

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCVAP2015/0006

BETWEEN:

JENNY LINDSAY dba JENNY LINDSAY & ASSOCIATES

Appellant

and

SIMEON FLEMING

**(In his capacity as Administrator of the Estates of the late
Sarah Ann Connor aka Richardson and Catherine Fleming, deceased)**

Respondent

Before:

The Hon. Dame Janice Pereira, DBE
The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

On Written Submissions:

Ms. Jenny Lindsay for the Appellant
Mr. Kerith Kentish of Joyce Kentish & Associates for the Respondent

2017: February 27.

Interlocutory appeal – Construction of arbitration clause in retainer agreement – Clause 14.3 – Dispute between parties in connection with retainer agreement to be referred to single arbitrator or mediator in Anguilla to be agreed between parties – Unilateral appointment of arbitrator by one party – Procedure for appointing sole arbitrator - Ambiguity of clause 14.3 – Court’s jurisdiction under s. 32 of the Arbitration Act – Whether learned judge erred in finding parties were not on equal footing – Whether learned judge erred in finding clause 14.3 ousts court’s jurisdiction and is therefore invalid

The appellant, Ms. Jenny Lindsay, is an attorney-at-law practising in Anguilla (“Ms. Lindsay”). The respondent, Mr. Simeon Fleming (“Mr. Fleming”) is her former client. Ms. Lindsay provided legal services to Mr. Fleming and other members of his family on the basis of several written retainer agreements. The retainer agreements contain a common

clause, clause 14.3, referring all disputes between the parties in connection with the retainer agreements to a single arbitrator or mediator in Anguilla to be agreed between the parties.

Mr. Fleming is the administrator of the estates of the late Benjamin Fleming and Sarah Jane Connor. Beginning in October 2010, Ms. Lindsay provided services to Mr. Fleming in connection with the distribution of the said estates. Disputes arose between the parties regarding the fees for services rendered by Ms. Lindsay to Mr. Fleming. These disputes led to the purported appointment of a sole arbitrator, Dr. Christopher Malcolm of Jamaica ("Dr. Malcolm") by Ms. Lindsay. Mr. Fleming objected to this purported appointment. He accordingly applied to the High Court under section 32 of the Arbitration Act ("the Act") for orders that the appointment of Dr. Malcolm was in breach of the procedures for appointing a sole arbitrator in clause 14.3 of the retainer agreements and section 16 of the Act; the revocation of Dr. Malcolm's appointment and a stay of all proceedings under clause 14.3 until payment of the costs of Dr. Malcolm and Mr. Fleming.

The learned judge heard and granted Mr. Fleming's application in June 2015. Aggrieved by the decision of the learned judge, Ms. Lindsay appealed to this Court. The main issues that arise from Ms. Lindsay's grounds of appeal concern the procedure adopted by Ms. Lindsay for appointing Dr. Malcolm; the court's jurisdiction under s. 32 of the Act; the construction of clause 14.3; the findings by the learned judge of lack of independent advice given to Mr. Fleming and the ouster of the court's jurisdiction by clause 14.3.

Held: dismissing the appeal in part; setting aside the appointment of the sole arbitrator and the award of costs of the arbitration to Mr. Fleming; ordering that the costs of the arbitration to date be costs in the arbitration; affirming the award of costs of application in the court below and ordering that each party bear their own costs of the appeal, that:

1. In the absence of an agreed procedure for the joint appointment by the parties of a sole arbitrator, the parties must follow the procedure for doing so outlined in sections 16 and 18 the Act. Section 16 provides that if the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator no later than 28 days after service of a request in writing by either party to do so. In case of a failure to appoint in time, any party may apply to the court to exercise its powers under section 18. In the present case, Ms. Lindsay had not followed the procedures outlined in the above sections. She did not give Mr. Fleming the requisite 28 day notice, and, when there was no agreement on Dr. Malcolm's appointment, she appointed him unilaterally and did not apply under section 18 for the court to appoint him. Therefore, the learned judge's conclusion that Dr. Malcolm's purported appointment was improper and should be revoked is affirmed.

