[2012] JMCC Comm 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2012 CD 00055

BETWEEN	**SANS SOUCI LIMITED**	**CLAIMANT**
AND	**VRL SERVICES LIMITED**	**DEFENDANT**

Mr. Gavin Goffe instructed by Myers, Fletcher and Gordon for the Claimant.

Mr. Richard Mahfood Q.C., Dr. Lloyd Barnett, and Mr. Weiden Daley, instructed by Hart, Muirhead Fatta for the Defendant.

Heard: 28th May, and 19th September 2012

IN CHAMBERS

> **PRACTICE AND PROCEDURE – APPLICATION TO STRIKE OUT – ABUSE OF PROCESS – NO REASONABLE GROUND FOR BRINGING CLAIM – RULE 26.3(1)(b) AND 26.3(1)(c) CPR – ARBITRATION PROCEEDINGS – ISSUE ESTOPPEL AND RES JUDICATA**

MANGATAL J

[1] The Claimant Sans Souci Limited "SSL" is a limited liability company duly incorporated in Jamaica with registered office at Twickenham Park, Spanish Town in the Parish of Saint Catherine. SSL was at times material the Lessee of and carried on the business of a hotel operator at the Sans Souci Hotel and Spa situated at White River, St. Mary, "the Hotel".

[2] The Defendant VRL Services Limited "VRLS" is a limited liability company, duly incorporated in Jamaica with registered office at 2 St. Lucia Avenue, Kingston 5, in the Parish of Saint Andrew. VRLS was at times material, engaged in the business of the management of hotels.

[3] This is an application by way of Amended Notice of Application to Strike Out filed on behalf of VRLS on the 7th of May 2012. There were several types of relief referred to in the Notice of Application, but ultimately, VRLS' Attorneys-at-Law indicated that the relief being sought at this time is as follows:

> "…..
>
> (2) an order pursuant to CPR 26.3(1)(b) and/or 26.3(1)(c) that paragraphs 18, 19, 20 and 21 of the Particulars of Claim be struck out, and in consequence thereof the Claim Form herein be struck out also;….

THE CLAIM

[4] By Management Agreement dated 12th October 1993 "the Agreement" between SSL of the one part and VRLS on the other part, SSL appointed VRLS to manage the Hotel for an initial term commencing on 1st November 1993 and continuing to 31st March 2004, subject to the terms and conditions set out therein. The Agreement was amended by three Supplemental Agreements.

[5] Clause 13 of the Agreement provided for differences arising between the parties to be referred to arbitration and reads as follows:

> *"13. This Agreement is governed by the Laws of Jamaica and shall be construed and take effect in accordance with the Laws of Jamaica. If any difference shall arise between the parties hereto as to the interpretation of this Agreement or as to the rights duties or liabilities of any party hereto or generally as to any act matter or thing arising out of or under this Agreement the same shall be submitted to two arbitrators one to be appointed by each party who shall by instrument in writing appoint an umpire immediately after they are themselves appointed. Such submission shall be a submission to arbitration under the provisions of the Arbitration Act or any statutory re-enactment modification or extension thereof for the time being in force."*

[6] By letter dated 4th March 2003, acting pursuant to Clause 14 (iv) of the Agreement, SSL gave VRLS noticed terminating the Agreement on the ground that force majeure had materially affected the operation of the Hotel.

[7] VRLS disputed SSL's right to terminate the Agreement under Clause 14(iv). Acting pursuant to Clause 2(a) of the Agreement, VRLS gave Notice dated 6th March 2003 of its intention to exercise an option to renew the Agreement for a further 10 years.

[8] Disputes having arisen between the parties, VRLS and SSL each appointed an Arbitrator to settle the matters in difference under Clause 13 of the Agreement. VRLS appointed Roald Nigel Adrian Henriques of 72 Harbour Street by Notice dated 31st March 2003 and SSL appointed John Cecil Wilman of 6A Holborn Road, Kingston 10 by Notice dated 7th April 2003. The two Arbitrators, in accordance with the Agreement, together nominated an Umpire, the Honourable Justice Boyd H. Carey, (Retired).

[9] On the 26th of August 2003, after a preliminary meeting with the parties and their Counsel, amongst other matters, the Arbitrators ruled that the Terms of Reference for the Arbitration were as follows:

> "(1) Whether Sans Souci Limited lawfully terminated the said Management Agreement under Clause 14(iv) thereof by a notice dated the 4th day of March 2003; and
>
> (2) If not, what damages would VRL Services Limited be entitled to recover as a consequence of the wrongful termination of the agreement."

[10] Hearings in the Arbitration concluded on 15th April 2004 and the Arbitrators delivered their Award and Reasons for Judgment dated 16th July 2004 "the Original Award", whereby, amongst other matters, it was awarded that:

> "The questions posed in the Terms of Reference can be answered as follows:
>
> (i) Sans Souci Limited unlawfully in breach of contract terminated the Management Agreement under Clause 14 (iv) thereof by a Notice dated the 4th day of March 2003.

(ii) The Claimant (VRLS) is entitled to the total sum of Six Million Thirty Four Thousand Seven Hundred and Ninety Three Dollars (United States Currency) (US$6,034,793) comprising US$5,475,000 damages as claimed and US$559,793 (cost of advertising and promotional material) which amount shall be payable in Jamaican currency computed at the prevailing 10 day moving average rate of exchange for sales published in the Jamaican press on the date of this Award and shall be accepted in full and final settlement of the Claimant's [VRLS'] claim arising out of the matters in dispute in this reference.

(iii) The Claimant [VRLS] is entitled to interest on the said sum of US$6,034,793 calculated from the date of this Award at a rate equivalent to the average of the commercial bank's prime lending rates prevailing on that rate.

[11] SSL in its Particulars of Claim states that the prevailing 10-day Moving Average Rate of Exchange for Sales published in the Jamaican press on the date of the Original Award was Jamaican $61.4280 to United States $1.00. It states that the damages that SSL was being ordered to pay VRLS therefore amounted to Jamaican $370,705,264.40 with interest on this sum calculated from the date of the Original Award at a rate equivalent to the average of the commercial banks' prime lending rates prevailing on that date. The applicable rate of interest was 21 %.

