[2012] UKPC 6
Privy Council Appeal No 0088 of 2010

JUDGMENT

SANS SOUCI LIMITED
(Appellant)
v
VRL SERVICES LIMITED
(Respondent)

From the Court of Appeal of Jamaica

before

Lord Hope
Lord Clarke
Lord Sumption
Lord Reed
Lady Paton

JUDGMENT DELIVERED BY
LORD SUMPTION
ON

7 March 2012

Heard on 1 February 2012

Appellant	*Respondent*
Vincent Nelson QC Gavin Goffe	Richard Mahfood QC Javan Herberg QC Dr Lloyd Barnett Weiden Daley
(Instructed by Myers, Fletcher & Gordon)	(Instructed by Charles Russell LLP)

LORD SUMPTION:

1. The Board has before it an appeal and a cross-appeal arising out of arbitration proceedings in Jamaica. The appeal is concerned with the scope of an order made by the Court of Appeal of Jamaica remitting the award to the arbitrators. The cross-appeal raises two discrete questions on costs.

The facts

2. The Appellant company was the proprietor of the Sans Souci Hotel at White River, St. Mary. The Respondent entered into a contract dated 12 October 1993 to manage the hotel. It is convenient to refer to the parties as "the Proprietor" and "the Manager" respectively. The agreement was for a period of just over ten years to 31 March 2004, plus a further ten years at the Manager's option. At the relevant time, the option had been exercised, and the agreement was therefore due to expire in 2014. For present purposes, the provisions which matter are clauses 4(A) and 13-16. By clause 4(A) the Manager was entitled to an annual management fee based on the gross revenue and gross operating profit of the hotel business. Clause 14 conferred on either party a right of termination in certain events, including force majeure. By clause 15, the agreement would also terminate if the Proprietor sold the hotel during its term, but before doing this he was required to offer it to the Manager. Clause 13 provided for disputes to be referred to arbitration before two arbitrators and an umpire in accordance with the laws of Jamaica.

3. In March 2003, the Proprietor purported to terminate the agreement under clause 14 on the ground of force majeure. This provoked a dispute which was referred to arbitration. It was common ground throughout the arbitration proceedings that the agreement was at an end. The issues were defined in general terms in Terms of Reference prepared by the arbitrators at the outset of their proceedings. Paraphrasing this document, they were (i) whether the termination of the agreement had come about by the lawful exercise of the Proprietor's right of termination or by their unlawful repudiation; and (ii) if the latter, what damages were recoverable by the Manager in consequence.

4. Before the arbitrators, the Manager claimed damages under three heads. The main claim was for the gross management fees which would have accrued from the termination of the agreement until 2014, discounted for early receipt. This was disputed mainly on the ground that the correct measure of damages was the Manager's loss of profit, and that in arriving at the loss of profit it was necessary to deduct from the gross fees the so-called "unrecoverable expenses". These were expenses which, according to the Proprietor, the Manager would have incurred in performing its

functions and could not have recovered under the terms of the agreement. The main issue about them was whether they were really unrecoverable. Second, there was a claim for the value of the Manager's right of first refusal on the sale of the hotel, if it should be held that the hotel would have been sold before the natural expiry of the agreement. This head of claim appears to have been introduced in case the Proprietor should contend that the hotel would have been sold and the payment of management fees thereby brought to an end before 2014. In the event, however, the Proprietor did not say this. Its case was that there was no evidence of any intention to sell and no reason to suppose that if there was a sale the Manager would emerge as the buyer. At some stage, the Manager appears to have conceded this, and the point fell away. Finally, the Manager claimed certain expenditure said to have been wasted as a result of the termination. This head was, in the event, unchallenged.

5. The arbitrators issued their award on 16 July 2004. They held that the Proprietor had repudiated the agreement, and awarded damages of US$6,034,793. A small proportion of this sum represented the wasted expenditure. The rest was the present value of management fees accruing between the termination of the contract and 2014, on assumptions about the gross revenue and operating profit during that period which were derived from expert evidence given at the hearing. The tribunal made no deduction from the projected management fees for "unrecoverable expenses". Apart from referring briefly to this issue as arising from a "set-off" claimed by the Proprietor, they said nothing about it at all.

