BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 437 of 2018

BETWEEN

BRIDGETOWN CRUISE TERMINALS INC **APPLICANT/CLAIMANT**

AND

BARBADOS PORT INC **RESPONDENT/DEFENDANT**

Before: The Honourable Mr. Justice Alrick Scott, QC, FCIArb, Judge of the High Court (Acting)

Date of Hearing: 8 May 2018
Date of Decision: 23 May 2018

Appearances: Mr. Barry Gale, QC in association with Mrs. Laura Harvey-Read for the claimant.

Mr. Kevin Boyce in association with Mr. Michael Koeiman for the defendant.

DECISION

Background

[1] This is my second written decision in this action. The first decision was given on 4th May 2018 ("First Decision"). The relevant factual background to this action is set out in the First Decision. In the First Decision, I indicated that I would hear the parties on the terms of the interim injunction that I felt inclined to give. I heard the parties on Tuesday, 8th May 2018 ("Continued Hearing"). Counsel for both the claimant and the defendant were helpful to this Court in drafting the terms of the order. I am

indebted to them for their assistance. Despite their assistance, the orders made are the orders of this Court. None of the parties is to be taken as having waived any right to have my orders or decisions reviewed on appeal.

[2] I wanted to hear the parties on the orders which I proposed to make to preserve the *status quo* because the relationship between the parties appeared intricate. In addition, some tenants had already started to pay rents to the defendant, and arrangements were made between the defendant and other tenants for payment of rent to the defendant. I needed more information on that situation. While I was certain that I would grant an injunction with the aim of preserving the *status quo*, I wanted to be satisfied that the orders I make would protect the rights of both parties in the interim, and that justice can be done between the parties when the arbitrator makes any interim order or final award in the matter. I therefore needed a better understanding of the involved relationship between the parties. I also needed further details of the state of play between the parties, which I did not obtain from the affidavit evidence filed or from the hearing of the application which occurred before me on 5th April 2018.

[3] The claimant submitted that an arbitral tribunal does not have power to grant interim injunctive relief. That seems to have been the basis for the claimant urging me to make more far-reaching interim orders than I was predisposed to make. The issue raised by the claimant is an important one. Whether the tribunal to be appointed by the parties would have power to grant an interim injunction may have significance for the parties going forward. This would be so where any further interim order is sought with respect to the *status quo* to be preserved, or the parties would wish to

ask the tribunal or the court to vary the state of affairs that I sought to preserve. In effect, it is possible that this question could arise again in the context of this *ad hoc* arbitration which relies upon the parties' cooperation, and the court's support, for its efficiency and success (see Nigel Blackaby and Constantine Partasides QC with Alan Redfern and Martin Hunter in *Redfern And Hunter On International Arbitration*, 6th edition, at paragraph 1.145). If the question arises, it would be important to know whether resort should be made to the tribunal or to the court for interim injunctive relief. I suggested at the Continued Hearing, that I thought that the parties could vest such power in an arbitral tribunal. Given the importance of the issue raised, I thought I should clarify my position on the question of an arbitral tribunal's power to grant an interim injunction in this case.

[4] In addition, the First Decision was given before the terms of the order were crafted. In the circumstances, I thought I should elaborate on what I wanted to achieve by my orders.

Scope of Decision

[5] At the outset, I must make it plain that this decision addresses solely the power of an arbitrator, in domestic arbitration in Barbados, to make an interim injunction requiring the parties to the arbitration agreement to do or refrain from doing an act. It is not concerned with an arbitrator's power to make interim orders generally, nor is it concerned with an arbitrator's power to grant other injunctions such as a Mareva Injunction or an Anton Pillar Order. An arbitrator's power to grant such injunctions was discussed in *Farah v. Sauvageau Holdings Inc.*, 2011 ONSC 1819 and

elsewhere. Further, this decision does not relate to the common powers of an arbitral tribunal to determine procedure and the like.

Implied Power to Grant Interim Injunction

[6] The Arbitration Act Cap 110 of Barbados ("AABB") is silent on the jurisdiction or power of an arbitral tribunal to grant an interim injunction. For clarity, the AABB provides for domestic arbitration. Institutional arbitration rules governing domestic arbitration invariably grant power to the arbitral tribunal to make an interim injunction (see Arbitration and Mediation Court of the Caribbean Inc's ("AMCC") Non-International Arbitration Rules 2018 ("AMCC NI Rules"), Article 9: Emergency Measures and Article 30: Interim Measures). Where such institutional rules are incorporated into the arbitration agreement, the arbitrator's power to grant an interim injunction will not be in doubt. The issue arises here in the context of *ad hoc* domestic arbitration where the parties are responsible for establishing the tribunal, adopting arbitration rules to govern the arbitration, and the rest.