[12] SSL applied to set aside the Original Award of the Arbitrators. The Honourable Mrs. Justice Harris (as she then was) heard the application and dismissed it on the 10th of February 2006.

[13] The decision of Harris J. was appealed to the Court of Appeal, and according to SSL's Particulars of Claim, paragraph 12, "the appeal was allowed in relation to damages".

[14] The Order of the Court of Appeal (per Harrison, P, McCalla J.A. and Dukharan J.A. (Ag), (as he then was), made on the 12th of December 2008 stated:

> *The appeal against the award of damages is allowed and the matter is remitted to the Arbitrators to determine the issue of damages only.*

[15] SSL pleads, that following the remission by the Court of Appeal, the arbitration continued on the 1st October 2009, and after Counsel had made submissions in relation to the issue of damages the Arbitrators in due course handed down their Award on the 9th of November 2009, (referred to by SSL as "the New Award").

[16] The New Award reads in part as follows:

" **NOW WE**, **ROALD NIGEL ADRIAN HENRIQUES** and **JOHN CECIL WILMAN** the Arbitrators herein, having considered the Orders of the Court of Appeal and the written and oral submissions of the parties and the evidence presented to us in written and oral form and for the reasons separately annexed to this Award **AWARD AND DIRECT** as follows:

1. In the light of our Findings(see p.8) the question remitted to us by the Court of Appeal can be answered as follows:
   (i) the Claimant VRL Services Limited is entitled to receive the full amount of the damages awarded on our Award dated 16th July 2004 ("the said Award") i.e. US$6,034,793 without any deduction therefrom and WE HEREBY RE-AFFIRM the said Award.
   (ii) The Claimant VRL Services Limited is also entitled to interest on the sum of US$6,034,793 calculated from 16th July, 2004 at the rate specified in the said Award.

……"

[17] In its pleading, SSL states that interest on arbitral awards accrues at the same rate as interest on judgment debts and is prescribed by the **Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 2006**.

[18] At the time of the publishing of the New Award, the applicable interest rate prescribed for judgment debts denominated in a foreign currency was 3 per centum per annum and 6 per centum per annum for Jamaican Dollar judgment debts.

[19] SSL at paragraph 18 of the Particulars of Claim, alleges that the Arbitrators have misconducted themselves and acted in excess of jurisdiction and authority by awarding interest at a rate equivalent to the average of the commercial bank's prime lending rates prevailing on the date of the Original Award until payment (i.e. post-judgment interest) when they only had jurisdiction to award interest in respect of the period between the date when the cause of action arose and the date of the award (i.e. pre-judgment interest) in accordance with section 3 of the **Law Reform (Miscellaneous Provisions) Act**.

[20] SSL also asserts, at paragraph 19, that there has never been any agreement or consent on its part to give the arbitrators the authority to make an award of post-judgment interest in the arbitration.

[21] Further, or in the alternative, at paragraph 20, SSL alleges that the Arbitrators have misconducted themselves as the New Award is neither an amendment to the Original Award, nor is it, by itself, in a proper or enforceable form but instead is one of two awards published by them under the same terms of reference.

[22] SSL states that the New Award does not deal with all of the matters under reference to the Arbitrators and in particular, does not address the question of " whether Sans Souci Limited lawfully terminated the said Management

Agreement under Clause 14(iv) thereof by a notice dated 4th day of March 2003"- Paragraph 21.

[23] SSL therefore claims:

(i) That the Award published on the 9th November 2009 be set aside pursuant to Section 12(2) of the Arbitration Act;

(ii) Any further or other relief as may be just in the circumstances; and

(iii) That VRLS pay the costs of the claim.

THE BASIS FOR THE APPLICATION TO STRIKE OUT

[24] The application to strike out is made pursuant to CPR 26.3(1)(b) and/or CPR 26.3(1)(c). Those Rules state as follows:

> ***Sanctions-striking out statement of case***
> *26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-*
>
> *…..*
>
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
>
> *(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim,…*

THE GROUNDS OF THE APPLICATION

[25] The grounds stated in the application are as follows:

(i) On 16th July 2004 the Arbitrators made an Award which the Claimant challenged, and on 10th February 2006 this Court dismissed the claim. The Claimant appealed, and on 12th December 2008 the Court of Appeal ordered, among other things, that ***"the appeal against the award of damages is allowed and the matter is remitted to the Arbitrators to determine the issue of damages only"****. The Court of Appeal's remission was restricted to requiring the Arbitrators to demonstrate whether or not they accept* ***"that the expenses were unrecoverable or alternatively, payable by"*** *the Applicant.*

(ii) *Pursuant to the Court of Appeal's order, on 9th November 2009 the Arbitrators made their Award on remission re-affirming the Award of 16th July 2004 (the "Award on Remission").*

(iii) *The bringing of this claim is an abuse of the process of the Court and/or the grounds upon which the Claimant seeks to set aside the Award on Remission disclose no reasonable grounds for bringing the claim, in that:*

(a) As to Paragraphs 18,19 and 22 of the Particulars of Claim

(i) It is well established in law that arbitrators are empowered by the general law to award interest at such rate and for such period between the date the cause of action arose and at least up to the date of the award as they may think fit. Since the Award on Remission was made on 9th November 2009, and the Claimant paid the sum awarded on 31st May 2005, then interest awarded by the Arbitrators was for the period of 16th July 2004 to 31st May 2005, a date well before the date of the Award on Remission.

(ii) It is not open to the Claimant to raise issues of the period and rate of interest and to claim that " the Award published on the 9th November 2009 be set aside pursuant to Section 12(2) of the Arbitration Act", since having regard to the scope of the remission as finally determined by the Privy Council the Arbitrators could not have considered and they rightly did not consider those issues on the remission, as admitted by the Claimant in paragraph 10 of its submissions filed on 18th May 2011.

