JUDGMENT : HIS HONOUR JUDGE BOWSHER Q.C. In the High Court of Justice 1996 : Official referees' business : 21 May, 1997

1. By order of the judge, no official shorthand note or tape recording is to be taken of this judgment.

INTRODUCTION

2. This is a trial of a preliminary issue requiring consideration of the law of Mauritius.

3. The First Plaintiff was established in 1958 and is the largest building and civil engineering company in Mauritius. The Second Plaintiff is a South African construction Company. The Plaintiffs acted at all material times in joint venture.

4. The Plaintiffs were engaged to construct the State Bank Tower, Port Louis, Mauritius. For that purpose they entered into a sub-contract with an English company named Polarstone Limited (a company owned by a Swedish company). That sub-contract, dated 11 November, 1993 provided for the design, supply and installation of external granite cladding and internal granite cladding and fixings for the State Bank headquarters.

5. In relation to those works, the plaintiffs and the defendants entered into a default bond of the type considered by the House of Lords in Trafalgar House v. General Surety [1996] AC 199.

6. That default bond contained the following term:

7. *"Provided always that the above obligation or guarantor (sic) to reimburse the cost of the damages sustained by the contractor [the plaintiffs] shall arise only*

8. (a) *on written notice from both the contractor and the sub-contractor [Polarstone] that the contractor and the sub-contractor have mutually agreed that the amount of damages concerned is payable to the contractor or*

9. (b) *on receipt by the guarantor of a legally certified copy of an award issued in arbitration proceeding carried out in conformity with the terms of the said contract that the amount of the damages is payable to the contractor."*

10. That default bond having been made in England is to be construed according to English law. But condition (b), which is the vital condition for this case, refers to an arbitration which was required by the terms of the sub-contract to be conducted in accordance with the laws of Mauritius.

11. There was no agreement between the contractor and the sub-contractor as to the amount of the damages, and accordingly there was no notice under condition (a) of the Bond. There was an arbitration in England which was required to be conducted in accordance with the laws of Mauritius. The plaintiffs say that following that arbitration, condition (b) of the Bond is satisfied.

12. The arbitration arose as follows.

13. Polarstone commenced the Works. However on 9 December,1994 Administrative Receivers were appointed. Polarstone stopped work without completing the works the subject of the sub-contract. On 14 December, 1994 the Plaintiffs determined the Sub-Contract and caused the works to be completed by other means at considerable cost to the plaintiffs.

14. After notification to the administrative receiver, on 3 November,1995 an arbitrator was appointed by a Judge in Mauritius pursuant to the requirements of the Sub-Contract.

15. On 17 November, 1995 leave was granted by the English Companies Court to continue the Arbitration subject to the condition that: *No award is to be enforced against Polarstone Limited without the leave of this Court.*

16. On 29 November 1995 time was extended by a Judge in Mauritius for the publication of the Award to 29 December, 1995.

17. The arbitration was conducted in England by Mr. John Webb, FRICS, FCIArb. It was at the request of the plaintiffs that the arbitrator appointed was English and that the arbitration was conducted in England. The plaintiffs appreciated that it would not be economical for the Receiver to travel to Mauritius and the plaintiffs were anxious that the Receiver should have every opportunity to take part in the arbitration. In fact, the Receiver took no part in the arbitration. He was not represented before the judge in Mauritius when the arbitrator was appointed nor did he attend with the plaintiffs'

solicitors at the preliminary meeting held by the arbitrator on 20 November, 1995, although, on 14 November, 1995, the arbitrator sent to both parties an agenda and questionnaire for use at that meeting, suggesting amongst other things a documents only hearing. At the preliminary meeting, the arbitrator ordered a documents only hearing. Thereafter, the Receiver served no Points of Defence to the plaintiffs' Points of Claim and did not attend the hearing before the arbitrator.