Arbitration Act, Revised Statutes of Anguilla, Chapter A105 2000 applied.

2. Section 17 of the Act which governs the right of a party to have its appointed arbitrator treated as sole arbitrator in the case of default by the other party does not apply where the arbitration agreement provides that the parties are to jointly appoint one arbitrator.

Arbitration Act, Revised Statutes of Anguilla, Chapter A105 2000 distinguished.

3. As there was no properly constituted tribunal, it was unnecessary for Mr. Fleming to take the additional step of including in his application a request for the court to determine the tribunal's substantive jurisdiction. The appointment process having failed, the remedy that was open to either party at that stage was to apply under section 18 of the Act for any of the reliefs available thereunder which include the appointment of a sole arbitrator by the court or the revocation of the purported appointment of Dr. Malcolm. In substance, Mr Fleming did the latter and the references in the application to section 32 of the Act do not invalidate the application.
4. The drafting of clause 14.3 is not as clear as it should be and any ambiguity therein should be resolved contra proferentem the interest of Ms. Lindsay who drafted it. However, despite the flaws and potential ambiguities of the clause, it constitutes a workable agreement to resolve the parties' differences by the voluntary process of mediation and in default, as in this case, by arbitration. In the circumstances, clause 14.3 is a valid dispute resolution clause in the retainer agreements.
5. It is not a part of Mr. Fleming's case that he did not understand the retainer agreements that he signed or that he felt that he was taken advantage of by Ms. Lindsay. His case is simply that Ms. Lindsay did not explore the possibility of mediation, and in pursuing arbitration she did not follow the correct procedures for appointing Dr. Malcolm. In the absence of pleadings and evidence, it was not open to the judge to make findings on the lack of independent advice and the parties not being on an equal footing.
6. One of the main aims of arbitration is to transfer the power to resolve disputes into the hands of the parties' chosen representatives – arbitrators. The courts have shown an increasing tendency to uphold arbitration agreements which, by their very nature, oust the court's jurisdiction, including its statutory jurisdiction, provided that the arbitrator has the power to grant the relief that is claimed. In the instant case, it is clear that the dispute regarding Mr. Fleming's liability for Ms. Lindsay's fees falls under the arbitration clause as it concerns the parties' "rights and liabilities" under the retainer agreements. As the dispute falls within the terms of clause 14.3, the assumption is that the parties intended the dispute to be resolved by the arbitrator. The learned judge's finding that clause 14.3 is not valid for having ousted the court's jurisdiction is set aside.

Fullham Football Club (1987) Ltd v Richards and another [2011] EWCA Civ 855 considered; **Artemis Trustees Limited et al v KBC Partners LP et al** BVIHC(COM)2012/0137 (delivered 12th March 2013, unreported) considered.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** The appellant, Ms. Jenny Lindsay, is an attorney-at-law practising in Anguilla (“Ms. Lindsay”). The respondent, Mr. Simeon Fleming (“Mr. Fleming”) is her former client. Ms. Lindsay provided legal services to Mr. Fleming and other members of his family on the basis of several written retainer agreements. The retainer agreements contain a common clause referring all disputes between the parties in connection with the retainer agreements to arbitration or mediation. Disputes arose between the parties regarding the fees for services rendered by Ms. Lindsay to Mr. Fleming. This led to the purported appointment of a sole arbitrator by Ms. Lindsay. Mr. Fleming applied to the High Court to set aside the appointment. His application was successful. This is an appeal by Ms. Lindsay against the learned judge’s order setting aside the appointment of the sole arbitrator and other orders.