(iii) In any event, the Claimant is bound in respect of all the issues raised in this action by the principles of ***res judicata*** *and issue estoppel.*

(b) As to Paragraph 20 of the Particulars of Claim

The Award on Remission is in proper and enforceable form in all material respects.

*Further, on 1st October 2009 the Claimant and the Defendant, through their respective attorneys agreed in writing that "….****the review by the Arbitrators upon remission in accordance with the Order of the Court of Appeal dated 12th December 2008 shall be limited to a reconsideration of the irrecoverable expenses and thereafter the Arbitrators shall determine whether and if so to what extent they should vary the quantum of damages previously awarded….****"*

The Claimant is bound by that agreement, and is barred and/or stopped from contending to the contrary or inconsistently therewith.

(c) As to paragraph 21 of the Particulars of Claim
The Claimant is bound by the principles of ***res judicata*** *and issue estoppel in respect of "****whether [it] lawfully terminated the said Management Agreement…****"*

(iv) The orders sought are required to give effect to the overriding objective to deal with cases justly, including saving expenses, and allotting an appropriate share of the Court's resources while taking into account the need to allot resources to other cases. In particular, the determination of the preliminary question can do substantive justice between the parties since the adjudication of the other issues raised in paragraphs 18,19,20 and 21 of the Particulars of Claim and paragraphs 19 and 20 of the Defendant's submissions would serve no worthwhile purpose.

(v) The above orders are necessary for the just, fair and effective disposal of the matter.

[26] In support of its application, VRLS filed two Affidavits of David Kay, Vice President Corporate Finance of VRLS, on the 5th March 2010 "the first Kay Affidavit" and the 7th May 2012 "the second Kay Affidavit" respectively.

[27] In the first Kay Affidavit, VRLS indicates that on the 16th of September 2004 VRLS applied in Claim No. 2004 HCV 2205 for permission to enforce the Original Award, and on the 22nd of September 2004 the Court granted permission. SSL appealed to the Court of Appeal in Supreme Court Civil Appeal No. 108 of 2004, and on the 24th of May 2005, the Court of Appeal allowed the appeal.

[28] On the 3rd of September 2004, SSL filed Claim No. 2004 HCV 2161 in which it challenged the Original Award, and sought an order that the Award be set aside on the ground of error on the face of the Award with respect to liability and in relation to damages with particular reference to:

"(a) Misinterpreting the issue raised by the Claimant herein in paragraph 18 of its Point of Defence that in future years, VRLS would incur certain unrecoverable expenses which should be deducted from any calculation of future loss as being merely a claim to set off overpayments in past years against the damages to be awarded;

(b) Failing to consider or rule on the said issue raised by the Claimant herein in paragraph 18 of its Points of Defence;

(c) Failing to take into account the possibility that under the Management Agreement, the Claimant was entitled to sell the Hotel to a third party, and to terminate the Agreement for that reason, provided that it gave the Defendant the opportunity to make an offer and provided that the sale was made within six months of the offer to a purchaser who buys under more favourable terms and to accordingly make provision for this eventuality by reducing their Award."

[29] On the 26th of May 2005 Sinclair-Haynes J. ordered, among other things, as follows:

(1) *The arbitral award delivered on the 16th day of July 2004 by Arbitrators Mr. R.N.A. Henriques and Mr. C. Wilman, and by Umpire, Hon. Justice Boyd H. Carey (Ret'd), be stayed until the determination of these Proceedings on the following conditions:*

CONDITIONS

The Claimant will pay to the Defendant on the 31st of May, 2005 the amount of the Award in the sum of J$370,705,264.40 plus interest thereon at the rate of 21.00 percent per annum from the date of the Award, namely the 16th day of July, 2004 to the date of payment as aforesaid amounting to J$68,037,111.40 plus the sum of J$10,000,000.00 on account of the costs incurred in and of the Arbitration and related litigation to the date of payment, such costs to be taxed or agreed, on the following conditions:

(a) That the Defendant supplies to the Claimant a Bank Guarantee or Guarantees or a Letter or Letters of Credit

from one or more of the Following Banks, such documents to be subject to the prior Approval by the Claimant, such approval not to be unreasonably withheld:

i) Bank of Nova Scotia Jamaica Limited,
ii) National Commercial Bank Jamaica Limited,
iii) Citibank, or
iv) First Global Bank Limited- up to a maximum of 40% of the Total bank guarantees and letters of credit.

Securing in the aggregate the repayment of the abovementioned amounts with simple interest thereon at the rate published by the Bank of Jamaica in its monthly Statistical Digest described as "Domestic Interest Rates- Commercial Banks Weighted Time Deposit Rates for three months and less than six months".

This rate will be adjusted monthly from the date of payment to the date of repayment pursuant to the Order of this Honourable Court either setting aside, or varying the said Award subject to any subsequent Order made by a Superior Court.

(b) Liberty for the parties to apply in the event of any non payment by the bank(s) on presentation of a certified copy of the Court Order discharging and/or varying the Award.

[30] Mr. Kay testifies that, on the basis of and pursuant to the Order of Haynes J., on the 31st of May 2005, SSL paid to VRLS the damages and interest awarded in the Arbitration, and VRLS obtained the guarantees in accordance with that Order.

[31] At paragraph 13 of the First Kay Affidavit, VRLS states that the grounds of Appeal filed by SSL against the judgment of Harris J. dismissing SSL's challenge to the Award, in so far as they relate to the issue of damages, were as follows:

"(e) The learned Judge erred in finding that when the Arbitrators Found that the Appellant's claim that the Respondent in performing its contractual obligations in future years would incur certain unrecoverable expenses which should be deducted from any calculation of future loss amounted to a "set off" of over-payments in past years against the damages to be awarded, it only amounted to an inaccurate use of the words and to no error on the face of the Award; when the Arbitrators as a consequence of their finding failed

to consider the Appellant's claim in relation to this issue at all and consequently did not deduct these unrecoverable expenses from their Award.

(f) The Learned Judge erred in finding that the principle that in assessing damages against a party who breaks a contract, that the contract breaker is entitled to perform the contract in a manner which is most beneficial to himself, was not applicable to damages for wrongful termination of a management contract for a fixed period of years, when the authorities support the application of this principle to the instant case.

