IN THE SUPREME COURT OF BELIZE, A.D. 2022

Claim No. 719 of 2021

BETWEEN

CENTRAL BANK OF BELIZE **REGISTRAR OF CREDIT UNIONS**	**Claimants/Respondents**

AND

CEDRIC FLOWERS	**Defendant/Applicant**

BEFORE The Honourable Madam Justice Geneviève Chabot

Date of Hearing: May 17, 2022

Appearances:

Yohhahnseh Cave, Counsel for the Claimants/Respondents

E. Andrew Marshalleck and Naima Barrow, Counsel for the Defendant/Applicant

RULING ON THE DEFENDANT'S APPLICATION FOR DECLARATION OF NO JURISDICTION

Introduction

1. This is an Application for a declaration under Rules 9.7 and 63.6 of the *Supreme Court (Civil Procedure) Rules*, 2005 (the "*Rules*") that the Court has no jurisdiction to try the Claim. The Claimants/Respondents (hereinafter the "Respondents") in the Claim, the Central Bank of Belize and the Registrar of Credit Unions, applied to this Court for orders under sections 11 and 12 of the *Arbitration Act*, Cap 125 in relation to an arbitral award made on June 4, 2021 (the "Award"). The Respondents seek an order setting aside parts of

the Award or, alternatively, remitting those parts of the Award to the Arbitrator for reconsideration.

2. The Applicant/Defendant (hereinafter the "Applicant") makes this Application seeking the Claim to be dismissed on the ground that this Court does not have jurisdiction to try the Claim under either section 11 or 12 of the *Arbitration Act.* The Applicant argues that the Arbitrator did not engage in misconduct and that there is no defect or error of law patent on the face of the record. According to the Applicant, there is therefore no basis for this Court to exercise its jurisdiction to remit any of the matters complained of by the Respondents to the Arbitrator for reconsideration, or to set aside the portions of the Award complained of by the Respondents.

3. The Application is dismissed. The Court has the power and authority to try this Claim under the *Arbitration Act*. Any assessment of the grounds of the Claim as against the requirements of sections 11 and 12 of the *Arbitration Act* necessarily involves an assessment of the merits of the Claim. The Court declines to expand the scope of Rule 9.7(1)(b) and will exercise its jurisdiction in the circumstances of this case.

The Fixed Date Claim

4. The Fixed Date Claim pertains to a Final Award made on June 4, 2021 by Melissa Balderamos Mahler, Sole Arbitrator, under Clause 9 of an agreement entered into by the Applicant, Cedric Flowers, and the Registrar of Credit Unions on May 2, 2017. In the Award, the Arbitrator makes certain orders related to the Applicant's remuneration under the May 2, 2017 agreement and another written agreement dated April 24, 2017.

5. The Respondents seek orders under sections 11 and 12 of the *Arbitration Act* in relation to the Award. Specifically, the Respondents seek to set aside those parts of the Award which held and ordered the following:

   a. The Applicant to be paid the sum of $3,250.00 plus GST for the liquidation of the Police Credit Union Limited ("PCU");

   b. The Applicant to be paid the sum of $9,425.00 plus GST for the liquidation of the Citrus Growers and Workers Credit Union Limited ("CGWCU"); and

   c. The Applicant to be paid the sum of $195,000.00 plus GST for the liquidation of the Civil Service Credit Union Limited ("CSCU").

6. Alternatively, the Respondents seek to remit the said portions of the Award to the Arbitrator for reconsideration.

7. The grounds for the Claim are detailed in the First Affidavit of Diane Gongora. According to Ms. Gongora, as part of her reasons for the Award the Arbitrator correctly determined that there was no legally enforceable agreement in respect of the liquidation of PCU, CGWCU, and CSCU. The Arbitrator therefore had to determine a reasonable sum to be paid to the Applicant. To do so, the Arbitrator was required to examine the evidence supplied by the Applicant.