6. After receiving the award, the Proprietor applied to the Court under Section 11 of the Arbitration Act to set it aside or remit it to the arbitrators. One of the grounds of the application was the arbitrators had not dealt with the "unrecoverable expenses". A number of other grounds were also put forward, but they failed and are not part of this appeal. It is unnecessary to say anything about them.

7. The Judge, Harris J, dismissed the Proprietor's application in its entirety. The Proprietor appealed, and the Court of Appeal gave judgment on 12 December 2008. On most points, they agreed with the Judge. However, they allowed the appeal on the ground based on the "unrecoverable expenses". They held that by characterising the Manager's case about these expenses as being based on set-off, the arbitrators had misunderstood it. As a result, they had failed to make the appropriate findings about the expenses, or to take them into account in the assessment of damages, or to explain why they had not done so. They remitted the award to the arbitrators in the following terms:

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

This order was perfected on 2 January 2009.

8. When the matter came back before the tribunal, the Proprietor sought to raise two points on damages in addition to the question of "unrecoverable expenses", and to lead fresh evidence in support of them. The first was that the Proprietor had in fact sold the hotel on 10 September 2005. This was presumably the prelude to an argument that management fees could not in any event have been earned beyond that date. The second additional point was that economic problems adversely affecting the Jamaican tourist industry after the termination of the agreement would have reduced the management fees below the level which the tribunal, in their award, had derived from the expert evidence. The tribunal refused to entertain either point. In a preliminary ruling on 20 February 2009, they ruled that the award had been remitted to them for the limited purpose of dealing with the "unrecoverable expenses" to be deducted from the future management fees. They were not therefore entitled to reassess the value of the management fees themselves.

9. The Proprietor responded with fresh court proceedings to challenge the arbitrators' preliminary ruling. Their case was that the Court of Appeal had remitted the question of damages generally, and that all points relevant to damages were therefore in principle open before the arbitrators. This was rejected in the Supreme Court and again in the Court of Appeal. The issue now comes before the Board some seven years after the date of the original award.

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, oversight, misunderstanding or misconduct 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".

Harrison P., delivering the leading judgment, identified the error or oversight which justified the remission at paragraph 69:

> "Whether or not expenses incurred by the Respondent were in fact 'unrecoverable', as claimed by the appellant in its Points of Defence, or reimbursable as contended by the Respondents, should have been determined by the arbitrators. The arbitrators were required to demonstrate in their award that they accepted that the expenses were 'unrecoverable', or alternatively payable by the Appellant. At its lowest, the arbitrators should have demonstrated that they considered the issue of 'unrecoverable expenses' as contended for by the Appellant."

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.

12. The Proprietor's response is simple, perhaps too simple. It is that the scope of the remission is determined by the Court of Appeal's order. The order allowed "the appeal against the award of damages", and remitted the award to the arbitrators to determine "the issue of damages". In the absence of any words of limitation, it is said that this unambiguously means the entire issue as to damages as formulated in the arbitrators' Terms of Reference. In the absence of any ambiguity in the language of the order, it should not be construed by reference to the limited reasons given for making it.

13. In the opinion of the Board, this approach to the construction of a judicial order is mistaken. It is of course correct that the scope of a remission depends on the construction of the order to remit. But implicit in the Proprietor's argument is the suggestion that the process of construing the order is to be carried out in two discrete stages, the first of which is concerned only with the meaning of the words, and the second with the resolution of any "ambiguities" which may emerge from the first. The Court's reasons, so it is said, are relevant only at the second stage, and then only if an "ambiguity" has been found. The Board is unable to accept these propositions, because the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.

