactment or section that confers on SBWL a right to appeal to this Court. MHDL insists that for these reasons the filing of the fixed date claim form by SBWL, under Part 60 of the CPR, was misconceived.

[29] A similar issue was considered by the Eastern Caribbean Court of Appeal in the case of **One Call Construction Co. Ltd. v. Grenada Solid Waste**

Management Authority (ECCA No. 14 of 2009; decision 08 Sept., 2010). Baptiste J.A. reviewed Part 60 of the Eastern Caribbean Supreme Court (ECSC) Civil Procedure Rules, 2000, which is substantially in tandem with Part 60 of the Barbados CPR. This was a procedural appeal heard by a single Justice of Appeal. The learned Justice of Appeal determined that an application to the Grenada High Court, for an order to remit the award of an arbitration tribunal for reconsideration, was not an appeal. Therefore, the application should not have been commenced under Part 60 of the ECSC rules.

[30] Baptiste J.A. reasoned thus:

> "[14] It is clear to me that what was before the [High Court] was not an appeal but an application to remit pursuant to the [Arbitration Act]. To found an appeal by virtue of the nature of the orders the High Court is authorised to give in sections 18 and 19 of the Arbitration Act is effectively to presume an appeal where no appeal is given by these sections. Further, in the absence of express words conferring an appeal, I am of the view that neither the language, substance or meaning of sections 18 and 19 gives an appeal. Where the Arbitration Act intended to confer a right of appeal it did so expressly. Thus section 31(3) provides that an appeal lies to the Court of Appeal from any decision of the High Court under this section, but no appeal lies against the decision on a case stated pursuant to subsection 1(a) except with the leave of the [High Court] or the Court of Appeal. To have recourse to part 60 of the [ECSC] CPR, 2000 it has to be first established that there is a right of appeal to the High Court given by the substantive law, here, the Arbitration Act. In the absence of such a right of appeal part 60 of the [ECSC] CPR 2000 cannot be engaged. This is borne out

> by rule 60.1 and rule 60.2(2)(b) of the [ECSC] CPR 2000. Rule 60.1 states that:
>
> > "This part deals with appeals to the High Court from any tribunal or person under any enactment other than appeal by way of case stated.".
>
> Rule 60.2 (2)(b) states that the appellant's grounds of appeal must state the "enactment enabling an appeal to be made to the court.".

[31] Baptiste J.A. concluded that the learned trial judge had erred when she held that the claim before the Grenada High Court was an appeal to which part 60 of the ECSC CPR 2000 applied. The **One Call** decision is a highly persuasive authority from a regional Court of Appeal. It is an authority which interprets a part in the ECSC CPR 2000 that is drafted similarly to Part 60 of the Barbados CPR.

[32] Both sets of Rules require that the grounds of appeal must identify the legislation that permits the appeal to the High Court. (See CPR Rule 60.2.(1)(c) and ECSC CPR 2000, Rule 60.2. (2)(b). Our CPR goes further by requesting the citation of the specific section that enables the appeal. But a significant difference between the two is that there is no definition of "appellant" in Part 60 of the ECSC CPR 2000. (See paras. [17] and [30] supra).

[33] It may be that the inclusion of a definition of "appellant", in Part 60 of the CPR, is an indication that Parliament did not intend that Part 60 should be

restricted to appeals in the narrow sense. Rather, Parliament may have intended that Part 60 appeals should be accommodated within the wider concept of challenges to the decisions of tribunals. Therefore, this Court must decide whether to follow the persuasive judgment in **One Call**; or hold that SBWL's application to set aside the arbitrator's award, under section 26 of the Act, is an appeal under Part 60 of the CPR. And if the Part 60 appeal is procedurally correct, the fixed date claim form would satisfy the requirements of Rules 60.2(c) and 8.1(5)(c) of the CPR.

(3) Rule 8.1(5)(d)

[34] With respect to Rule 8.1(5)(d) of the CPR, the Court embarked on an enquiry as to whether, at the time SBWL filed its claim, there was in existence any legislative requirement for proceedings under the Act to be commenced either by originating summons or motion. Section 40 of the Act authorises Parliament to legislate rules for regulating the practice and procedure to be followed "for carrying the purposes of this Act into effect". The Court was unable to trace any rules made under section 40. And there are no provisions in the Act that speak to the commencement of proceedings by either originating summons or motion.

[35] The Court also looked at the Supreme Court rules in existence prior to the commencement of the CPR. The 1958 Rules of the Supreme Court did not

dedicate any specific Order to the hearing of arbitration applications by the High Court. However, the 1958 Rules contained a provision that allowed the procedural rules in England to be applied where the local 1958 Rules were silent. Order 1 Rule 3 stated that:

> "Wherever touching any matter of practice or procedure these Rules are silent, the Rules of the Supreme Court for the time being in force, made in England under and by virtue of the Supreme Court of Judicature (Consolidation) Act, 1925, or any statute amending the same shall apply *mutatis mutandis.*".