Background

- [2] The relevant factual background to the dispute between the parties is summarised in the judgment of the learned judge and I borrow from it generously.
- [3] Mr. Fleming is the administrator of the estates of the late Benjamin Fleming and Sarah Jane Connor. Beginning in October 2010, Ms. Lindsay provided services to Mr. Fleming in connection with the distribution of said estates. She claims that fees of US\$297,163.00 are outstanding for said services. Mr. Fleming disputes the outstanding fees.
- [4] The dispute resolution clause that is common to all the retainer agreements is clause 14.3 which reads -
- “This agreement shall be governed and construed in accordance with the laws of Anguilla without giving effect to conflict of law considerations. Any question or difference which may arise concerning the construction, meaning or effect of this Agreement or concerning the rights and liabilities of the parties hereunder or any other matter arising out of or in connection with this Agreement shall be referred to a single arbitrator or mediator in

Anguilla to be agreed between the parties. The decision of such arbitrator or mediator shall be final and binding upon the parties. Any reference under this clause shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act Anguilla R.S.A. c. A105.”

- [5] By letter dated 12th February 2015, Ms. Lindsay wrote to Mr. Fleming and others stating that clause 14.3 provides that disputes are to be referred to arbitration under the **Arbitration Act**¹ (“the Act”) and that the agreement requires the parties to agree to a single arbitrator. Ms. Lindsay also stated that she had been referred to Dr. Christopher Malcolm of Jamaica (“Dr. Malcolm”) and attached his curriculum vitae and a draft arbitration agreement for consideration by Mr. Fleming. She added that she would be obliged to hear from Mr. Fleming within 14 days after which she would proceed to make the appointment of the arbitrator in default of an agreement. Fifteen days after sending the letter, Ms. Lindsay forwarded to Mr. Fleming a notice that she intended to appoint Dr. Malcolm to act as sole arbitrator pursuant to section 17(2) of the Act and that any award made by Dr. Malcolm would be binding on them as if he had been appointed by agreement.
- [6] On 1st March 2015, Ms. Mariette Fleming responded on behalf of Mr. Fleming. She stated that Mr. Fleming did not agree to arbitration or the use of an overseas arbitrator and that there were arbitrators and a retired judge in Anguilla who could conduct arbitration.
- [7] On 3rd March 2015, Ms. Lindsay responded that the appointment had been made according to the notice sent on 27th February 2015 and the Act would continue to govern the proceedings unless an amicable agreement was reached and the outstanding invoices settled.
- [8] On 6th March 2015, Ms. Fleming responded reiterating that there were arbitrators and a retired judge in Anguilla and that there was no reason to go off island for that service. She also referred to clause 14.3 of the retainer agreements which

¹ The Arbitration Act, Revised Statutes of Anguilla, Chapter A105 2000.

provides that disputes shall be referred to a single arbitrator or mediator in Anguilla to be agreed between the parties.

[9] On 6th March 2015, Ms. Lindsay responded that the time for objections had passed, that there was no retired judge in Anguilla, and that the failure by the respondents to provide details of such a judge was a clear indication that there was no such person. Ms. Lindsay added that the appointment was already made and would not be retracted and the arbitration could only be stopped on payment of the outstanding invoices, and that even then any agreement reached would have to be recorded by the arbitrator in a consent order.

[10] On 27th March 2015, Keithley Lake and Associates, attorneys for Mr. Fleming, wrote to Ms. Lindsay referring her to section 16(3) of the Act which states that:

“If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.”

The letter also stated that Ms. Lindsay’s comment that time for objections had passed had no legal basis and that in any event in the absence of an agreement, section 18 of the Act sets out the appropriate procedure for appointing a sole arbitrator. The attorneys also pointed out that nothing in clause 14.3 required the arbitrator to be a retired judge or attorney and there was no justifiable reason for appointing an overseas arbitrator at additional cost to Mr. Fleming. Finally, the attorneys noted that the reference to mediation in clause 14.3 had been ignored and that mediation would be a more cost effective way forward.

[11] On 13th April 2015, Ms. Lindsay responded that Mr. Fleming’s objections were out of time and that she was not willing to stay the arbitration proceedings as there was no reason to do so.