18. I wish to make it plain that although the defendants baldly state that Mr. Webb's award was wrong there is absolutely no evidence at this stage that he was wrong in any particular. It is suggested that he failed to comply with the laws of evidence of the Mauritius by acting in a way which would have been perfectly acceptable under the laws of England and Wales, namely by conducting a documents only hearing. For reasons which will be given later in this judgment, I reject that criticism of Mr. Webb. No other criticism of any substance is made of the conduct of Mr. Webb. I have to say, "no criticism of any substance" because there was some implied criticism of him for testing one section of the award by considering test items amounting to 24% by value of the total sums claimed. That seems to me to have been an extremely sensible and careful way to have proceeded. Since the respondents to the arbitration did not contest the claim, and since there was written evidence supporting the whole of the claim, there is no reason why the arbitrator should have undertaken the burden of testing any of the claim, but he did undertake that burden by testing a substantial sample. In that respect, the arbitrator went beyond the call of duty. The defendants also say that those who took up the award failed to deal with it in such a way as to make it enforceable under the terms of the performance guarantee.

19. On 20 December, 1995 the Arbitrator published his Award. The Award was that Polarstone should pay to the plaintiffs the sum of 7,310,482.28 Mauritian rupees plus interest at the rate of 8% from 20 December, 1990 and the plaintiffs' costs of the arbitration on a standard basis. The Award was notarised by a Notary Public in London on 21 December, 1995 and demand was made of the Defendant on the same day. The demand was made by letter from the plaintiffs' solicitors, Norton Rose, enclosing a notarised copy of the award, described in the letter as "a legally certified copy of the Final Award". A further demand was made on 29 December, 1995.

20. On 29 December, 1995, the plaintiffs were given leave by the Companies Court in England to enforce the award.

21. The writ in this action was issued on 4 March, 1996. There was an unsuccessful application for summary judgment, and then on 29 June, 1996, the action was set down for hearing of a preliminary issue for trial commencing on 6 May, 1997. That trial began on 6 May, 1997.

THE ISSUE

22. The issue for trial is: Did the Defendant receive a legally certified copy of an Award issued in Arbitration proceedings carried out in conformity with the terms of the Sub-Contract that the amount of damages is payable to the Plaintiffs?

23. That issue has been sub-divided by counsel into several sub-issues, but in essence, the defendants put their case in two ways:

24. 1. That the arbitrator carried out a "documents only" arbitration and, it is submitted, that arbitration did not comply with articles 1018 and 1019 of the Code of Civil Procedure Act, 1981 of the Mauritius;

25. 2. That the words "legally certified copy of an award" provide only for an award which has received an exequatur of a judge of the Supreme Court of Mauritius.

THE TERMS OF THE SUB-CONTRACT

26. The contract to which reference is made in the bond is the sub-contract made by the Plaintiffs and Polarstone dated 11th November 1993.

27. The sub-contract expressly required, by Clause 38.1, that any dispute between main and sub-contractor was to be referred to Arbitration.

28. Clause 38.8 provided:-

29. *"....the law of Mauritius shall be the proper law applicable to this sub-contract."*

30. Clause 38.10 stipulated that:-

31. *"The Arbitration shall be conducted in accordance with the Code of Civil Procedure relating to Arbitration Act No. 1 -1981 current at the Base Date"*

32. The Base date was stated by the sub-contract to be 7 October, 1992.

THE CODE

33. The Code current at the base date (7th October 1992) was the Code of Civil Procedure Act, 1981 and included inter alia, (1) Article 1026-6 (A/272):-

34. *"The Arbitrator determines the dispute conformably with the rules of law, unless the parties have, in the arbitration agreement, conferred on the arbitrator the mission of determining the dispute as an amiable compositeur."*

35. It is agreed between the parties that the arbitrator did not have the power to act as an amiable compositeur.

36. (2) Article 1018 is in the following terms:

37. *"Les parties et les arbitres suivront, dans la procédure, les délais et les formes établies pour les tribunaux, si les parties n'en sont autrement convenues."*

38. I have moulded together the translations given by the two experts in Mauritian law to provide the following translation:

39. *"The parties and the arbitrators shall follow, in respect of procedure, the time limits and forms prescribed for the ordinary courts of law unless the parties have otherwise agreed."*

In **De Lanux v. Boyer de la Giroday [1884] MR** the same wording in the French Civil Code, (Article 1009), was construed as meaning:-

40. *"the parties and the arbiters are bound to follow in the procedure the delays and forms established by the Courts of Law, if the parties have not otherwise agreed."*

41. (I have adopted the translation given to me but it should be noted that a better translation of the word "délais" would be "time limits").