8. At paragraphs 85 and 86 of the Award, the Arbitrator identifies the following deficiencies in the evidence provided by the Applicant (the Claimant in the arbitral process):

> *The burden is on the Claimant to properly set out the time he has spent on the work done. The Arbitrator finds that he has failed to do so, from the invoices produced by the Claimant.*
>
> *Further, the Arbitrator notes that the Claimant has not itemized his bill by actual time spent on each activity. The Claimant did accept under cross-examination that the invoice "does not attempt to identify specific tasks or give an indication as to how much time was expended on each individual task". There is a general notation of work done but this was not itemized or separated by activity or date.*

9. According to Ms. Gongora, following her finding that the evidence supplied by the Applicant was deficient, the Arbitrator opined that the Respondents "*have provided no evidence to show or even suggest what time would be reasonable in the circumstances or to counter the assertion by the Claimant that certain hours were actually spent on the work as stated in the said invoice*" (para. 88 of the Award).

10. Notwithstanding the above findings, the Arbitrator relied on the time allocation in the Applicant's invoices in determining what was owed to him in respect of the liquidation of PCU, CGWCU, and CSCU. The Arbitrator's approach, according to Ms. Gongora, was erroneous and amounted to an error of law patent on the face of the record because:

    a. The Arbitrator misapplied the principle and implications of the burden of proof;

    b. Once the Arbitrator had expressly found, as she did, that the evidence from the Applicant was dissatisfactory, she was obligated to reject the evidence irrespective of any evidence coming from the other side in opposition to it; and

    c. The Arbitrator's reliance on the time allocation in the Applicant's invoices in the said proceedings in order to determine what was reasonable remuneration in the circumstances was erroneous on point of law and a misapplication of the principle of *quantum meruit*.

The Application

Submissions of the Applicant

11. The Applicant applies for an order declaring that this Court does not have jurisdiction to try the Claim. The Applicant submits that the Respondents have not provided any basis for this Court to exercise its jurisdiction to remit any of the matters complained of by the Respondents to the Arbitrator, or to set aside the portions of the Award complained of by the Respondents.

12. The Application rests on two main contentions. Firstly, the Applicant argues that there was no error of law or misconduct by the Arbitrator in observing the Respondents' failure to provide evidence. It is the burden of any party to a dispute to establish the facts and contentions in support of its case and persuade the tribunal of the correctness of its allegations. Taken in its proper context, the sentence at paragraph 88 of the Award referring to the Respondents' failure to provide evidence was in support of the Respondents' own assertion that the sum claimed by the Applicant was not a reasonable sum. The Respondents therefore have mischaracterized what was actually found by the Arbitrator.

13. Secondly, the Respondents' position that the Arbitrator engaged in misconduct by relying on portions of the Applicant's evidence after finding that the Applicant's evidence was deficient, instead of rejecting the evidence in its entirety, has no basis in law. The Applicant's claim was a claim for a type of damages, and the Arbitrator was entitled to do her best to determine the sums due to the Applicant. A tribunal's task is to make whatever findings it can on the evidence before it, and that is precisely what the Arbitrator did in making the awards being challenged.

14. According to the Applicant, there is no basis for this Court to exercise its jurisdiction since the errors and the misconduct alleged by the Respondents clearly do not appear on the face of the Award. At the hearing, Applicant's counsel acknowledged that if this Court considers that it must go further than simply looking at the face of the Award to satisfy itself of the absence of any error or misconduct, then the Court should exercise its jurisdiction to try the Claim.

Submissions of the Respondents

15. The Respondents oppose the Application. They note that the Application was not brought under Rules 26.3 or 15, which would require the Court to assume jurisdiction and to adjudicate the merits of the Claim, but was made under Rule 9.7. A challenge under Rule 9.7 may consist of either a dispute as to the court's jurisdiction to try the claim, or an argument that the court should not exercise its jurisdiction.