[12] Dissatisfied with Ms. Lindsay’s responses, Mr. Fleming wrote directly to Dr. Malcolm, who, after various exchanges concluded on 21st April 2015 that in

accordance with the power under the Act that permits an arbitrator to determine his own jurisdiction, he was properly appointed and had jurisdiction over the matter. Further, that insofar as the agreement provided that the arbitrator shall be in Anguilla, it does not support any contention that the arbitrator must be Anguillan or must reside in Anguilla.

[13] On 28th April 2015, Dr. Malcolm wrote to Mr. Kentish, the current attorney for Mr. Fleming, stating that “if, for whatever reason, you disagree with my decision, you may, as is provided for under the relevant law, challenge my ruling in a court of law.”

[14] It is against this background that Mr. Fleming applied to the court under section 32 of the Act for orders that the appointment of Dr. Malcolm was in breach of the procedures for appointing a sole arbitrator in clause 14.3 of the retainer agreements and section 16 of the Act, the revocation of Dr. Malcolm's appointment, and a stay of all proceedings under clause 14.3 until payment of the costs of Dr. Malcolm and Mr. Fleming.

[15] The application was opposed on several factual and legal grounds. However, the one that is directly relevant to the disposal of this appeal is the legal objection that Dr. Malcolm was not properly appointed based on the procedure used by Ms. Lindsay and her reliance on sections 16 - 18 of the Act of which more will be said later.

Proceedings before the Learned Judge

[16] Prior to the full hearing of Mr. Fleming's application, the judge invited the parties to make written submissions and file additional evidence if necessary on the following issues:

- (a) Whether the clause 14.3 was a valid arbitration clause having regard to:
 - i. The purported ouster of the court's jurisdiction.

- ii. The lack of independent legal advice to Mr. Fleming before signing the various retainer agreements.
- iii. The ambiguity of the clause.

(b) The effect of s. 70 of the **Solicitors Act, 1974** of the U.K.

[17] The full application was heard by the learned judge on 6th and 9th June 2015 and on 24th June 2015 she delivered her written judgment and made the following orders:

- (1) "Clause 14.3 is an invalid clause inasmuch as it purports to oust the jurisdiction of the court.
- (2) Clause 14.3 is an invalid arbitration agreement in that Mr. Fleming was not independently advised as to its effect and consequences before signing the agreement.
- (3) Clause 14.3 is ambiguous and unclear and is to be interpreted contra-proferentum [sic] the interests of Ms. Lindsay.
- (4) The appointment of Dr. Malcolm was not in accordance with the procedural provisions of the Act and as such is null and void.
- (5) The purported appointment of Dr. Malcolm be revoked with immediate effect.
- (6) All costs of the arbitration thus far are to be met by the respondent.
- (7) Costs of the application are assessed in the sum of US\$2,500 to the applicant."

[18] Ms. Lindsay was granted leave to appeal against the orders by a single judge of this Court. The notice of appeal contains 17 grounds of appeal, many of which

overlap. For convenience I have categorised them into the following issues which appear to be the main issues in the appeal:

- (i) The procedure adopted by Ms. Lindsay for appointing Dr. Malcolm.
- (ii) The court's jurisdiction under s. 32 of the Act
- (iii) The findings of lack of independent advice given to Mr. Fleming and the ambiguity of clause 14.3.
- (iv) The ouster of the court's jurisdiction by clause 14.3.

I will deal with these issues as they relate to the grounds of appeal.

The Appointment of Dr. Malcolm

- [19] Clause 14.3 contemplates a joint appointment of a single arbitrator or mediator by the parties to the retainer agreements. However, the clause does not set out a procedure that the parties should use to make the joint appointment. In the absence of an agreed procedure, the parties must follow the procedure in the Act for a joint appointment of the sole arbitrator. The procedure is set out in sections 16 and 18:

Section 16

- “(1) The parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire.
- (2) If or to the extent that there is no such agreement, the following provisions apply.
- (3) If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.”