42. Following cross-examination of the plaintiffs' expert in the laws of the Mauritius, the parties are agreed that article 1018, subject to agreement between the parties, is not merely permissive.

43. By reason of the monetary amount of the claim in the arbitration, the relevant court whose rules are to be followed for the purpose of article 1018 is the Supreme Court of Mauritius. (There are two other levels of courts dealing with lesser monetary claims).

44. There is a further relevant article to be considered, namely Article 1019. The parties are agreed that the effect of this article is that third parties to the arbitration (that is, non-parties) are not allowed to give evidence under oath at an arbitration even if they ask to be sworn, though they may give unsworn evidence.

45. By contrast, the evidence of parties to an arbitration is governed by section 129 of the Courts Act.

46. One of the points taken on behalf of the defendants is that the arbitration was conducted by the arbitrator as a "documents only" arbitration and was decided without any sworn evidence and was for that reason not in conformity with the law of Mauritius.

47. It is therefore necessary to consider the procedure governing the law of the Supreme Court of Mauritius and the relevant laws of evidence.

THE COURTS ACT 1945

48. The procedure of the Supreme Court is governed by the Courts Act, 1945 which includes the following provisions:

49. Section 17 of the Act:-

50. *"... the Judges shall sit and proceed to and conduct and carry on business in the same manner as the High Court of Justice in England and Wales."*

51. Section 129 of the Act:-

52. *"Any witness heard before any proceeding before any courts shall be heard upon oath, and may be examined, cross-examined and re-examined in accordance with the law of evidence."*

53. Section 161 of the Act: Interpretation: *"In this Part- "evidence" includes testimony upon oath or solemn affirmation given viva voce or by affidavit in writing and unsworn personal answers of parties to trials.*

54. Section 162 of the Act:-

55. *"Except where it is otherwise provided by special law now in force in Mauritius or hereafter to be enacted, the* English Law of Evidence for the time being shall prevail and be applied in all Courts in Mauritius."

56. Section 198 of the Act:-

57. *"The Judges of the Supreme Court may make rules for the purposes of this Act to regulate -*

58. *(a) the practice and procedure before any court;*

59. *(b) the means by which particular facts may be proved and the mode in which evidence thereof may be given in civil cases before any court."*

60. Despite the use of the words "for the time being" in section 162 of the Act, the section is interpreted by the Courts of Mauritius as meaning that the Mauritian Law of evidence is English Law as at 1945, subject to any amendments made by the Mauritian Authorities and regardless of any changes in the laws of England and Wales after 1945: see **Seetaram v. R [1988] MR** :-

61. *"Finally we agree with learned Counsel for the appellant that, with regard to our law of evidence, we should interpret section 162 of the Courts Act to mean that we should not import into our law any UK statute subsequent to the coming into operation of the then Courts Ordinance in 1945. That limitation applies only to statutes, and decisions of the British Courts interpreting the common law of evidence, or a UK statute anterior to 1945, would be authoritative here."*

62. Accordingly, the Civil Evidence Acts of 1968 and 1972 applying to England and Wales or like provisions do not apply in Mauritius.

63. There is, however, an important provision of Mauritian Subsidiary Law made before the Base Date, namely Rules of the Supreme Court, 1908 Rule 6(3)(a).

64. Rule 6 is headed, "Procedure in default of Statement of Defence". Rule 6(3)(a) is in the following terms:

65. *"Where the claim is for pecuniary damages only and the defendant fails, or all the defendants, if more than one,fail, to show cause to the satisfaction of the Court on the return of the rule referred to in paragraph (1) of this rule, the plaintiff may enter interlocutory judgment, and the damages in respect of the causes of action disclosed in the Statement of Claim shall be assessed* ***in such manner as the Court may direct*** *before judgment is signed on the claim."*

66. The plaintiffs particularly rely on the words which I have underlined in that rule.

INTERPRETATION OF THE LAWS OF MAURITIUS

67. Evidence before me was limited to one witness of fact whose evidence was admitted in writing under the Civil Evidence Acts, and to the evidence of two experts.

