

EASTERN CARIBBEAN SUPREME COURT
ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV2013/0078

IN THE MATTER OF S. 69 (2) (b)
ARBITRATION ACT 1996 (as received
by the Arbitration Act (c. A105)

and

IN THE MATTER OF THE
ARBITRATION CLAIM

BETWEEN:

TEMENOS DEVELOPMENT INC.

Claimant

and

LUXURY PROPERTIES LLC
ULTIMATE LUXURY PROPERTIES LLC

First Defendant

LANCE LUNDBERG

Second Defendant

TEMENOS VILLA 22, LLC

Third Defendant

2013: September 25th

RULING

[1] Mathurin, J: Before me is a document entitled "Arbitration Claim Form for Permission to Appeal from an Award on Points of Law" purportedly in accordance with section 69 (2)(b) of the Arbitration Act 1996 (UK) as received by the Arbitration Act of Anguilla c. A105 ("the Act"). This document was filed

on the 28th August 2013. The Act provides that such a process is by way of application and the matter herein will be treated as and referred to as such. It is unlikely that the correct procedure for permission to appeal would be by way of claim form with an accompanying witness statement before such permission was obtained.

[2] Leave to appeal the decision of an Arbitrator in accordance with section 69 (3) of the Act will only be granted if the court is satisfied of the following:

- a. *“that the determination of the question will substantially affect the rights of one or more of the parties;*
- b. *that the question is one which the tribunal was asked to determine;*
- c. *that on the basis of the findings of fact in the award –*
 - i. *The decision of the tribunal on the question is obviously wrong; or*
 - ii. *The question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and*
- d. *that despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.”*

[3] The applicant is also required to identify the question of law to be determined and state the grounds on which it is alleged that leave should be granted. The court shall determine the application without a hearing unless it appears to the court that a hearing is required.

[4] The applicant states as the question of law to be determined, two issues.

- a. Whether on the proper construction of clause 20, they were required to refund all monies to the Respondents;
- b. Whether the force majeure clause contained in each of the Agreements constituted a valid defence to the claim for the return of monies.

[5] The grounds of the application state that the determination of the question will substantially affect the rights of parties, and that the question was one which the arbitrator was asked to determine. The applicant also states in ground 3 that;

3. *“the question is one of public importance in that;*
 - a. *The question is as to the construction of a clause of a contract which is in standard form and in widespread use.*
 - b. *There are conflicting arbitral decisions on this question.*
 - c. *A decision on this question by the Court is necessary to promote legal certainty.”*

Further grounds are that the authorities relied on by the arbitrator in making his award had wholly different circumstances and are wholly distinguishable from their case. The applicant also states as a ground insufficient time to properly meet the case in fact and in law and that it is proper in all the circumstances for the court to determine the question.

[6] The application is supported by a witness statement of Yoshodra Rampersaud which indicates that the construction of the issue of return of monies and force majeure were the agreed issues that the arbitrator had to determine. Ms. Rampersaud states that the correctness of the construction of the arbitrator, which was in favor of the Respondents *“is questionable.”* She does not state why.

[7] Ms. Rampersaud further states that the decision is open to serious doubt, in that the authorities on which the arbitrator relied are wholly distinguishable from the circumstances of the case he had before him. Again, Ms. Rampersaud does not elaborate. She also states that based on the facts of the case, *“the defence of force majeure is a valid defence that applies and is recognized as a new and emerging area of law since the economic collapse of the market in 2008”*. Ms. Rampersaud, makes neither reference to nor provides any authority for this statement.

- [8] In support of her witness statement, Ms. Rampersaud refers to and attaches the Agreements containing the clauses in question, the Arguments presented to the Arbitrator at the hearing and a copy of the award of the Arbitrator.
- [9] Bearing in mind the fact that the application for leave is generally determined without a hearing in accordance with section 69(5), I would have thought that the applicant would provide the court with a substantive application which clearly accords with the requirements of Section 69(3) to the court's satisfaction. It is difficult to imagine how the decision of the tribunal is obviously wrong or at least open to serious doubt if apart from rather bald statements, no authority or submission is provided.
- [10] The witness statement, whilst referring to the interpretation of the force majeure clause, has made no reference to the construction of the repayment clause which was one of the questions of law which the applicant wants appealed. Regrettably, with no indication to the Court as to why the decision with regards to repayment of funds is questionable or at least open to serious doubt, permission to appeal as a question of law on that ground is refused.
- [11] With reference to the force majeure clause, I fail to appreciate why no "conflicting arbitral decisions" on the question are cited or provided and also why no authority has been referred to or provided for the proposition that since the cataclysmic economic recession in 2008, such recession is a force majeure defence and is a new and emerging area of law. At best the application is completely unsatisfactory.
- [12] In the event that I am wrong, I have no difficulty with the Arbitrator's reliance, in the absence of any other authority provided by the applicant to the contrary, on the authority of *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC et al* [2010] EWHC 40 wherein a defendant sought to rely on the "unanticipated, unforeseeable and cataclysmic downward spiral of the world's financial markets" as a force majeure defence. In that matter, which is the most recent of decisions provided on the matter, Hamblen J., after a detailed analysis of several

authorities discussing economic variations and hardships as giving rise to the force majeure defence stated as follows;

“It is well established under English law that a change in economic/market circumstances, affecting the profitability of a contract or the ease with which the parties’ obligations can be performed, is not regarded as a force majeure event”.

- [13] Hamblen J. also made reference to *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm) where it was stated by Christopher Clarke J that;

“...It does not at all follow that the supplier is entitled to rely upon an increase in the market price in comparison to the contract price as a force majeure circumstance... This conclusion is consistent with a line of cases, both on force majeure clauses and on frustration... to the effect that the fact that a contract has become expensive to perform, even dramatically more expensive, is not a ground to relieve a party on the grounds of force majeure or frustration.”

Clarke J cited Lord Loreburn’s observation in *Tennants (Lancashire) Ltd v Wilson & Co Ltd* [1917] AC 495 that *“The argument that a man can be excused from performance of his contract when it becomes ‘commercially impossible’ seems to me to be a dangerous contention which ought not to be admitted unless the parties plainly contracted to that effect.”*

- [14] Further reference is made to Chitty on Contract, 30th ed, para 14-148 when Hamblen J states that matters listed as having been held not to be capable of constituting force majeure include *“failure of performance due to the provision of insufficient financial resources or to a miscalculation, a rise in cost or expense...”*
- [15] It is clear to me therefore, and in the absence of anything in contradiction or other compelling authority, that in order for economic circumstances to be considered as a force majeure defence it has to be specifically contracted as a

term. It has not been suggested that this is the case and is not an issue before me.

[16] In the circumstances, the application of Temenos Development Inc to appeal the decision on a question of law is hereby refused and dismissed.

Cheryl Mathurin
High Court Judge