Section 18

- “(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal. There is no failure if an appointment is duly made under section 17 (power in case of default sole arbitrator) [section 17 is set out and dealt with in the following paragraph], unless that appointment is set aside.

- (2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.
- (3) Those powers are –
 - (a) To give directions as to the making of any necessary appointments;
 - (b) To direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;
 - (c) To revoke any appointments already made;
 - (d) To make any necessary appointments itself.
- (4) An appointment made by the court under this section has effect as if made with the agreement of the parties.
- (5) The leave of the court is required for any appeal from a decision of the court under this section.”

[20] The judge referred to these sections in her judgment, applied the relevant facts to the sections and found that Ms. Lindsay had not followed the procedures outlined therein. She did not give Mr. Fleming the requisite 28 day notice, and when there was no agreement on Dr. Malcolm’s appointment, she did not apply under section 16 for the court to appoint him. She appointed him unilaterally. The judge also rejected Ms. Lindsay’s submission, which was repeated in this Court, that the appointment was valid following the procedure in section 17 of the Act. Section 17 reads –

- “17(1) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”) refuses to do so, or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.
- (2) If the party in default does not within 7 clear days of that notice being given –
 - (a) Make the required appointment; and
 - (b) Notify the other party that he has done so,
 the other party may appoint his arbitrator as sole arbitrator whose award shall be binding on both parties as if he had been so appointed by agreement.”

[21] The judge's analysis of the facts and her conclusions of the law relating to Dr. Malcolm's appointment are set out in paragraphs 30 to 33 of her judgment and I can do no better than to set them out and adopt them as my own:

"[30] With respect, I do not think that section 17 applies where the parties have agreed to a sole arbitrator. Each of the parties here did not agree to appoint an arbitrator. This was an instance where the parties were to jointly appoint one arbitrator. I am fortified by para 2-139 of **Handbook of Arbitration Practice**; Sweet & Maxwell in conjunction with the Chartered Institute of Arbitrators; London 1998; which states;

'Where an arbitrator has not been nominated in the arbitration agreement and the parties do not or are not able to reach an informal agreement on a suitable person, a formal procedure is necessary. The parties are free to agree on the procedure, even to the point of drawing a name out of a hat. If they do not have an agreed procedure, the 1996 Act provides for joint appointment by the parties not later than 28 days after service of a request in writing by one party to the other to do so. **If there is no agreement within the 28 days recourse must be had to the court under section 18**, unless the parties have agreed on a fall-back procedure to cover this event.' (Emphasis mine).

[31] Further in Arbitration Act 1996, 5th edition at page 73 Notes; 'The right of a party to have its appointed arbitrator treated as sole arbitrator in the case of default by the other party does not apply where the arbitration agreement provides, either by agreement or under the default presumption in 15(3), that there is to be a sole arbitrator. In such a case, if the agreement does not specify the time for agreeing the appointment, the only applicable provision is section 16(3), and, in case of a failure to appoint in time, the appropriate mechanism for a default appointment is under section 18, not section 17.'

[32] I also considered the authority of Mr. Fleming **Mylcris Builders Ltd v Buck** [(2008) EWCH 2172], which is on all fours with this matter with respect to this point wherein Ramsey J started as follows:

'Accordingly, in my judgment, the provisions of s. 17 of the 1996 Act do not apply in this case and Mr. Hannet was not properly appointed as arbitrator. He was not jointly appointed as arbitrator and cannot be treated as sole arbitrator by reason of the provisions of s. 17 of the

1996 Act.² On that ground the tribunal lacked substantive jurisdiction to make the Award.'

[33] I am therefore of the view that the proper procedure for the appointment of a sole arbitrator is either by joint appointment within 28 days or failing that, application to the court to exercise its powers under section 18."³

[22] Having accepted and agreed with these findings by the learned judge, it follows that I agree with and affirm the judge's conclusion that Dr. Malcolm's purported appointment was improper and should be revoked. This conclusion is sufficient to dispose of the appeal since the main focus of the claim was the revocation of the appointment and the appeal was to reverse the judge's revocation. However, I will go on to deal with the other findings made by the judge so that the parties can be guided in the future conduct of the dispute.