68. The witness of fact was Mr. David Lyon, a South African director of the second defendants. I have summarised some parts of his evidence in reciting facts in this judgment. Those facts are important in setting the context for the opinion evidence. His evidence is contested as a matter of submission but not contested by any contrary evidence. I accept the evidence of Mr. David Lyon, unopposed by any contrary evidence.

69. The experts were Sir Marc David Q.C. and M. Clarel Benoit.

70. Sir Marc has 47 years experience in the law in Mauritius. He was called to the Bar by the Middle Temple in 1949 and in the following year graduated from the London School of Economics with a degree of LLB (Hons). The same year he was called to the Bar in Mauritius and has remained in private practice in Mauritius ever since apart from a period of 10 years (1954 - 1964) when he was

successively District Magistrate, Crown Counsel, Senior Crown Counsel, and Acting Assistant Attorney General. He took Silk in 1969 and has represented clients before the courts and before arbitrators as well as acting as arbitrator.

71. M. Benoit was born in 1961. He graduated from Emmanuel College, Cambridge in 1984. In 1985 he was called to the Bar by the Middle Temple and was also called to the Bar in Mauritius in the same year. From 1985 to 1990 he was Crown Counsel and District Magistrate. From 1989 to 1990 he was Chairman of a Value Assessment Tribunal. Since 1990 he has been in private practice. He has also held part time posts lecturing in law. In cross-examination he accepted that while he had appeared in three arbitrations he had never been appointed an arbitrator and there were very few cases in which he had represented a client in court. His work is mostly advisory in non-contentious financial matters. M. Benoit has appeared before Sir Marc as junior counsel in an arbitration and has been led by Sir Marc.

72. On the question of evidence at the hearing before the arbitrator, the experts take opposing views.

73. Sir Marc said that the law had been complied with and that if there was non-compliance it was of a technical nature which would not vitiate the award. M. Benoit said that there was technical non-compliance with the law which would have been strictly enforced and the arbitrator acted unlawfully and to the detriment of Polarstone.

74. I am bound to say at once that in the light of the whole of the evidence, I can see no detriment to Polarstone. It is not suggested that the award of the arbitrator was wrong in its result. The Receiver was kept fully informed of the steps in the arbitration including the proposal that it should be a "documents only arbitration" and chose to do nothing. If the evidence had been presented by sworn witnesses, the only difference in the result would have been that the costs ordered to be paid by Polarstone would have been much higher. I reject the allegation of detriment to Polarstone.

75. Nonetheless, M. Benoit insisted that the court of Mauritius would take a very strict approach to evidence. When asked, "Does the Mauritian court have the power to order a documents only hearing?", he said, "Absolutely not." He added that section 129 of the Act requires the judge of Mauritius to hear evidence and it must be under oath. Moreover, the judge cannot accept documents in evidence unless they are proved under oath. Documents are not admissible in evidence unless there is a statutory provision authorising the admission of that document. In addition, Article 1019 of the Code does not alter the position in an arbitration except in relation to third parties to the arbitration.

76. Sir Marc on the other hand gave it as his opinion that the court of Mauritius would take a less strict view. The plaintiffs complied with the arbitrator's direction: they were not heard in the proceedings and therefore did not have to comply with section 129.

77. In particular, Sir Marc refers to Rule 6(3)(a). He gave evidence that applying Rule 6(3)(a) the arbitrator had a discretion. The arbitrator directed a documents only arbitration, as he was empowered to do by Rule 6(3)(a). There were three sources of documents:

78. 1. The plaintiffs' points of claim, which could be taken as submissions;

79. 2. The written opinion of an expert accountant;

80. 3. Supporting documents, such as the final account and so forth.