[36] The rules in England provided for applications to the High Court for the removal of an arbitrator, or the setting aside of an award, to be made by originating motion. For example, order 73 Rule 2 of the 1965 English rules provided that:

> "2 – (1) Every application to the Court –
>
> (a) to remit an award under section 22 of the Arbitration Act 1950, or
>
> (b) to remove an arbitrator or umpire under section 23(1) of that Act, or
>
> (c) to set aside an award under section 23(2) thereof,
>
> must be made by originating motion to a single judge in Court.". (See also Halsbury's Statutes Of England, 3rd ed., Vol.2, (1968), p.453).

[37] The Court assumes that, while the 1956 local Rules were in force, any arbitration applications made to the Barbados High Court used the originating motion process. The 1956 Rules were replaced by the 1982 Rules. In the 1982 Rules, Order 72 was dedicated to arbitration proceedings. Rule 2 of Order 72 stated that:

> (1) Every application to the Court –
>
> (a) to remit an award under section 25 of the Act, or
>
> (b) to set aside an award under section 26(1) of the Act or otherwise
>
> must be made by originating motion.".

[38] Absent from Order 72 was any provision for applications to remove an arbitrator. Also missing from the 1982 Rules was a provision similar to Order 1 Rule 3 of the 1958 rules. (See para. [35] supra). Therefore, the originating motion process could not be imported from the English rules, if the removal of an arbitrator was contemplated.

[39] The Court has been unable to identify any legislation or practice direction that dictated the procedural requirements for filing an application to remove an arbitrator, while the regime of the 1982 Rules was in force. However, the recent High Court decision of **Fiton Techologies Corp. v. The Attorney-General** (B'dos. H.C. No.884 of 2008; decision 17 June, 2013), suggests the use of an originating process. In setting out the background to that case,

Alleyne J. noted that the Plaintiff had filed an originating summons on 21 May, 2008, seeking the appointment of an arbitrator pursuant to section 12 of the Act. (Para.[18] of judgment).

[40] The CPR replaced the 1982 Rules in 2008. The CPR apply to all civil cases, except certain exempted matters. (Rule 2.2(1)). Rule 2.2(3)(e) exempts:

> "any proceedings in the Supreme Court instituted under any enactment, in so far as rules made under that enactment regulate those proceedings;"

As noted earlier, no rules were made under the Act to regulate its proceedings. Therefore arbitration proceedings do not fall within the class of proceedings that Rule 2.2(2) exempts from the purview of the CPR. Additionally, the procedural rules in Order 72 of the 1982 Rules were repealed by the CPR. (CPR Rule 74.2). Thus, in relation to Rule 8.1(5)(d) of the CPR, there is no existing enactment that requires arbitration proceedings to be commenced either by originating summons or motion.

[41] In this context, the Court reviewed another decision from the Eastern Caribbean Court of Appeal. In **De Bellotte v. Attorney-General of Grenada** (No.17 of 2011; decision 22 November, 2011), Mitchell J.A. (Ag.) applied the **One Call** decision. (Supra, at para. [28]). The learned Acting Justice of Appeal agreed that what was before him did not qualify as an appeal to the High Court under the ECSC CPR 2000. However, the fixed

date claim form utilised was appropriate for an application to remit or set aside an arbitration award.

[42] Mitchell J.A. (Ag.) adopted the reasoning of the Grenada High Court that, prior to the enactment of the ECSC CPR 2000, such matters came before that High Court by way of an originating motion. Therefore, under the new rules regime, a fixed date claim form was appropriate, even though the application was not a Part 60 appeal. (See the Grenada H.C. judgment in **Attorney-General of Grenada v. De Bellotte,** No.6 of 2011, decision 07 July, 2011, Price Findlay J. at paras. [15] to [21]).

[43] But the **De Bellotte** judgment may be distinguished from the present facts. Here, the pre-existing enactment was repealed by the CPR. Although the appropriate rule under the ECSC CPR 2000 is the same as Rule 8.1(5)(d) of the CPR, Mitchell J.A. (Ag.). did not cite the existing legislative authority for the originating motion process. The language of Rule 8.1(5)(d) is clear and unambiguous. And there is nothing to suggest a drafting error. Therefore, the use of a fixed date claim form for matters previously commenced under the 1982 Rules, either by originating summons or originating motion, would require an amendment to CPR Rule 8.1(5)(d) so as to allow its use "whereby any enactment [*prior to the commencement of*

the CPR] proceedings [*were*] required to be commenced by originating summons or motion.".