The Court's Jurisdiction under Section 32 of the Act

- [23] The grounds of appeal relating to the court's jurisdiction under section 32 are:
- (i) That the judge fell into error in considering the application under the section;
 - (ii) The judge erred in fact and in law in finding that the appeal tribunal (Dr. Malcolm) had given permission to Mr. Fleming to apply to the court for a determination of the tribunal's substantive jurisdiction under section 32(2)(b) of the Act.
- [24] I note that Mr. Fleming's application to determine the tribunal's jurisdiction states in the opening paragraph that it is made under section 32 of the Act. However, the body of the application refers to breaches by Ms. Lindsay of section 16 of the Act in the appointment process and the relief sought is the revocation of Dr. Malcolm's appointment under section 18 on account of these breaches. That is all that Mr. Fleming needed to do to achieve the result that he desired. Nonetheless, he

² Section 17 of the 1996 Act (UK) is reproduced verbatim in section 17 of the Act in Anguilla.

³ *Simeon Fleming v Jenny Lindsay dba Jenny Lindsay & Associates AXAHCv2010/0067* (delivered 24th June 2015, unreported), paras. 30-33.

went on in grounds 21 – 28 of the application to ask for the court’s determination of the tribunal’s substantive jurisdiction pursuant to section 32. In ground 21 he explained that he had advised the arbitrator that his appointment was unlawful for non-compliance with section 16. Nevertheless, the arbitrator confirmed by email on 28th April 2015 that he had already determined that he had jurisdiction and that his determination could be challenged in the court of law. As a result, Mr. Fleming thought it was prudent to seek a determination from the court under s. 32 as to the substantive jurisdiction of the tribunal.

[25] I do not think it was necessary for Mr. Fleming to take the additional step of including in his application a request for the court to determine the substantive jurisdiction of the tribunal for the simple reason that there was no properly constituted tribunal. As stated above,⁴ the appointment process had failed and the remedy that was open to either party at that stage was to apply under section 18 for any of the reliefs available under the section. The reliefs include appointment by the court of a sole arbitrator (by Ms. Lindsay), or the revocation of the purported appointment of Dr. Malcolm (by Mr. Fleming). The latter, in substance, is what Mr. Fleming did and the references in the application to section 32 do not in any way invalidate the application, although it is a factor that can be considered on the issue of costs.

Ambiguity in Clause 14.3

[26] Clause 14.3 is set out in paragraph 4 above. The drafting of the clause is not as clear as it should be. It gives parties the option of resolving their disputes by a sole mediator or arbitrator to be agreed between them. It then goes on to say that “the decision of the arbitrator or mediator shall be final and binding upon the parties.” This statement cannot, as a matter of law, apply to mediation. A mediator cannot make a decision that is final and binding on the parties. His or her function is to act as an intermediary in bringing the parties together to try to achieve a settlement of their dispute. If he or she cannot achieve a settlement, the

⁴ Paragraphs 20 and 21 above.

mediation is considered to have failed and the parties are left to resolve their difference by other means such as arbitration or litigation.