81. M. Benoit says, correctly, that Rule 6 was revoked and replaced by Rules of the Supreme Court 1903 (Amendment) Rules 1994 with effect from 1 July, 1994. That amendment is in very different terms from the previous rule, though the plaintiffs submit in the alternative that even in its new form they can rely on it. M. Benoit said that the old rule 6(3)(a) "was not in force at the material time and cannot be relied on by the contractor."

82. The old rule 6(3)(a) was not in force at the time of the arbitration but it was in force at the time of the Base Date. So what was "the material time"? Clause 38.10 of the sub-contract, quoted at page 3 of this judgment made it absolutely clear that the procedure to be adopted in the arbitration was that current at the Base Date. The old rule 6(3)(a) therefore applied.

83. M. Benoit says that there is no evidence that the arbitrator had that rule in mind and therefore he could not have exercised any discretion, if he had any discretion. I reject that submission. The arbitrator exercised a discretion and he obviously thought he had jurisdiction to exercise that discretion. It is true that there has been no evidence tendered in this action that the plaintiffs drew the attention of the arbitrator to the provisions of the law of Mauritius, equally there is no evidence that they did not. Moreover, there is no evidence that the arbitrator did not inform himself of the laws of Mauritius. On the principle that omnia praesumuntur rite esse acta, I assume in the absence of any evidence one way or the other that the arbitrator did have rule 6(3)(a) in mind when he exercised his discretion. However, even if he could not have cited chapter and verse for his jurisdiction at the time that he exercised his discretion, that does not mean that he did not have any jurisdiction. The proposition put forward on behalf of the defendants seems to be that if a judge or arbitrator exercises a discretion without it being proved that he had in mind correctly the precise legal jurisdiction for exercising that discretion, then the exercise of the discretion is invalid even though there was jurisdiction to exercise the discretion. I reject that proposition. If that proposition were accepted, the work of the Court of Appeal would be increased a thousandfold.

84. Sir Marc pointed out that the agenda and questionnaire issued by the Arbitrator on 14 November, 1995 and sent to both parties clearly indicated the intended approach of the arbitrator to matters of procedure. Neither the sub-contractor nor the receiver attended nor objected in any other way, and, says Sir Marc, they cannot now contend that they were deprived of a fair hearing under the provisions of the written Constitution of Mauritius or under the principles of natural justice. Sir Marc added: "In this context the absence of formal oral evidence is at best a technical objection with which the Supreme Court of Mauritius would have little or no sympathy." Later, Sir Marc added:

85. *"In view of the Receiver's attitude and the nature of the exercise in question, the Court in Mauritius would be likely to rule that it was reasonable and fair for the arbitrator to rely only on the documents produced by the plaintiffs' lawyer."*

86. Both Sir Marc and M.Benoit are clearly professional men of the highest rank. It was a privilege to hear their evidence given in the very best traditions of expert evidence. I prefer the evidence of Sir Marc for the following reasons:

87. 1. He has much greater practical experience of the practice of the courts of Mauritius.

88. 2. His evidence was in accordance with the tendency of the common law courts and of the courts in France to avoid legalistic solutions particularly in matters relating to arbitrations;

89. 3. His evidence was in accordance with the decisions of the Courts of Mauritius cited to me.

90. I find that the arbitrator was entitled to apply the old rule 6(3)(a) to adopt his own procedure to assess damages and that rule gave him jurisdiction to direct as he did that the arbitration be conducted on "documents only" and he exercised his discretion within his jurisdiction. It is true that when the arbitrator ordered a documents only hearing, the respondents had not failed "to show cause" in the sense that there had been no failure to comply with an order to serve a defence, but it was quite obvious from their failure to attend the preliminary meeting that they were failing and would continue to fail "to show cause", and that is what in fact happened. It has to be added that Article 1019 required that the evidence which was in fact received by the arbitrator had to be evidence without oath. If there was to be no oath and, by wish of the defendants no cross-examination, what was the point of the attendance in England at great expense of witnesses from Mauritius to give evidence without oath and without cross-examination when they had already given their evidence in writing?