(g) The learned Judge erred in finding that although the Arbitrators failed to give details of the specific amounts which were computed as the base and incentive fee that this could not be considered a violation of the Award as the Arbitrators were guided by the opinion of experts and the Award was therefore made without any error of law appearing on the face of the record; when by not giving these details the Arbitrators failed to properly illustrate whether their starting point was the full base and incentive fees less the costs of earning those fees and then discounting for contingencies in particular the possibility of the early sale of the hotel.

[32] Mr. Kay in paragraph 14 then sets out the orders of the Court of Appeal made on the 12th December 2008, referred to in paragraph 14 above.

[33] At paragraphs 15 and 16 of the First Kay Affidavit, it is stated:

15. The Court of Appeal has therefore upheld the Arbitrators' decision and the trial Judge's finding that SSL breached the Management Agreement and is liable to VRLS in damages for that breach. There was no appeal from the decision of the Court of Appeal

16. With regard to the award of damages, the Arbitrators, this Honourable Court and the Court of Appeal have all ruled that the matter which was remitted by the Court of Appeal is a narrow one, being in respect of the only error found, namely for the arbitrators to state whether or not they had taken into account and decided the issue as to whether SSL's contention that certain alleged unrecoverable expenses should or should not be deducted. On all other points relating to damages the Court of Appeal upheld the learned trial Judge's finding that there was no error of law on the face of the record. … .

[34] In the Second Kay Affidavit, a copy of the Judgment of the Judicial Committee of the Privy Council delivered 7th March 2012, in Privy Council Appeal No. 0088 of 2010, is exhibited.

[35] It is in this Judgment that the Judicial Committee of the Privy Council held that the matter remitted by the Court of Appeal to the Arbitrators was a narrow one, being in respect of the only error found, namely, for the Arbitrators to state whether or not they had taken into account and decided the issue as to whether the contention of SSL that certain alleged "unrecoverable expenses" should or should not be deducted.

[36] When one examines the copy of the New Award, dated 9th November 2009, DK1, exhibited to the first Kay Affidavit, there is recording of an agreement between the parties through their then Counsel, which agreement is referred to in VRLS' Submissions. Both parties agreed as follows:

> *That the review by the Arbitrators upon remission in accordance with the Order of the Court of Appeal dated 12th December 2008 shall be limited to a reconsideration of the irrecoverable expenses and thereafter the Arbitrators shall determine whether and if so to what extent they should vary the quantum of damages previously awarded, without prejudice to the exercise of any right of appeal to the Privy Council by Sans Souci Limited.*

VRLS'S SUBMISSIONS IN SUPPORT OF THE APPLICATION TO STRIKE OUT

[37] In VRLS's Supplemental Written Submissions dated the 22nd day of May 2012, it is submitted that the current purpose of the present claim is to challenge the rate and period of interest the Arbitrators awarded. That rate and period of interest were awarded in the 16th July 2004 Award. SSL challenged that award in the Supreme Court and in the Court of Appeal. VRLS points out that in none of those courts did SSL challenge either the rate or the period of interest.

[38] Further, on the 7th March 2012 the Privy Council held that the matter remitted by the Court of Appeal to the Arbitrators was a narrow one, i.e. to do

with the issue of damages as it related to alleged unrecoverable expenses. VRLS therefore submits that it was therefore clearly not open to SSL to raise the issues of the rate and period of interest and to claim that "the Award published on the 9th November 2009 be set aside pursuant to section 12(2) of the Arbitration Act", since having regard to the scope of the remission, as finally determined by the Privy Council, the Arbitrators could not have considered, and they rightly did not consider those issues on the remission.

[39] VRLS further referred to the decision of the Judicial Committee of the Privy Council in **Thomas v. AG(No. 2)** (1988) 39 W.I.R. 383, where at page 385 d-f, Lord Jauncey stated:

> *The principles applicable to a plea of **res judicata** are not in doubt and have been considered in detail in the judgment of the Court of Appeal. It is in the interest of the public that there should be finality to litigation and that no person should be subjected to action at the instance of the same individual more than once in relation to the same issue. **The principle applies not only where the remedy sought and the grounds therefore are the same in the second action as in the first but also where, the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or law directly related to the subject matter which could have been but were not raised in the first action***
> (VRLS's emphasis)

[40] Queen's Counsel Mr. Richard Mahfood on behalf of VRLS submits that SSL are therefore bound in this action by the principles of res judicata and issue estoppel in respect of the issues of the rate and period of interest awarded as those issues could and should have been raised in the previous court proceedings. VRLS relies upon the authorities of **Henderson v. Henderson** [1843-60] All E.R. Rep. 378; **Fidelitas Shipping Company Limited v. V/O Exportchleb** [1965] 1 Lloyd's Rep. 223; **Interbulk Ltd. v. Aiden Shipping Company Limited, The Vimiera (No. 3)** [1986] 2 Lloyd's Rep. 75; **Halsbury's Law of England**, 4th Edition Reissue, Volume 16(2) , paragraph 962.

SSL'S SUBMISSIONS

[41] Mr. Goffe submitted on behalf of SSL that the sanction of striking out would be inappropriate as there is no evidence of abuse of process, and that SSL has good prospects of success.

[42] SSL asserts that VRLS has not disputed the legal contention that the arbitrators had no authority to award post-award interest and cite the Court of Appeal's decision in **Marley and Plant Limited v. Mutual Housing Services Limited** (1998) 25 JLR 38, as local authority on that point. However, SSL submits that beyond that, one of the issues in dispute is that of the date of the award. It was Mr. Goffe's submission that the Court cannot properly consider the merits of the application to strike out, and in particular the arguments related to res judicata and issue estoppel, without first adjudicating upon the relevant date(s) of the award in question. The argument continues that this involves a consideration of the merits of the case and would take the matter far beyond the boundaries of an application to strike out for an abuse of process. Mr. Goffe submitted that such an application should only be entertained in clear cases and that this is not such a case.