14. It is generally unhelpful to look for an "ambiguity", if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity.

15. As with any judicial order which seeks to encapsulate in the terse language of a forensic draftsman the outcome of what may be a complex discussion, the meaning of the order of the Court of Appeal in this case is open to question if one does not know the background. The order refers generally to "the issue of damages" because if the arbitrators were to decide that there were "unrecoverable expenses", they would not simply deduct them from the amount which they had awarded. They would have to deduct them from the undiscounted gross management fees, and then discount the net figure for early receipt. But the reference in the order to "the issue of damages", although necessary, begged the question "Which issue of damages?" The order does not itself answer it. Only extrinsic evidence can do that. The Proprietor accepts this. Mr Nelson's case was that it is admissible to consult the arbitrators' Terms of Reference to identify "the issue of damages" to which the order referred. But it appears to the Board that this concession, which was clearly rightly made, exposed the illogicality of the Proprietor's case. If it is admissible to construe an order of remission by reference to the issues in the arbitration, it cannot rationally be held inadmissible to construe it by reference to the issues which the remitting court regarded as calling for reconsideration by the arbitrators. As Rix J pointed out in his valuable judgment in *Glencore International A.G. v. Beogradska Plovidba (The "AVALA")* [1996] 2 Lloyd's Rep. 311, 316:

> "When... a Court remits an award to an arbitrator, it is not remitting a whole dispute, unless upon the terms of the order it expressly does so. It generally remits something narrower, and where it does so against the background of an arbitration which has already been defined by pleadings and argument before an arbitrator, it is some one or more of the issues as so defined within the scope of the reference that in general must be considered to be the subject matter of the remission."

16. Of course, it does not follow from the fact that a judgment is admissible to construe an order, that it will necessarily be of much assistance. There is a world of difference between using a Court's reasons to interpret the language of its order, and using it to contradict that language. The point may be illustrated by the decision of the Court of Appeal in England in *Gordon v. Gonda* [1955] 1 WLR 885, where an attempt was made to contradict what the Court regarded as the inescapable meaning of an order, by arguing that the circumstances described in the judgment could not have justified an order which meant what it clearly said. Therefore, it was said, the judge must have meant something else. The answer to this was that any inconsistency between the circumstances of the case or the reasoning of the Court and the resultant

order was properly a matter for appeal. A very similar argument was rejected by the Board for the same reason in *Winston Gibson v Public Service Commission* [2011] UKPC 24. Decisions such as these (and there are others) are not authority for the proposition that a Court's reasons are inadmissible to construe its order. They only show that the answer depends on the construction of the order and that the reasons given in the Judgment may or may not make any difference to that.

17. These considerations apply generally to the construction of judicial orders. But there are particular reasons for giving effect to them in the context of the judicial supervision of arbitration proceedings. An arbitration award is prima facie conclusive. The Court has only limited powers of intervention. It exercises them on well-established grounds such as (to take the case arising here) the arbitrators' failure to deal with some matter falling within the submission. The reopening by the arbitrators of findings which there were no grounds for remitting and which they had already conclusively decided would therefore have been contrary to the scheme of the Arbitration Act. The terms of the order may of course in some cases be such that it must be concluded that the Court did exceed the proper limits of its functions. But it should not readily be assumed to have done so, especially when its reasons show that it has not.

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.

The cross-appeal: Costs of the Proprietor's application to set aside or remit

19. This point may be shortly dealt with, for it turns entirely on the facts.

20. The Court of Appeal reserved judgment for nineteen months on the Proprietor's application to set aside or remit the award. They then handed it down on one day's notice on 12 December 2008, the last day of term. No advance copy of the judgment was available before it was handed down. Counsel who had been engaged for the Manager on the application were unable to attend, and it was necessary to send junior counsel to take the judgment who knew little or nothing about the case. The judgment as handed down dealt with the costs of the application by ordering that half of the Proprietor's costs should be paid by the Manager. But no argument about costs was either invited or heard.

21. Once the Manager's advisers had studied the judgment, they decided to ask for a more favourable order as to costs than the Court had proposed. They wrote to the Registrar of the Court of Appeal on 7 January 2009 asking to be heard. Unfortunately, unknown to the Manager or its representatives, the order had in the mean time been perfected on 2 January 2009. On 20 January 2009, the Manager formally applied for a

more favourable order. On the following day the Registrar wrote in answer to the Manager's letter of 7 January to convey the view of Panton P., the President of the Court of Appeal, that the Court of Appeal was *functus officio* and that in any event the order for costs was right. Panton P. had not been a member of the court that decided the Proprietor's application. Nor, judging by the Registrar's letter, had he consulted those who had been. He also appears to have been unaware of the Manager's formal application of 20 January. The Manager's application on costs was ultimately heard on 9 March 2009 by a division of the Court of Appeal constituted by Smith, Crooke and Dukhran, J.J.A. On 2 July 2009, they gave Judgment rejecting it. Their reason, in summary, was that that there had been no miscarriage of justice, essentially because "there was ample opportunity for Counsel for the Applicant to make an application to be heard on the issue of costs before the order was perfected": Panton P. at [32]; cf. Cooke at [49]. By leave of the Board, the Manager now cross-appeals against that decision.