Resolution

[44] The learned Chief Justice in **Auto-Guadeloupe**, supra, commented on the fixed date claim form and Part 8 of the CPR. He reasoned that:

> "[31]....The proceeding in this matter does not fit any of the categories described in Rule 8.1(5).
>
> [32] The clear domino effect of an excessively narrow conception of "appeal" led [the applicant]....to utilise a form which, by its very language, precludes its applicability to any arbitration, much less one governed by the ICAA,.... It follows, therefore, that [the applicant] had indeed commenced the proceedings before us in the wrong way since the rule nowhere mentions either domestic or international arbitration.".

[45] With respect, while the fixed date claim form may not have been appropriate for the application in **Auto-Guadeloupe**, it does not follow that the language of Rule 8.1(5) "precludes its applicability to any arbitration". The interpretation of the language of Rules 8.1(5)(c) and (d), admits the possibility of using the fixed date claim form for applications under the Act. Although Rule 8.1(5) does not mention domestic or international arbitrations, applications to the High Court, using a fixed date claim form, may have been contemplated by Parliament through the deliberate choice of language in Rule 60.1 of the CPR. Rules 60.1 and 8.1(5)(c), when read

together, are capable of supporting the procedural mechanism utilised by SBWL to invoke the jurisdiction of the High Court. In addition, if this Court chose to follow the reasoning in the ECCA **De Bellotte** decision, the fixed date claim form is the appropriate procedural route under Rule 8.1(5)(d) of the CPR.

[46] This Court cannot say with certainty that Rule 8.1(5)(d) is to be preferred, although the originating summons or motion procedure existed immediately before the CPR came into force. Parliament's intention may well have been to close this route, because Rule 8.1(5)(c) contemplated the use of a fixed date claim form as required by Rule 60.2(1) of the CPR. The fixed date claim form is appropriate for either Rule, and for an appeal under Part 60 of the CPR.

[47] After careful reflection, this Court is not persuaded that SBWL used the wrong procedure to invoke the jurisdiction of the High Court under the Act. There is no clarity in the CPR, and SBWL's procedural approach is accepted by this Court. The Court cannot say that the method used by SBWL to invoke its jurisdiction was either misconceived and/or an abuse of the process of the Court. Even if the fixed date claim form was not the correct way to access this Court's jurisdiction, Rule 26.4 of the CPR provides a

discretion to correct errors of procedure. (See **Auto-Guadeloupe** judgment, supra, at para. [34]).

[48] The Court is also of the view that the resolution proposed will not prejudice MHDL. MHDL knows the case it is being called upon to answer. In this regard, the Court again draws on the wisdom of the Court of Appeal in **Auto-Guadeloupe**, where the learned Chief Justice opined that:

> "In an era when access to justice is an unquestionable desideratum, particularly in light of the overriding objective stated in Rule 1.1 [of the CPR] "to enable the court to deal with cases justly", we must, in construing the CPR, always prefer substances to form in regulating access to the courts.". (Para.[37] of judgment).

[49] The Court is mindful of the fact that in addition to challenging the decision of the arbitrator, SBWL is also seeking the removal of the arbitrator under sections 16(1) and (2) of the Act; and consequential orders under sections 28 (2)(a) and (b). The CPR permits a claimant "to include in a single claim form all, or any, other claims which may be conveniently disposed of in the same proceeding.". (Rule 8.3). It would be convenient for this Court to entertain all the claims, arising out of the arbitration, in the same fixed date claim form.

Disposal

[50] MHDL's application was not unreasonable in the circumstances of this case, where there was no clear road map in the CPR or the Act for the filing of SBWL's action. However, for the reasons given, MHDL's application is dismissed. There is, therefore, no need for the Court to give further consideration to whether MHDL was barred from raising its objection to jurisdiction.

[51] SBWL's application is also dismissed in part. Rule 12.2 (b) of the CPR debars the Court from granting a default judgment where the claim is a fixed date claim. In addition, had MHDL filed a defence, it would surely have been faced with the argument that it had submitted to the jurisdiction of the Court. The Court is of the view that in order to deal with this case justly, MHDL should be permitted to respond to the appeal.

[52] Counsel for MHDL contended that Part 60 of the CPR makes no provision for MHDL to file a defence. However, the Court must point out that the grounds of appeal are considered to be a statement of case. Rule 60.6 allows for the amendment of the grounds of appeal. Indeed, the heading to Rule 60.6 describes it as "Amendment of statement of case". It should also be noted that the fixed date claim form envisages the filing of either an affidavit

or a defence by MHDL. The Court is empowered to make the requisite orders at a case management conference. (See Rule 9.7 (7)).

[53] No order as to costs will be made at this time. The decision on costs is reserved until the determination of the substantive matter.

Sonia L. Richards

Sonia Richards

Judge of the High Court