[43] SSL's Counsel submits that in relation to the issue of the applicable date of the award, the Court could come to one, and only one, of the following conclusions:

a. *Two awards were made-one on July 16, 2004 and another on October 1, 2009;*

b. *The Award was made as of November 9, 2009 [erroneously referred to as October 1, 2009 in submissions] (as VRLS appears to contend); or*

c. *The Award was made as of July 16, 2004 and "re-affirmed" on November 9, 2009 [erroneously referred to as October 1, 2009 in submissions].*

[44] SSL submits that conclusion (a) would result in Judgment for the Claimant. This is because, Mr. Goffe contended, an arbitrator cannot make two awards under the same reference. SSL referred to **Russell on the Law of** Arbitration, 20th Edition, at page 310, as authority for the proposition that if an arbitrator makes two awards, each deciding part of the matters referred, and not one entire award on all together, both may be set aside.

[45] SSL submits that conclusion (b) is wholly untenable because it is apparent on the face of the remitted award that the arbitrators did not intend to make an entirely new award. SSL submits that in their New Award, by referring to the "said Award" dated 16th July 2004, not specifying an interest rate in the New Award, stating that the Claimant is entitled to damages under the 2004 Award, and then re-affirming the 2004 Award, the arbitrators made it clear that they did not intend to publish a new award, but rather were simply "answering the question remitted to [them] by the Court of Appeal." SSL has argued that the Court of Appeal did not remit any question to the Arbitrators and that what the Court in fact did was to remit the Award for reconsideration. The argument continues that the arbitrators then had a duty to publish a new award after the remission, which duty they clearly, it was submitted, failed to appreciate. If VRLS is contending therefore that conclusion (b) is the one that is correct in law, then the award would, SSL contends, necessarily have to be set aside as the language of the Award would be entirely inconsistent with the law.

[46] SSL submits that an argument contained in paragraph 20 of VRLS's submissions that in 2009 the Arbitrators awarded interest for the period 16th July 2004 to 31st May 2005 is illogical. The 16th July 2004 is, by the arbitrators' own words, the date of their Award. The date of the 16th July 2004 has no relevance whatsoever if it is not the date of the award. Therefore any interest after that date is, by definition, post-judgment interest (or post-award interest, SSL submits in this case). The remission by the Court of Appeal, Mr. Goffe strongly submits, could not convert what was once post-award interest to pre-award interest.

[47] If however the Court arrives at the conclusion that conclusion (b) is the correct one, SSL submits that it would then automatically be entitled to a refund of interest paid before the Award was made on the basis that VRLS could not be entitled to receive interest on the sum awarded *prior* to the Award being made.

[48] SSL submits that conclusion (c) therefore appears to be what the arbitrators had in mind, and SSL base that submission on the language of the Award on remission.

[49] SSL goes on to submit that, if that is the case, the Court would need to determine whether the Award, as "re-affirmed" is a valid Award on remission.

[50] SSL contends that the re-affirmed Award is not a valid one on remission. It submitted that the case of **Johnson v. Latham** (1851) 20 L.J.Q.B. 236, is authority for the proposition that an award following remission should embrace every matter originally referred (preferably by way of repetition of the original award), and can only confirm the first award in terms as to matter not remitted. This supports the principle that an award must be "one entire and complete instrument in itself". Reference was also made to the Privy Council's decision in **Michael Carter (trading as Michael Carter Partnership) v. Harold Simpson Associates (Architects) Ltd.** [2004] U.K.P.C. 29, where **Johnson v. Latham** is referred to.

[51] It was Mr. Goffe's submission that the Award is unenforceable in its present form and that an action to set aside an award that is bad in law cannot be an abuse of the process of the Court. Reference was made by Mr. Goffe to **Margulies Bro's Ltd. v. Dafnis Thomaides & Co. (U.K.) Ltd** [1958] 1 All E.R. 777.

[52] SSL submits that even if VRLS were to succeed on the point of *res judicata* with respect to the challenge on the interest, there would still be an unenforceable award on grounds that are not affected by estoppel.

[53] SSL submits that the concepts of *res judicata* and *issue estoppel* have no applicability to this case. In relation to *res judicata*, Mr. Goffe submits that for *res judicata* in its strict sense to apply, the cause of action between identical parties would have to have been determined conclusively in earlier proceedings. It is contended that that is not the situation here.

[54] It was submitted that in the case at bar, the only available argument is that issue estoppel applies to bar SSL from raising issues that it could have raised in earlier proceedings. However, it was submitted that the law in relation to estoppel has developed far beyond what VRLS has submitted to the Court. Reference was made to **Specialist Group International Ltd.v Deakin and another** [2001] All E.R. (D) 287 (May). Mr. Goffe argued that the **Specialist Group** case, shows that a mechanistic approach is not appropriate in circumstances such as the present. Mr. Goffe submitted that Rimer J. found that although the Claimant had an opportunity to raise a particular issue in earlier proceedings, that did not mean that it was necessarily an abuse of process. The Defendant needed to establish more than that there was an earlier opportunity to raise the point in order for the later proceedings to be considered an abuse of the process of the Court. Rimer J's decision was upheld on appeal.

[55] However, the matter does not rest there. SSL's Counsel goes on to submit that the issue is not whether SSL had an opportunity to challenge the award of interest on this specific point in prior proceedings. Instead, the issue is whether the arbitrators had the jurisdiction to make the determination that they did. Mr. Goffe submits that in each of the cases that VRLS has cited in support of this application, the issue that the party was stopped from pleading was one that was an ingredient, or a 'condition' of their cause of action. It was, the submission

continues, some issue of fact or law joined between the parties that could have been raised at an earlier time. It is submitted that that is not the case here. SSL's argument is that the arbitrators acted *ultra vires* when they awarded post-award interest at commercial rates and therefore the award itself is wholly unenforceable. This is a matter therefore that SSL contends goes to the issue of jurisdiction.

[56] It was further submitted that the law is clear and settled that jurisdiction that is derived from statute cannot be conferred by way of estoppel or consent. Either the relevant body has the requisite jurisdiction or it does not. Reference was made to the case of **Farquharson v. Morgan** [1891-94] All E.R. 595, where it was held that where want of jurisdiction is apparent on the face of the proceedings the grant of a writ of prohibition is as of course, and the applicant cannot be precluded by any consent or acquiescence in the exercise of the jurisdiction.