- [27] The clause is also defective by stating in the final sentence that “Any reference under this clause shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act RSA CA 105”. This sentence appears to shut out the option of mediation which cannot be conducted under the **Arbitration Act**.
- [28] The parties also disagree on whether clause 14.3 means that the appointed arbitrator/mediator must be resident in Anguilla.
- [29] The deficiencies in clause 14.3 were dealt with by the judge in paragraphs 11 – 14 of her judgment and in paragraph 15 she found that the clause was ambiguous and that any ambiguity should be resolved contra proferentem the interest of Ms. Lindsay who drafted it. I agree with the judge but I do not think very much turns on it. The reference to mediation is obviously unworkable unless the parties agree, when a dispute arises, to go to mediation and then settle the rules for the mediation. This is highly unlikely on the facts of this case. This brings into play arbitration which is not dependent on agreement by the parties except for the choice of the sole arbitrator. I think that the clause is workable on the issue of the choice of mediation or arbitration. If the parties do not agree to mediate, the dispute goes over to arbitration in accordance with the provisions of the Act.
- [30] Finally, on the construction of the clause, I note that the parties cannot agree on whether an overseas arbitrator can be appointed. Mr. Fleming submits that the reference in clause 14.3 to “a single arbitrator or mediator in Anguilla” means just that – a person in Anguilla. Ms. Lindsay disagrees and submits that the arbitrator can be resident outside Anguilla but the arbitration must take place in Anguilla.
- [31] I do not think that this part of the clause 14.3 is ambiguous. The sentence means that the arbitrator or mediator must be resident in Anguilla. If the parties wanted to

stipulate that the arbitration or mediation was to take place in Anguilla it would been a simple matter to do so in clause 14.3. If I am wrong and the sentence is ambiguous it should be interpreted contra proferentem Ms Lindsay's interest which means that the arbitrator should be resident in Anguilla.

- [32] In the circumstances I find that clause 14.3, despite the flaws and potential ambiguities, constitutes a workable agreement to resolve the parties' differences by the voluntary process of mediation and in default, as in this case, by arbitration. In the circumstances I find that clause 14.3 is a valid dispute resolution clause.

Lack of Independent Advice/Parties Not on Equal Footing

- [33] It is not a part of Mr. Fleming's case that he did not understand the several retainer agreements that he signed or that he felt that he was taken advantage of by Ms. Lindsay. His case is simply that Ms. Lindsay did not explore the possibility of mediation, and in pursuing arbitration she did not follow the correct procedures for appointing Dr. Malcolm. At the first hearing of Mr. Fleming's application to revoke the arbitrator's appointment, the judge raised the issue of the lack of independent advice and invited the parties to file evidence on the point. No such evidence was filed. Notwithstanding and without the benefit of any evidence on the point, the judge found that Mr. Fleming was not independently advised and was not on an equal footing with Ms. Lindsay. As a result, she ordered that clause 14.3 of the agreements is invalid. In the absence of pleadings and evidence, I do not think it was open to the judge to make this finding and I would set it aside.

Ousting the Court's Jurisdiction

- [34] The judge found that section 70 of the **Solicitors Act, 1974** (UK) which gives a client a general right to apply for assessment of his solicitors fees and charges applies in Anguilla by virtue of section 74 of the **Eastern Caribbean Supreme Court Act**.⁵ Section 70 provides that before a solicitor can sue for his fees he must give the client a general right to apply to the High Court for an assessment of

⁵ Paragraph 3 of the judgment in the court below.

his solicitor's costs before the solicitor can pursue an action in court for the recovery of the fees. Further, that this jurisdiction can be ousted by agreement by the parties but the agreement must be clear and unambiguous and the client must be properly informed.⁶ Having found that clause 14.3 is ambiguous, that Mr. Fleming was not properly advised; and that the parties were not on equal footing the judge went on to decide that clause 14.3 was further invalidated by purporting to oust the court's jurisdiction. I do not agree with the judge on this point.