[7] Arbitration is a creature of agreement. The arbitral tribunal derives its jurisdiction or power from the agreement between the parties. The arbitral tribunal is clothed with such jurisdiction or power as the parties grant it. Unless prohibited by legislation or public policy, parties are generally free to agree the scope of the tribunal's jurisdiction or power. J Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd edition, at paragraph 5.1.1, makes the point thus:

> "*There is no "inherent" jurisdiction in an arbitral tribunal. The arbitral tribunal takes its jurisdiction to decide a particular dispute from the agreement between the parties. An arbitral tribunal does not get its jurisdiction from any legislation. The scope of the tribunal's jurisdiction will be determined by the*

scope of the arbitration agreement, subject only to any mandatory legislative enactments governing the arbitration agreement. Under the theory of party autonomy, if two parties have the legal right to settle a dispute between themselves, then they can give jurisdiction to a third party to settle it for them.

[8] The wellspring of the arbitral tribunal's jurisdiction or power is the agreement between the parties, supplemented or extended by the national laws governing the arbitration agreement (see Nigel Blackaby and Constantine Partasides QC with Alan Redfern and Martin Hunter, *Redfern And Hunter On International Arbitration*, 6th edition, at paragraph 5.06 and *Farah v. Sauvageau Holdings Inc.* 11 C.P.C. (7th) 363, 1999 A.C.W.S. (3d) 1063 at paragraph [54]).

[9] There is a dearth of case law on the point, but there is commentary to the effect that an arbitrator has implied power to grant an interim injunction where neither the applicable rules nor the applicable national arbitration laws provide for such. A brief survey of the commentary is in order. J Brian Casey, in the text referred to earlier, writes, at paragraph 5.8:

> *"A tribunal has the power to make orders for interim injunctions, the preservation or sale of assets, and particularly perishables. The reason for implying such jurisdiction, absent express language in the arbitration agreement is that since the arbitral tribunal may craft a remedy appropriate to the case in a final award, in order to support and give effect to this power, the power to grant an interim award for an injunction or other equitable relief must also reside in the arbitral tribunal. If an arbitral award is to have any meaning at all, the arbitral tribunal must have the power to preserve the status quo until the award is made. Similarly, if there is evidence that a party is dissipating assets so as to make a final award meaningless, the tribunal has the power to grant an interim measure of preservation."*

[10] A similar view is propounded by the authors of *Halsbury's Laws of Canada - Alternative Dispute Resolution* (2018 Reissue), at paragraph HDR-64, and by the Chartered Institute of Arbitrators, in its International Arbitration Practice Guideline,

entitled "*Applications for Interim Measures*"[1] (see Commentary to Article 1, paragraph 2 b of the International Arbitration Practice Guideline). The issue is unlikely to arise with any frequency in international arbitration as national laws governing international arbitration usual confer power on the arbitral tribunal to grant interim relief, including injunctive relief to preserve the status quo.

[11] Not all commentators are of the same settled view as J Brian Casey. David Sutton and Judith Gill, in *Russell on Arbitration*, 22nd edition, appear not to hold a concluded view on the issue. They write, at paragraph 6-130, under the rubric, "*Interim Injunctions*" thus: "*The position is more difficult where the injunction is sought on an interim basis…….. The parties may have agreed pursuant to section 39 of the Arbitration Act 1996 that the tribunal should have such power. It is often expressly set out in institutional rules. In the absence of such authority, the tribunal would not have power to order interim injunctive relief unless it fell within the tribunal's general powers conferred by section 38 of the Arbitration Act 1996.*" The authors did not seek to make the case that an arbitral tribunal would have the power to grant an interim injunction under the tribunal's general powers under section 38 of the UK 1996 Arbitration Act.

[12] Section 14(1)(a) of the AABB appears to give an arbitral tribunal general powers. It provides that the parties to the arbitration shall submit to be examined by the arbitrator or umpire, shall produce all documents within their possession or power, "*and do all other things which during the proceedings on the reference the arbitrator or umpire may require*." The UK Arbitration Act of 1950 had a similar provision

[1] The Guideline has been published on the website of the Chartered Institute of Arbitrators. The Guideline was drafted by a committee.