16. The Applicant seeks a declaration that the Court has no jurisdiction. In *Dunn v Parole Board*,[1] the Court held that challenges to the court's jurisdiction do not include disputes based on an application of any limitation provisions which provide a defence to a claim and are considered procedural. Similarly, the contention that there were no reasonable grounds for bringing the claim and that the claim had no real prospect of success did not go to the jurisdiction of the court, but went to an assessment of the claim that was before the court.

17. The Applicant's argument can be distilled to an argument that the Respondents' prospects of success are either extremely limited or non-existent. The matters on which the Application is premised involve an assessment of the merits of the Claim, something that the Court may only consider subsequent to a finding that it has the necessary jurisdiction. Rule 9.7 is inapplicable.

18. Sections 11 and 12 of the *Arbitration Act* confer statutory powers on this Court to remit an award for the reconsideration of the arbitrator in four circumstances: where there is some defect or error patent on the face of the award; where the arbitrator made some mistake; where material evidence which could not with reasonable diligence have been discovered before the award was made has since been obtained; and where there has been misconduct on the part of the arbitrator. These sections also confer powers on this Court to set aside an award in circumstances where the arbitration or award has been improperly procured; material evidence has been fraudulently concealed; or the arbitrator engaged in misconduct in the proceedings.

19. The question at issue in this Application is not whether either of these criteria have been met, but whether the Court has the power or authority to enquire into the issue and to further determine whether or not the orders sought should be granted. The Applicant is attempting to involve the Court in an assessment of the merits of the Claim. A discussion of the merits of the Claim in the context of an Application under Rule 9.7 is irrelevant or, at the very least, premature.

Analysis

20. This Application was brought under Rules 9.7 and 63.6 of the *Rules*. While there was a discussion at the hearing as to which of Rule 9.7's subsections the Applicant relied on, the Court notes that the Application itself and the submissions of the Applicant refer to the "basis" upon which the Court should or should not exercise its jurisdiction to act, implying that Rule 9.7(1)(b) was relied upon. Although the Application would have benefited from more clarity in that regard, the Court found the Respondents' submissions helpful and

[1] [2008] EWCA Civ 374.

responsive to the grounds of the Application and therefore considers that it has sufficient information to make a ruling on the Application.

21. Rule 9.7(1) deals with the Court's jurisdiction to try a Claim. Rule 9.7(1) provides as follows:

> 9.7 (1) A defendant who -
>
> (a) disputes the court's jurisdiction to try the claim; or
>
> (b) argues that the court should not exercise its jurisdiction;
>
> may apply to the court for a declaration to that effect.

22. Rule 9.7(1) is modeled after Rule 11(1) of the British *Civil Procedure Rules* and is practically identical in its phrasing. It is helpful to look at English precedents to provide assistance in interpreting Rule 9.7(1) because it has seldom been interpreted in Belize.

23. Rule 9.7 (or its equivalents) is most often understood as referring to the Court's territorial jurisdiction to try a claim. In *Texan Management Ltd & Ors v Pacific Electric Wire & Cable Company*,[2] the Privy Council was called upon to interpret Rule 9.7 of the *Eastern Caribbean Supreme Court Civil Procedure Rule*, 2000 ("*EC CPR*"). Rule 9.7 of the *EC CPR* was identical to Rule 9.7 of the Belize *Rules* until its repeal from the *EC CPR*. The respondent in *Texan Management* had commended proceedings against the appellants before the courts of several jurisdictions, including the British Virgin Islands ("BVI"). The BVI courts granted a stay of the proceedings in BVI on the basis of the *forum non conveniens* doctrine. The appeal before the Privy Council involved a consideration of the BVI courts' inherent jurisdiction to grant a stay on *forum non conveniens* grounds, independent of the provisions of Rule 9.7 of the *EC CPR*.