22. It is the duty of a Court to afford a litigant a reasonable opportunity to be heard on any relevant matter, including costs, on which he wishes to be heard. The Court of Appeal included an order for costs in their Judgment of 12 December 2008 without hearing either party upon it. The Practice Direction in Jamaica assumes that submissions on costs, if any, will be made before the Court rises after giving Judgment, a course which it would have been impossible for the Manager's representatives to follow in this case because they had had no advance notice of the contents of the judgment and only one day's notice of the fact that it was to be delivered. This procedure may nevertheless be perfectly acceptable, provided that the order included in the Judgment is provisional, and that parties are given a reasonable opportunity to address the Court on costs later.

23. The importance of finality in litigation has been emphasised by generations of common lawyers. Ultimately there must come an end to the parties' opportunities for reopening matters procedural or substantive which have been judicially decided. This principle is, however, founded on an assumption that they were decided in accordance with the rules of natural justice. Notwithstanding the importance of finality, the rule of practice is that until either (i) a reasonable time has elapsed, or (ii) the order has been perfected, a party who has not been heard on costs or other matters arising out of a judgment, is entitled as of right to be heard. Thereafter, the Court still has an inherent jurisdiction to hear him, but the test is more exacting. The order will be varied only in exceptional circumstances, when the party can demonstrate that the form of the order can be attributed to a miscarriage of justice: *Taylor v. Lawrence* [2002] EWCA Civ. 10, [2003] QB 528 at [55]. The Board would endorse the test which was formulated in *Re Uddin* [2005] I WLR 2398, at [4], and applied by the Court of Appeal in this case, that there must be "special circumstances where the process itself has been corrupted." This is not the occasion for extended review of the circumstances which will satisfy this test, but the Board has no doubt that one of the circumstances which will satisfy it is that the party desiring to be heard did not have a

reasonable opportunity to be heard at an earlier stage when the test would have been less formidable.

24. The Board cannot avoid a strong sense of discomfort about the rather peremptory procedure which was adopted in this case. However, the Manager was ultimately heard on costs, and it seems to the Board that when the Court of Appeal came to rule upon it they applied the correct test. The decisive factor was the Court's finding that in the three week period between the delivery of judgment on 12 December 2008 and the perfection of the order on 2 January 2009, the Manager had had a reasonable opportunity to apply to be heard. The Board has been invited to reject this finding. But they are satisfied that it would not be appropriate for them to do so. The Court of Appeal was familiar with the practicalities of litigation in its jurisdiction. It was in a much better position than the Board is to assess what opportunities there were for the Manager to make its application in that period. There are no grounds on which its finding can properly be disturbed.

The cross-appeal: the costs of the guarantee

25. There is brief coda to the cross-appeal. It arises from the fact that in 2005 the Supreme Court stayed enforcement of the award on terms that the Proprietor should pay it in full against a guarantee for its repayment so far as the subsequent proceedings should go the Proprietor's way. The Manager had to pay the substantial charges for setting up the guarantee and maintaining it in force, which it now wishes to claim as part of the costs of the proceedings. However, no application to this effect was made to the Court of Appeal when the Manager sought to vary the order for costs made on 12 December 2008. And if it had been, it would inevitably have met the same fate as the Manager's principal application on costs. Since the premise of this particular argument is that the Manager succeeds in its application to reopen the Court of Appeal's order for costs, the point does not arise.

Conclusion

26. The Board will humbly advise her Majesty that the appeal and the cross-appeal should both be dismissed. The parties will have twenty-eight days in which to lodge written submissions about the order to be made for the costs of the proceedings before the Board.