(section 12(1)). That provision was given a narrow interpretation. Viscount Reading CJ, in *Re Unione Stearinerie Lanza and Weiner* [1916-17] All ER Rep 1079, [1917] 2 KB 558 ("*Re Unione*"), interpreted the last quoted words as having "*..... general import, giving to the arbitrator the power to do anything which he may require for the purpose of ascertaining the facts or the law in order that be may decide the dispute.*" In that case, the court held that, in the absence of agreement between the parties, an arbitrator has no power to make an order for security for costs or to stay proceedings pending the giving of security for costs. There is dogmatic commentary that an arbitrator did not have power to grant an interim injunction under the UK 1950 Arbitration Act.[2] Given the restrictive interpretation applied to the UK counterpart provision to section 14(1)(a), the power to grant an interim injunction cannot be inferred or implied from the general power to require the parties to submit to examination, produce documents and "*do all other things which during the proceedings on the reference the arbitrator or umpire may require.*" In my judgment, *Re Unione* demonstrates that an arbitral tribunal does not have the panoply of powers of a court to grant interim relief.

[13] Both Barbados and Singapore have separate regimes for international and domestic arbitration. Arbitration in Singapore is governed by the International Arbitration Act Cap 143A ("IAASG") and the Singapore Arbitration Act Cap 10 ("AASG"). The former provides for international arbitration and the latter for domestic arbitration in Singapore. In brief, the IAASG empowers the arbitral tribunal to grant a range of interim remedies, including interim injunctions, which the AASG does not. Rajah JA,

[2] See the article by Tamara Oyre, entitled "*The Power of an Arbitrator to Grant Interim Relief under the Arbitration Act 1996*", accessible on the website of the Chartered Institute of Arbitrators.

in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 5 LRC 187 ("*NCC International v Alliance Concrete*"), explained the different approaches to interim remedies under the IAASG and AASG on the wider supervisory role given to the court in domestic arbitration (see paragraph [46]). Rajah JA is of the view that the domestic arbitral tribunal lacks comprehensive power to grant interim remedies. He concluded (at paragraphs [49] and [50]):

> *"[49] Second, an arbitral tribunal formed under the AA lacks the comprehensive power to grant an interim injunction or other interim measures as a general rule. In contrast, such power is expressly conferred on an arbitral tribunal where international arbitration is concerned (see s 12(1)(i) of the IAA). This distinction between the regime under the AA and that under the IAA was deliberate because, as explained at the second reading of the Arbitration Bill 2001 (Bill 37 of 2001) (see Singapore Parliamentary Debates, Official Report (5 October 2001) vol 73, col 2215):*
>
> > *'[T]he Bill adopts the position that some supervision by the Courts over the conduct of arbitration in domestic arbitration is desirable. ..... '*
>
> *"[50] The rationale underlying this larger role for the court in domestic arbitration is one of policy—namely, 'for the development of domestic commercial and legal practice, and for a closer supervision of decisions which may affect weaker domestic parties' (see the Sub-Committee's Report at para 12)."*

[14] The two separate statutory regimes in Barbados governing international arbitration and domestic arbitration are the International Commercial Arbitration Act Cap 110B ("ICAABB") and the AABB, respectively.[3] The ICAABB gives the arbitral tribunal, in international arbitration, powers to grant interim remedies, including orders to

[3] This is unlike Jamaica which has a single regime for both international and domestic arbitration. The Arbitration Act 2017 of Jamaica gives the arbitral tribunal, whether domestic or international, the power to grant interim measures, including orders to maintain or restore the status quo (see section 20). There is a strong, if not compelling case, for one regime for both international arbitration and domestic arbitration, with the UNCITRAL Model Law as the foundation. The Arbitration Act 2017 of Jamaica takes that enlightened approach. The fact is that Barbados has the unsuitable case of the ICAABB based on the UNCITRAL Model Law and an old AABB dating back to the 1950s on domestic arbitration, giving rise to this issue.

preserve the status quo,[4] which the AABB does not confer on an arbitrator in domestic arbitration. This seems to be deliberate. Parliament, by giving the arbitral tribunal power to grant an interim injunction in international arbitration, seems to acknowledge that such power must be given by agreement or by the national laws governing the arbitration. It seems incongruous to infer or imply the grant of a power to the arbitral tribunal to order interim injunctive relief in domestic arbitration where Parliament did not confer such power and the parties did not give it to the arbitral tribunal.