[57] In conclusion, SSL submits that the Court must consider, first and foremost, whether the Claimant has an arguable case that the award is bad on its face and unenforceable. In doing so it is submitted that the Court should consider the position the parties would have been in had the arbitrators followed the guidance in **Johnson v. Latham** and repeated the terms of the original award in relation to matters not remitted to them. In relation to interest, whether the words "from the date of the award" refer to 2004 or 2009, the result is the same to SSL. If it refers to 2004, then the Award must be set aside in accordance with the principle in **Marley and Plant v. Mutual Housing**. Alternatively, if the words refer to 2009, and the award is nonetheless valid, then interest would start to run from 2009, but since the award was paid in 2005, no interest would have accrued and become payable to VRLS.

[58] Mr. Goffe submits that it is only after it has been determined that the award is enforceable will the arguments related to issue estoppel be relevant.

The Court would need to determine whether the fact that SSL could have raised this specific jurisdictional point in earlier proceedings means that doing so now amounts to an abuse of the process of the Court.

[59] In reply, Dr. Barnett on behalf of VRLS referred to **Russell on Arbitration**, 18th Edition, Appendix 6, Form 37 B. This Form reads as follows:

> ***37. Award made after the Original Award has been Remitted for Reconsideration…..B. Where original award confirmed*** *[Recitals and Preamble as in "A"]*
>
> 1. *Do hereby award and declare that I see no reason to alter the amount of the said damages, and do, therefore, hereby confirm my former award, and direct it to stand as to [the said damages].*
>
> 2. *Do hereby award and direct, that the said CD do pay and bear the costs of this my second award, and also do pay to the said AB his costs of and incidental to this second reference.*
> *In witness whereof, etc.*

[60] It was Dr. Barnett's submission that this Form demonstrates that what the Arbitrators did was wholly permissible.

[61] Mr. Goffe on the other hand submitted that Form A is the appropriate Form since the Arbitrators were compelled to amend their award. He was prepared to concede that the Form B may be appropriate where no amendment is required. However here in this case he submits that the award did require amendment. He says that this is so because here the Award required amendment and reconsideration since the Arbitrators sought to re-affirm an award of interest that was unenforceable because it was unclear and made outside their jurisdiction. Form A. states as follows:

> ***37. Award made after the Original Award has been remitted for reconsideration***
>
> *A. Whereas on the ….day of …. 19 , I, the undersigned XY, made an award in pursuance of a submission to arbitration between AB and CD, dated the… day of….19….*

And whereas by an order of the Queen's Bench Division of the High Court of Justice made the ….day of …19…, the matters referred to me by the said submission [or state which of them] were remitted to me for consideration, and by the said order the costs of the further reference and award were to be in my discretion.

Now I, the said XY, having taken upon myself the burthen of this further reference, and having duly considered the further allegations and proofs made and adduced by the said parties, and having, in pursuance of the said order, reconsidered the matters referred to me [or the matters remitted to me by the said order]

1. *Do hereby award and determine **[set out any alteration or amendments in the first award due to the reconsideration of the matters remitted]**.*
2. *Do hereby direct that the said CD shall pay and bear the costs of this my further award and also pay to the said AB [deal with the costs of the reference].*
   Made and published by me this … day of …..
   Witness, PQ. *XY.*
   (My emphasis)

RESOLUTION OF THE ISSUES

[62] I think it is important to go back and examine the nature of the arbitration proceedings. Clause 13 of the Agreement between the parties provided for differences between the parties to be referred to arbitration. The submission is a submission to arbitration under the provisions of the Arbitration Act. This submission or reference arose from agreement between the parties, it was based upon a consensual arrangement. Section 4(h) of the Arbitration Act provides that the award to be made by the arbitrators or umpire shall be final and binding on the parties. So the parties by their agreement to submit to arbitration under the Arbitration Act have agreed that the award made by the arbitrators or umpire shall be final and binding. However, by virtue of section 11 of the Act the Court is empowered to "remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire." As stated in the recent Privy Council decision in March 2012, "Some error or oversight must have occurred which resulted in the

tribunal failing to complete its task and justifies reopening what would otherwise be a conclusive resolution of the dispute." (My emphasis)

[63] An arbitration award can be set aside or remitted on the ground of error of law on the face of the record.-see **Marley v. Plant** and the cases there cited, also **Farquharson v. Morgan**.

[64] An arbitration award can also be set aside where the arbitrators have exceeded their jurisdiction. In **Timber Shipping Company SA v. London and Overseas Freighters** [1971] 2 All E.R. 599, an award of interest from the date of the award until payment was set aside on the grounds that the arbitrators had exceeded their jurisdiction.

[65] Mr. Goffe sought to argue that if it is that the arbitrators made two awards, one on July 16 2004, and another on November 9, 2009 they can both be set aside because an arbitrator cannot make two awards under the same reference. I agree with Dr. Barnett that there is no merit whatsoever in that argument. I am also of the view that this point of law is clear, it does not at all have to await trial, and can and must be examined by the Court upon this application. The extract from **Russell on Arbitration**, at page 310 has no relevance here. What that paragraph is speaking about is where on the original reference two awards are made. Where there is a remission the consensual position of the reference is now altered by the remission, because if an error has been made and any aspect of the matter is remitted, the arbitrators must make another award in response to the remission. This is borne out by the language used in the Form B at Appendix 6 of the **Russell on Arbitration**, for example reference to "original award" and "former award" and to "second award".

[66] I agree with Queen's Counsel Mr. Mahfood and Dr. Barnett that an Award made upon remission along the lines of Form B was clearly appropriate, since what the Arbitrators did was to confirm the original award. I also agree that Mr. Goffe's argument that Form A is applicable, is a new argument that has never

been pleaded or argued previously. It is quite clear that there is no merit whatsoever in the latest (unpleaded) argument raised by SSL, that the arbitrators should have amended the award to deal with the issue of interest.