24. Noting that the "concept of a declaration that the court should not exercise its jurisdiction is a novel one", the Privy Council went on to interpret Rule 11(1) "as being intended to apply to applications for stays of proceedings as well as challenge to the jurisdiction *stricto sensu*".[3] In other words, Rule 11(1) is engaged not only where a party challenges the jurisdiction of the domestic courts to try a claim (Rule 11(1)(a)), but also where a party claims that a domestic court properly seized of a dispute should yield its jurisdiction in favour of that of a foreign court on the basis of the doctrine of *forum non conveniens* (Rule 11(1)(b)).

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[2] [2009] UKPC 46 ("*Texan Management*").
[3] *Texan Management* at para. 66.

25. The Privy Council, in *Texan Management*, did not comment on the meaning of Rule 11(1) (or its equivalents) in the strictly domestic context, but did rely on the Court of Appeal's decision in *Hoddinott v Persimmon Homes (Wessex) Ltd*,[4] a decision rendered in the domestic context, in its analysis.[5] In *Hoddinott*, the claimants in an intended civil proceeding had sought and been granted an order extending the time to serve their claim by a District Judge. The defendant applied to the Court of Appeal for an order setting aside the order extending the time for service. The question at issue was whether, in a case where an application to set aside an order extending time for service has already been made, a defendant is to be treated as having accepted that the court should exercise its jurisdiction to try the claim unless he also makes an application under Rule 11(1) within 14 days after filing the acknowledgment of service. In coming to its decision, the Court of Appeal considered whether Rule 11(1) was engaged outside of the territorial jurisdiction context and concluded that it was. According to the Court of Appeal, the word "jurisdiction" in Rule 11(1) does not denote territorial jurisdiction but refers more generally to the court's power or authority to try a claim:

> In our judgment, CPR 11 is engaged in the present context. The definition of "jurisdiction" is not exhaustive. The word "jurisdiction" is used in two different senses in the CPR. One meaning is territorial jurisdiction. This is the sense in which the word is used in the definition in CPR 2.3 and in the provisions which govern service of the claim form out of the jurisdiction: see CPR 6.20 et seq.
>
> <u>But in CPR 11(1) the word does not denote territorial jurisdiction. Here it is a reference to the court's power or authority to try a claim.</u> There may be a number of reasons why it is said that a court has no jurisdiction to try a claim (CPR 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim (CPR 11(1)(b)). Even if Mr Exall is right in submitting that the court has jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court should not exercise its jurisdiction to do so in such circumstances. In our judgment, CPR 11(1)(b) is engaged in such a case. It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure, namely CPR 7.5(2). It is the breach of this rule which provides the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim. [emphasis added]

[4] [2007] EWCA Civ 1203, [2008] 1 WLR 806 ("*Hoddinott*").

[5] While in *Texan Management* the Privy Council expressly declined to comment on the correctness of the Court of Appeal's analysis in *Hoddinott*, its subsequent reliance on this precedent in *Ramsook v Crossley (Trinidad and Tobago)* [2018] UKPC 9 supports its endorsement of the ruling in *Hoddinott.*

26. The term "jurisdiction" in Rule 9.7 therefore refers to the court's power or authority to try a claim. Where a dispute involves a foreign element, Rule 9.7(1)(a) applies to a challenge of the court's jurisdiction *stricto sensu* and Rule 9.7(1)(b) applies where the doctrine of *forum non conveniens* is relied upon. Where a dispute is strictly domestic in scope, Rule 9.7(1)(a) applies where the court has not been conferred with the power or authority to try a claim, and Rule 9.7(1)(b) applies where a defendant advances that the court, although endowed with power or authority over the claim, should not exercise that power or authority.

27. Despite the Court of Appeal's suggestion in *Hoddinott* that there "may be a number of reasons why it is said that a court […] should not exercise its jurisdiction to try a claim", the case law under Rule 9.7 or its equivalents, applied in the domestic context, has yet to find any application for the Rule outside of the absent or defective service of a claim.[6] It is not disputed that the Applicant was properly served with the Fixed Date Claim Form. This Application therefore raises a novel issue of law.