[35] It is axiomatic that one of the main aims of arbitration, as with other forms of alternative dispute resolution, is to transfer the power to resolve disputes into the hands of the parties' chosen representatives – arbitrators, mediators or experts.⁷ The courts have shown an increasing tendency to uphold the parties' choice of alternative dispute resolution, especially arbitration. The courts have gone as far as to uphold arbitration agreements that oust the court's statutory jurisdiction provided that the arbitrator has the power to grant the relief that is claimed.⁸ The starting point is to determine whether the dispute falls under the arbitration clause. In this case it is clear that it does – the dispute is about Mr. Fleming's liability for Ms. Lindsay's fees which is a dispute concerning the parties "rights and liabilities" under the retainer agreements. Once the dispute falls within the terms of the arbitration clause, the assumption is that the parties intended the dispute to be resolved by the arbitrator. For example, in **Fullham Football Club (1987) Ltd v Richards and another**,⁹ the respondent company's articles of association contained an arbitration clause. Disputes arose between the company and one of its members which fell under the arbitration clause. The member petitioned the court for relief under the unfairly prejudicial provisions in section 994 of the **Companies Act, 2004 (UK)**. The High Court stayed the petition holding that the disputes fell within the arbitration clause and the arbitrator could grant the relief sought under section 994. **Fullham Football Club** was followed in the British

⁶ Paragraph 9 of the judgment in the court below.

⁷ See paragraph above.

⁸ See the cases referred to the following paragraph.

⁹ [2011] EWCA Civ 855.

Virgin Islands in **Artemis Trustees Limited et al v KBC Partners LP et al**¹⁰ which involved an application to wind up and dissolve a limited partnership under the provisions of the **Partnership Act** of the BVI. Bannister J found that a limited partnership, like an ordinary partnership, was not a statutory creature and could be wound up and dissolved by an arbitrator (without reference to the winding up provisions in the **Partnership Act**). At paragraph 21 Bannister J. said –

“All arbitration agreements by their nature give up rights to approach the courts. The fact that the right may be conferred by statute does not by itself mean that it may not be relinquished in favour of arbitration if that is what the arbitration agreement provides for – see **Zanotti and Fullham Football Club** [The reference to Zanotti is to the case of Ennio Zanotti v Interlog Finance Corp. BVIHCV2009/0394 (8th February 2010, unreported)].”.

- [36] Bannister J went on in his judgment to point out that different considerations would apply if the remedy being sought could only be granted by a court such as the winding up and dissolution of a limited company created under the companies' legislation.
- [37] Even if section 70 of the **Solicitors Act** applies in Anguilla, and I make no definitive ruling on the issue, I am satisfied that an arbitrator properly appointed under clause 14.3 has the power to assess the amount of fees payable by Mr. Fleming to Ms. Lindsay and make any consequential orders.
- [38] The judge's main reason for invalidating clause 14.3 was on the ground that the parties were not on an equal footing. That finding was rejected.¹¹ I also find that clause 14.3 is not invalid insofar as it ousted the court's jurisdiction. The clause allows for a properly appointed arbitrator to assess Ms. Lindsay's fees and make an appropriate award.

¹⁰ BVIHC(COM)2012/0137 (delivered 12th March 2013, unreported).

¹¹ See paragraph 33 above.

Conclusion

[39] The most appropriate way of setting out my conclusions on this appeal is to relate my findings on the orders made by the judge in the order dated 9th June 2015. I would dismiss the appeal in part and make the following orders –

- (a) The order that clause 14.3 (of the retainer agreements) is invalid because it purports to oust the court's jurisdiction is set aside.
- (b) The order that clause 14.3 is invalid because Mr. Fleming was not independently advised is set aside.
- (c) The orders that the appointment of Dr. Malcolm was not in accordance with the procedural provisions of the **Arbitration Act** and as such is null and void, and that the appointment is revoked with immediate effect, are affirmed.
- (d) The order awarding the costs of the arbitration to Mr. Fleming is set aside. The costs of the arbitration to date will be costs in the arbitration.
- (e) The award of \$2,500 costs of the application in the court below is affirmed.

- (f) Both parties have enjoyed success on this appeal and therefore they will bear their own costs of the appeal.

I concur.
Dame Janice Pereira, DBE
Chief Justice

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

By the Court

Deputy Chief Registrar