[67] I disagree with Mr. Goffe that the case of **Johnson v. Latham** is authority for the proposition that an award following remission should embrace every matter originally referred, preferably by repetition of the original award and can only confirm the first award in terms as to matters not remitted.

[68] Mr. Goffe conceded that his argument that the arbitrators should have repeated the Original Award, including the words about interest, is more a matter of form and not so much about substance. However, in any event, Form B and the case of **Michael Carter** make it quite clear that where the Arbitrators are simply confirming the original award, there is no necessity to repeat every word of the original award and the arbitrators would be unable to alter the parts of the original award which were not remitted to them. It was stated at paragraph 19 of the Privy Council's decision in **Michael Carter**:

> *19. The Court of Appeal, in a judgment delivered by Forte P., said that the amended award was not a new award. It was amended to put it into enforceable form, that is to say, it was the same award in a better form. Their Lordships agree. There is no rule that a remittal under section 11 necessarily means that the award ceases to have any effect and that the parties start with a clean sheet. The general principle is that the powers and duties of the arbitrator cannot exceed what is necessary to give effect to the order for remittal. If the award is remitted for one specific purpose, such as to amend a name, the arbitrator has no power to amend the award in any other way: see* ***Howett v. Clements*** *(1845) 1 CB 128.*
> (My emphasis)

[69] Then at paragraph 23, having discussed a number of the exchanges which took place in **Johnson v. Latham** upon which SSL also rely, their Lordships stated:

> *23. The conclusion their Lordships draw from these exchanges is that on any view, the remittal of the award does not deprive it of*

legal effect. It continues to operate so as to make the arbitrator functus officio, unable to alter his award, on those matters which were not remitted. In the judgment, at p 240, Erle J allowed the objection to the allocutur because "the discretion of the arbitrator over the costs of the reference and award is to be exercised at the close of the reference". This only finally happened when the new award was made. But that does not mean that the old award had ceased to have any effect. On the contrary, "the arbitrator might not alter his first award upon any matter not referred back". In Russell on Arbitration (18th ed) p.409 the effect of Johnson v. Latham was said to be that "the part not remitted will continue valid. Their Lordships agree.
(My emphasis)

[70] In my judgment, the Awards of the arbitrators are not in their present form unenforceable as argued by Mr. Goffe.

[71] In the Privy Council's decision as recently as March 2012, Privy Council Appeal No. 0088 of 2010, their Lordships made it crystal-clear that only the very narrow issue of the way in which the Arbitrators had dealt with, or failed to deal with, the unrecoverable expenses, was remitted to the Arbitrators. Indeed, they made it clear that the Arbitrators were right to reject SSL's attempt to introduce new challenges to the assessment of the gross future management fees. At paragraphs 10, 11 and 18 of the Judgment, it was stated:

The appeal: the scope of the remission

10. Section 11 of the Arbitration Act empowers the Court to "remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire". This statutory power has its origin in section 8 of the English Common Law Procedure Act 1854. It exists in order to enable the tribunal, which would otherwise have been functus officio from the publication of its award, to address issues which were part of the submission to arbitration but were not resolved, or not properly resolved, in the award. Leaving aside the perhaps anomalous category of cases in which an award has been remitted on the ground that fresh evidence has become available since it was made ,the essential condition for the exercise of the power is that something has gone wrong with the proceedings before the arbitrators. Some error or oversight must have occurred which resulted in the tribunal failing to complete its task and justifies

reopening what would otherwise be a conclusive resolution of the dispute.

11. It is apparent from the reasons given by the Court of Appeal in December 2008 that, in ordering a remission, they were concerned only with the way in which the arbitrators had dealt with, or failed to deal with, the "unrecoverable expenses"….

…
No other matter is identified by the Court of Appeal as warranting a remission. Indeed, no other criticism was made of the way in which the arbitrators had dealt with damages.
…..
18. The arbitrators were right to reject the Proprietor's attempt to introduce new challenges to the assessment of the gross future management fees in February 2009, and the Courts below were right to endorse their decision.
(My emphasis)

[72] In my judgment, since the issue of post-award interest, or indeed, interest generally was not the subject of remission to the arbitrators for their reconsideration, then the original award was conclusive on the issue of interest and remained valid. It remained final and binding upon the parties.

[73] The significance of the award being valid is that it creates an estoppel in relation to the matters which it deals with and prevents either party from pursuing those matters in subsequent proceedings. In **Russell on Arbitration**, 21st Edition, at paragraph 6-201, the principles are neatly summarised, with reference being made to **Fidelitas Shipping Company Limited v. V/O Exportchleb** [1965] 1 Lloyd's Report 223, and **Henderson v. Henderson** cited by VRLS's Attorneys. It is stated as follows:

...

To the extent that a cause of action has been decided by the award, a party will be prevented from asserting or denying, as against the other party, its existence or non-existence in subsequent proceedings. Any attempt to do so may be met by a plea of ***res judicata****. Where one or more issues have previously been determined, albeit that the cause of action is different, a party will again be prevented from seeking to contradict the earlier*

> *findings on those issues on the basis of "issue estoppel". Further, the principle of issue estoppel has been extended to prevent issues being raised in subsequent proceedings which could and should have been raised in the earlier proceedings, i.e. those issues which properly belong to the subject of the earlier proceedings. This principle has been specifically applied to arbitrations.*

[74] I set out as still instructive the time-honoured words of Wigram V-C, uttered as long ago as 1848, in **Henderson v. Henderson** [1843-1860] All E.R. 378. at 381 I -382 A:

> *…I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.*
> (My emphasis)

[75] The case of **Thomas v. AG (No. 2)** (1988) 39 W.I.R. 383, cited by VRLS is also instructive on the question of res judicata. I think it is worth noting that these matters of res judicata and issue estoppel are matters having to do with public policy. As Lord Bingham stated in **Johnson v. Gorewood** [2001] 2 WLR 72, at page 89H, "The underlying public interest is…that there should be finality in litigation and a party should not be vexed twice in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole." It is also my view that the correctness of a legal point that a party may have omitted through inadvertence or by accident to raise, does not without more affect the applicability of these principles. In my judgment it therefore does not matter, and

is not relevant, for the purposes of deciding the matter of issue estoppel or res judicata, for me to determine whether the Arbitrators had power to award post-award interest and I have deliberately refrained from examining that issue.