[15] In my judgment, the better view seems to be that, in the absence of agreement between the parties, or national arbitration laws providing for interim injunction, the arbitral tribunal in domestic arbitration in Barbados has no power to grant an interim injunction. This seems consistent with the greater supervisory role given to the court over domestic arbitration, though the court's role in the arbitral process remains narrow.

[16] Countries with dual arbitration regimes, have traditionally given enhanced powers to arbitrators in international arbitration. Therefore, in the context of international arbitration, it may be reasonable for the arbitral tribunal to assume implied power to grant interim remedies, including an interim injunction, where the applicable arbitration rules and the *lex arbitri* do not provide for such. Such power is implied to enable the arbitral tribunal to function in an autonomous, self-reliant and efficient manner in international arbitration. I feel constrained, on the current structure of arbitration law in Barbados, to agree with counsel for the claimant, that in the context

[4] See section 20 of ICAABB.

of the *ad hoc* domestic arbitration before me, an arbitrator would not have the power to grant an interim injunction, subject to below.

Party Autonomy & Concurrent Powers

[17] This brings me to the suggestion I was making to counsel for the claimant. The governing principle in arbitration is that of party autonomy. It permits parties, subject to any limitations which the *lex arbitri* may place on party autonomy, either (i) to vest power in an arbitral tribunal to grant an interim injunction to preserve the *status quo*, or (ii) to exclude from an arbitral tribunal, the power to grant an interim injunction. Whatever the uncertainty may be with respect to the implied power of an arbitrator to grant an interim injunction, parties can certainly bestow such power on an arbitral tribunal in domestic arbitration. I know of no enactment or public policy consideration which would prohibit parties to a domestic arbitration agreement governed by the laws of Barbados from vesting an arbitral tribunal with the power to make an interim injunction to preserve the *status quo*. AMCC was recently established to provide arbitration and mediation services. It is based in Barbados. AMCC's AMCC NI Rules, providing for domestic arbitration, specifically vest power in the arbitrator to grant such interim measures it deems necessary, including injunctive relief, obviously, where those rules govern the arbitration. That is lawful and permissible under Barbados law.

[18] Counsel for the claimant, at the Continued Hearing, referred me to section 14(5)(h) of the AABB in support of the argument that the court, not the arbitral tribunal, has jurisdiction to grant an interim injunction. Subsection 14(5) of the AABB gives the court the power to make a range of interim orders, including an interim injunction.

However, the subsection does not prohibit parties from conferring power on the arbitral tribunal to grant the same interim relief. The subsection does not confer an exclusive jurisdiction on the court to make such orders. This is reflected by section 14(6) of the AABB, which provides that: "*Nothing in subsection (5) shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters mentioned in this section.*" The court and the arbitral tribunal can have concurrent jurisdiction to make interim orders, including interim injunctions where applicable national arbitration laws and the applicable institutional or other adopted arbitration rules provide for the same (see Rajah JA, in *NCC International v Alliance Concrete*, at paragraph [52]).

[19] The court's overlapping power to grant an interim injunction where the arbitral tribunal has specific jurisdiction to do so is important. It is not contrary to an arbitration agreement for a party to apply to the court for an interim injunction. There are some circumstances, notwithstanding the concurrent jurisdiction in the arbitral tribunal, where it will be necessary to invoke the court's jurisdiction to grant an interim injunction (see David Sutton and Judith Gill, in *Russell on Arbitration*, 22nd edition, at paragraph 7-138 and J Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd edition, at paragraph 5.8.3). First, where the case is one of urgency, it may be necessary to apply to the court for an interim injunction. This would apply equally where the tribunal has not been constituted as well as after the tribunal has been constituted. Secondly, an arbitrator's powers are not complete and cannot grant all the reliefs which a court can grant. Therefore, where there is gap in the arbitral tribunal's jurisdiction or power, an application must be made to the court. For example, an arbitral tribunal has no jurisdiction or power to make an

interim injunction against a third party (see *Farah v. Sauvageau Holdings Inc.*, 2011 ONSC 1819, 11 C.P.C. (7th) 363, 1999 A.C.W.S. (3d) 1063, 2011 CarswellOnt 1862). Therefore, where such an order is required against a third party, a party needs to apply to the court. And thirdly, where there is some need to invoke the court's coercive jurisdiction, for example, where there is reasonable concern that a party to the arbitration agreement will disobey the order or direction of the arbitral tribunal, an application may appropriately be made to the court.