28. The *Arbitration Act* confers on this Court the power or authority to review an arbitral award made under the *Arbitration Act*. It is not disputed that the Award was made under the *Arbitration Act*. Therefore, Rule 9.7(1)(a) does not apply. The Applicant's argument, as I understand it, is that under Rule 9.7(1)(b), this Court should not exercise its power or authority to review the Award because when considered against the requirements of sections 11 and 12 of the *Arbitration Act*, it is obvious on the face of the Award that neither section is engaged. As a result, there is no basis for this Court to exercise its jurisdiction to review the Award.

29. This Court does not interpret Rule 9.7(1)(b) as applying in these circumstances. The starting point in the analysis is the *Arbitration Act*. Sections 11 and 12 of the *Arbitration Act* describe the court's powers "in all cases of reference to arbitration" as follows:

> 11-(1) In all cases of reference to arbitration the court may from time to time remit the matters referred, or any of them, for the re-consideration of the arbitrators or umpire.
>
> (2) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.
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> 12-(1) Where an arbitrator or umpire has misconducted himself, the court may remove him.

[6] See for instance *Hand Held Products, Inc & Anor v Zebra Technologies Europe Ltd & Anor* [2022] EWHC 640 (Ch); *Caine v Advertiser and Times Ltd* [2019] EWHC 39; *Dunn v Parole Board* [2008] All ER (D) 222.

(2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside.

30. Sections 11 and 12 of the *Arbitration Act* confer on the court the power or authority to grant certain remedies. However, the *Arbitration Act* does not provide for the criteria under which the court may exercise that power or authority. Section 11 provides for the court's power to remit an award for the reconsideration of an arbitrator or umpire, but is silent as to the basis upon which the power to remit can be exercised. Section 12 provides for the court's power to remove an arbitrator or umpire in case of misconduct, but is silent as to the basis upon which the court can find that an arbitrator or umpire has engaged in misconduct. Criteria have been developed in the case law to assist the court in that regard, but those criteria do not appear in the *Arbitration Act* itself.

31. It is on this basis that this Court rejects the notion that it can determine on the face of the Award itself that neither section 11 nor section 12 is engaged. To determine whether an Award should be remitted, the Court must consider not only the language in section 11 of the *Arbitration Act*, but also the criteria developed in the case law. Once informed of the applicable principles, the Court must consider the findings in the Award as against those principles. Similarly, to determine whether an arbitrator or umpire has engaged in misconduct, the Court must consider the language in section 12 of the *Arbitration Act* and the criteria developed in the case law, before applying those principles to the Award. In other words, to determine whether either section 11 or 12 is engaged, the Court must by necessity perform a legal analysis of the applicable principles, and apply those principles to the Award. Whether or not it is obvious on the face of the Award that those principles are not met is irrelevant, as at this stage the Court will have already engaged with the merits of the Claim.

32. This Court therefore declines to expand the scope of Rule 9.7(1)(b) as allowing a court not to exercise its jurisdiction where a claim, on its face, does not meet the legal requirements giving rise to a right to a remedy. Determining whether the court's power or authority should be exercised in view of the nature of the claim or the remedies sought is an issue going to the merits of the claim, and can only be considered once jurisdiction has properly been asserted by the Court.

33. As noted by Respondents' counsel, this Application could more properly be considered as an application for summary judgment under Part 15 of the Rules given the Applicant's position that the Claim has no real prospect of success. However, Rule 15.3 excludes "proceedings by way of fixed date claim" from the ambit of Part 15. An application under

Rule 9.7(1)(b) should not be utilized as a way to circumvent the Rules' clear intent that fixed date claims be considered in light of all available evidence.

IT IS HEREBY ORDERED:

1. The Application is dismissed.
2. Costs of this Application are awarded to the Claimants/Respondents and shall be costs in the cause.

Dated May 27, 2022

Geneviève Chabot
Justice of the Supreme Court