[76] As stated by VRLS's Attorneys in their written submissions filed 22nd May 2012, the current purpose of this claim is to challenge the rate and period of interest awarded under the 16th July 2004 Award. However, many years ago, SSL challenged that 16th July 2004 Award upon a number of bases, setting out terms of the Award, including detailed reference to the section that dealt with interest. SSL challenged the Award on all sorts of bases, including the grounds of error on the face of the record, error of law, and the arbitrators having misconducted themselves. Whilst interest was mentioned in the Fixed Date Claim Form in the 2004 HCV 2161 claim, and the rate of interest was stated to be disputed in the enforcement claim, SSL did not ultimately in any of these several law suits mount any attack or challenge on either the rate or period of interest.

[77] SSL has had the opportunity from as far back as 2004 to have challenged the part of the original award relating to interest. The matter of interest, being calculable on the damages awarded in the 2004 Award, was an issue that properly should have been raised in the earlier suit. The issue raised in this claim as to whether the Arbitrators have misconducted themselves and acted in excess of jurisdiction by awarding post-award interest is the exact same issue that could have been raised in the 2004 claim HCV 2161. In my judgment the facts of the case relied upon by Mr. Goffe, **Specialist Group International Ltd. v. Deakin** are clearly distinguishable. Whilst this case may well show that in relation to issue estoppel a less dogmatic approach than that suggested in **Henderson v. Henderson** may in particular circumstances be warranted, the instant case does not fall into that special category. On the facts of the **Specialist Group** case, the Court felt that there was no offence to the true basis of the principle; there was no abuse of the process of the Court. It was held that the issues in certain bonus

transactions were not the same as the issues in the loans actions which had been settled. They were not all one transaction. The question of the illegality of the bonuses could have been pleaded as a counterclaim in the loan suits and probably as a defence of equitable set off. However, such a defence was said not to be a true defence. It would rather have been a right to set off a sum against the sum claimed in the action involved. In my judgment, in the instant case on the other hand, what SSL is trying to do is to mount a collateral attack on the 2004 Award by challenging the enforceability of the 2009 Award. Collateral attacks can certainly constitute abuse of process – see paragraph 9 of the **Specialist Group** case. I note that although the onus of proving abuse of the Court's process is on the applicant VRLS, no evidence explaining why this challenge is only now being mounted has been forthcoming from SSL. SSL is to my mind abusing the process of the court by bringing this claim. The instant claim was filed in 2010 and was originally numbered 2010 HCV 0006 before it was ordered transferred to the Commercial Court. The principle of issue estoppel in its wider sense is clearly applicable here and SSL are estopped from bringing this claim some six years after the 2004 HCV 2161 claim.

[78] I also agree with VRLS that the case of **Farquharson v. Morgan**, cited by Mr. Goffe does not assist SSL. This is because in the first place, in that case, the arbitrators powers were conferred by Statute, i.e. the English Agricultural Holdings Act 1883. Thus, when the arbitrators awarded compensation for matters not falling within the Act, notwithstanding that the affected party had acquiesced in county court proceedings for enforcement, it was held that since the want of jurisdiction was apparent on the face of the award, a writ of prohibition should be granted. In the instant case, on the other hand, what the arbitrators were entitled to deal with initially is what was in the reference. Thereafter, upon the remission, the Arbitrators had no power to consider afresh the matters not remitted, such as the issue of interest. That aspect of the 2004 Original Award remained final and binding. In this case, SSL has already challenged aspects of the 2004 Award on

the basis of error on the face of the award and for misconduct, but did not include the matter of interest. SSL is estopped from so doing now.

[79] However, there are even more curious twists in this marathon of a court battle. SSL pursuant to the order of Haynes J., on the 31st of May 2005 paid to VRLS the amount of damages awarded, together with interest. This interest, the rate and an exact sum were set out and quantified in the order. SSL paid the damages and interest and VRLS provided the necessary conditional guarantees.

[80] Further, on the 1st of October 2009, SSL and VRLS agreed in writing that "…the review by the Arbitrators upon remission in accordance with the Order of the Court of Appeal dated 12th December 2008 shall be limited to a reconsideration of the irrecoverable expenses and thereafter the Arbitrators shall determine whether and if so to what extent they should vary the quantum of damages previously awarded, without prejudice to the exercise of any right of appeal in the Privy Council by Sans Souci Limited. "

[81] The Privy Council on the 7th March 2012 the Privy Council confirmed the narrowness of the matters remitted.

[82] I agree with the submission of VRLS's Attorneys that it is clearly not open to SSL to raise the issues of the rate and period of interest and to claim that "the Award published on the 19th November 2009 be set aside pursuant to section 12(2) of the Arbitration Act". SSL cannot reasonably be permitted any more bites at the cherry; indeed, not only does SSL seem to want more bites, it appears to want to revisit and unravel the past. Even if technically the 2004 award could be said to not yet have been enforced, it certainly seems to me to have been implemented and/or satisfied. This appears to me to be the classic case of a party failing to bring forward their whole case when they ought to have. In the same way that the Privy Council indicated that the Arbitrators were right to reject

SSL's attempt to introduce new challenges during the remission proceedings, I think I am right to reject this claim also.

[83] In my judgment, it is just in all the circumstances to strike out paragraphs 18, 19, 20 and 21 of the Particulars of Claim as requested by VRLS, indeed the whole Claim is struck out as being an abuse of the process of the Court on the basis of issue estoppel and/or res judicata. Further or in the alternative, SSL's Statements of Case disclose no reasonable grounds for bringing the claim. There will therefore be an order in terms of paragraph 2 of the Amended Notice of Application to Strike Out filed May 7, 2012. Costs are awarded to the Defendant VRL Services Limited to be taxed if not agreed.