[20] The instances mentioned in the preceding paragraph are not necessarily exhaustive of the circumstances in which a party may properly apply to the court for interim injunctive relief where the arbitral tribunal has similar power. However, outside of special circumstances, where the arbitral tribunal and the court have concurrent jurisdiction to grant interim injunctive relief, the arbitral tribunal is the forum to which the parties should go for interim injunctive relief. Rajah JA, in *NCC International v Alliance Concrete,* articulated the court's approach where the court and the arbitral tribunal have concurrent jurisdiction to grant interim remedies thus (at paragraph [61]):

> *"It can therefore be said that the English authorities fortify our view that the courts should generally decline to exercise their jurisdiction to grant interim injunctions pending arbitration where an arbitral tribunal has concurrent jurisdiction to make such orders and there are no special circumstances to justify the application being made to the court instead of to the tribunal."*

Approach to Order

[21] At the Continued Hearing, I indicated the state of affairs I wished to preserve. My aim was to maintain the state of affairs as existed when the matter came before me. I would not be seeking to restore any earlier state of affairs, such as before the

alleged wrongful acts of the defendant were alleged to have occurred. Accordingly, I would not be interfering with the arrangements which were made between the defendant and the tenants before the matter came before me. But I would not allow the defendant to continue with its march to control the Cruise Facility to the exclusion of the claimant.

[22] The Cruise Facility has to be managed in the interim. The claimant has managed and operated the Cruise Facility for more than two decades. It seems to me to be just, wise and in the best interest of the Cruise Facility and the parties that this be allowed to continue in the interim. In effect, there is continuity in the management and control of the Cruise Facility. There is no harm to the defendant by permitting the claimant to manage the Cruise Facility in the interim.

[23] The parties indicated that there is no reason why the arbitral tribunal could not be constituted in six months, that is, of course, provided that there is no challenge to my orders or decisions, and also provided that the parties are cooperating to establish the arbitral tribunal. The Claimant has a reasonably substantial sum of cash on hand and can continue operating the Cruise Facility without any financial distress before an arbitral tribunal is constituted and for some time thereafter. The head tax, after the netting off as specifically provided for in the order, will be held in escrow. The rents which the defendants are to collect are likewise to be held in escrow. The claimant has undertaken not to pay any dividends as provided in the order. The moneys are protected for whoever should triumph in the arbitration. My orders will therefore facilitate enforcement of the award of any arbitral tribunal when it is made.

[24] In my judgment, the circumstances were sufficiently urgent to warrant the court's intervention to aid, support and promote the contemplated arbitral proceedings. I am satisfied that the arbitration would not be rendered moot, and given the state of affairs preserved, both parties are likely to be incentivized to proceed with the arbitration with dispatch. My orders do not have the effect of determining any of the issues between the parties. I do not see any need or urgency for me to make any further interim orders, and certainly there is no need to restore any earlier state of affairs. Any further interim orders could be pursued before the arbitral tribunal to be appointed once the parties are agreed that it should have jurisdiction or power to do so.

[25] My orders have been expressed in the interim, *inter alia*, until further order of the arbitrator. I have so limited my orders because I do not wish to fetter the power of any arbitrator appointed by the parties, in the event that the parties agree to clothe the arbitrator with power to make interim injunctions to preserve the *status quo*.

Conclusion

[26] I have granted the parties liberty to apply to the Court. Whether the parties will or will not agree to grant the tribunal jurisdiction or power to make such injunctions as are necessary to preserve the *status quo* between them is a matter for them. The permission I have given the parties to apply to the Court should be embraced within the context of the modern approach to arbitration, as described by Sharpe JA in *Inforica Inc v CGI Information Systems and Management Consultants Inc*, 97 OR (3d) 161; 311 DLR (4th) 728; 254 OAC 117. At paragraph 14, he wrote: "*This is in keeping with the modern approach that sees arbitration as an autonomous, self-*

contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts." As is so often said, whatever the courts' view of, or approach to arbitration used to be, whether suspicion of or hostility towards arbitration, that is not the case today. The use of arbitration in the settlement of disputes is growing globally. Soo too is the confidence in arbitration as a means of settling disputes. Some proponents of arbitration argue that it is cheaper, faster and better than court litigation. This Court's decided approach, which I hope has been reflected in the First Decision and in my discourse with counsel, has been that since the parties have agreed to arbitrate, then they should pursue that course to decide their disputes, and should treat their consensual arrangement to arbitrate their disputes as "*..an autonomous, self-contained, self-sufficient process...*"

[27] Again, I thank counsel on both sides for their assistance.

.....

ALRICK SCOTT, QC
Judge of the High Court (Acting)