91. I do not find it necessary to make any finding on the alternative submission concerning the new rule 6.

92. Before making the above rulings, I considered some decisions of the law of Mauritius put before me by the parties.

93. In support of their submission that the Mauritian Courts strictly apply the law of evidence including hearsay, the defendants rely on the following decisions:

(1) **The Mauritian Fire Insurance Company v. Constant Lemeur** [1893] MR.
(2) Police v. Poonoosamy [1986] MR
(3) **Khadaroo v. Chooranum** [1989] MR

94. None of those decisions concern the application of the old Rule 6(3)(a).

95. For their alternative argument, the plaintiffs rely both on the new rule 6 and the decision of **Beeko v. Bussier.**

96. The plaintiffs further contend, that although the arbitrator was required to comply with Article 1018, any failure to comply would not necessarily cause the Award to be set aside. Article 1018 is not a matter of Public Order because:

97. (a) the parties are entitled to derogate from it; and

98. (b) there is no penalty for non-compliance.

99. Sir Marc therefore submits that if, which he does not accept, there was a procedural default, the Courts of Mauritius would have a discretion whether to set the award aside except where there had been prejudice to the complainant. As his alternative evidence, Sir Marc said that the arbitrator was obliged to apply the procedural law of Mauritius but not on pain of nullity should there be a failure of compliance. If there was a procedural default which did not cause prejudice to the complainant, the award would be held to remain valid. That evidence makes such good sense that I find no difficulty in accepting that it is the law of Mauritius.

100. I have already found that there was no prejudice to Polarstone or the Receiver.

101. In summary, I therefore find that:

102. 1. The arbitrator acted in accordance with the governing law;

103. 2. If the arbitrator did not act in accordance with the governing law, his default was merely technical and if brought to the attention of the Supreme Court of Mauritius would not have resulted in his award being set aside.

104. 3. If, contrary to my findings, the arbitrator's award had been set aside, then, subject to time limits, a further arbitration could have been mounted which would have come to exactly the same result.

I therefore turn to the second point in this preliminary hearing.

105. The defendants submit:

106. *"That the words "legally certified copy of an award" provide only for an award which has received an exequatur of a judge of the Supreme Court of Mauritius."*

107. The defendants also submit, as I understand them, that the person who legally certifies the copy also certifies that the award was made in accordance with the law.

108. The words, "***Legally certified copy of an award***" appear only in the bond entered into between the plaintiffs and the defendants, subject in my view to English law.

109. Under English law, I hold that a "***legally certified copy of an award***" would include a copy which the arbitrator himself had certified as a copy of the award which he had made. It would have certainly have included a notarised copy which was in fact presented. As to the suggestion that the certifier of the copy was required by the Bond to certify that the award was made in accordance with the law of Mauritius, I can only say that the submission seems to me to be nonsense.

110. However, the parties have tendered, and I have heard, expert evidence of the law of Mauritius concerning those words. I hold that evidence to be irrelevant, but I have considered it.

111. The evidence is not in dispute that to enforce an arbitration award in Mauritius it is necessary to obtain an order of the court which is called an "exequatur". There is a similar procedure in England for making an award an order of the court. In Mauritius, as elsewhere, it is unusual for awards to be made orders of the court. Parties who have agreed to arbitration generally honour the award without the need for enforcement.

112. In this case, there was no point in obtaining an exequatur from the Supreme Court of Mauritius because there was no one in Mauritius against whom it could have been enforced. Had it been sensible to apply to the Supreme Court of Mauritius for an exequatur, that court would have required production of a legally certified copy of the award before granting the exequatur. It is clear that there is a distinction between the exequatur and the legally certified copy of the award. I do not find it necessary to rehearse the arguments between the experts on this point, even if, contrary to my view they are relevant. I reject the defendants' submissions on this point.

CONCLUSION

113. The issue for trial is: Did the Defendant receive a legally certified copy of an Award issued in Arbitration proceedings carried out in conformity with the terms of the Sub-Contract that the amount of damages is payable to the Plaintiffs?

114. I answer that question: Yes.

Plaintiffs: Counsel: Paul Reed Solicitors: Norton Rose
Defendants: Counsel: Marcus Taverner Solicitors: Winward Fearon