MASSILIA LIMITED v GOLF DEVELOPMENT INTERNATIONAL HOLDINGS LIMITED & ORS

2014 SCJ 188

RECORD NO. 107931

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

Massilia Limited (In Voluntary Liquidation)

Applicant

v.

1. **Golf Development International Holdings Limited**
2. **Island Projects Limited**
3. **River Club Limited**
4. **Liberalis Limited**

Respondents

JUDGMENT

This is the second application arising from and in connection with an arbitration agreement entered into by the above parties, which is being made under section 20(7) of the International Arbitration Act (the Act). A first application to set aside a ruling of the arbitrator upholding the validity of the arbitration agreement was disallowed by the Court on 21 May 2013. **(See Liberalis Limited & Anor v. Golf Development International Holdings Limited and Others [2013 SCJ 211]).**

On 1 March 2013, whilst the matter as regards the validity of the arbitration agreement was still pending before the Supreme Court, the arbitrator after having heard evidence, "*so as to preserve assets out of which a subsequent award may be satisfied ..... order(ed) Massilia Ltd. (In Voluntary Winding-Up) not to charge, sell and dispose of (specified) portions of land, pending determination of the dispute in the arbitral proceedings or by the Supreme Court*".

The present application is for the above interim measures to be set aside and for the proceedings held before the arbitrator in connection with the interim measures to be declared null and void.

At the heart of the present application is the question of concurrence of arbitral and judicial proceedings. Parties are agreed that the issue raised and requiring our

determination is as follows:

> "*Whether the Arbitrator, after having given an award/ruling – in the same case and involving the same parties – that there ought to be a 'stay of proceedings', was competent to have subsequently entertained an application for 'interim measures' and to have granted an Order preventing the applicant from charging, selling and disposing of portions of land.*"

The submission of Counsel for Massilia Limited in support of the application is made up of the following two limbs:

(1) After having stayed the arbitration proceedings on 11 December 2012, there was no intervening event which warranted a change in the stand of the arbitrator and a resumption of jurisdiction to decide on the issue of interim measures.

(2) Having regard to the provisions of the law as they stood in 2012 and also to section 23 of the Act on the powers of the Supreme Court to issue interim measures, the application for interim measures should have been made to the Court and not to the arbitral tribunal.

As regards the first limb of Counsel's submission, it is common ground that pending the examination by the Court of his determination on the validity of the arbitration agreement, the arbitrator stayed the arbitration proceedings in the following terms:

> "*I consider that to continue such proceedings now before the Supreme Court has ruled upon the legality of the compromise, would not amount to an efficient administration of justice. The arbitrator may be exercising a jurisdiction which he may not have and this would result in a complete waste of time, costs and resources.*"

It is also common ground that despite the above ruling, on 1 March 2013, the arbitrator dealt with the objection of Mr. M. Sauzier, Senior Counsel, who appeared for River Club Limited and Liberalis Limited as follows:

> "*The second point was taken by Mr. M. Sauzier, S.C. He submitted that I could not hear an application for interim measures as I had myself stayed the proceedings and was therefore 'functus officio'. After having heard submissions I ruled that I had jurisdiction.*"

Counsel's submission is focused on the argument that there exists no fact or

circumstance which does justify the decision of the arbitrator to renege his own previous ruling for a stay of proceedings.

In support of the second limb, sections 6 and 23(1)(a) and (3) of the Act are being invoked. Sections 6 and 23(1)(a) and (3) deal with the powers of the Supreme Court to issue interim measures in connection with arbitral proceedings. Section 6 provides that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from the Supreme Court an interim measure of protection in support of arbitration and for the Court to grant such a measure. Section 23(1)(a), as it then stood, provides that the Supreme Court shall have the same power of issuing an interim measure in relation to arbitration proceedings as a Judge in Chambers has in relation to Court proceedings in Mauritius. And section 23(3) provides that where the case is one of urgency, the Court may, on the *ex parte* application of a party or proposed party to the arbitral proceedings, make such order as it thinks necessary.

We have listened to the submission of Counsel for Massilia Limited. For reasons which will be apparent further on, we are of the opinion that it contains no cogent or convincing argument in support of the application. On the other hand, the point made on behalf of Golf Development International Holdings (Pty) Limited and Island Projects Limited on the issue of "*functus officio*" is well taken.

Counsel for River Club Limited and Liberalis Limited joined in the submission made on behalf of Massilia Limited that the arbitrator having stayed the proceedings pending the determination of the application to the Court on the issue of his jurisdiction, was "*functus officio*". On the principle of "*functus officio*" and its application in arbitral proceedings, Counsel for Golf Development International Holdings Limited and Island Projects Limited cited the judgment of the High Court of England and Wales in **Five Oceans Salvage Limited v. Wenzhou Timber Group Company [2011 EWHC 3282]**.

In the above named case, the question was whether the party Wenzhou Timber Group Company was entitled to and should invite the arbitrator to set aside a final award and to make a further award on the ground that it was not bound by the final award. The High Court (Field J) held that on the authorities submitted to him, the arbitrator was "*functus officio*". The following passages at pp 404-405 in **Mustill and Boyd's The Law and Practice of Arbitration in England 2nd Edition** were relied upon:

> "*When an arbitrator makes a valid award, his authority as an arbitrator comes to an end and, with it, his powers and duties in the reference: he is then said to be 'functus officio'. This at least, is the general rule, although it needs qualification in two respects. First, if the award is merely an interim award, the arbitrator still has authority to deal with the matters left over, although he is 'functus officio' as regards matters dealt with in the award. Second, if the award is remitted to the arbitrator by the Court for reconsideration, he has authority to deal with the matters on which the award had been remitted and to make a fresh award.*"

Our view – which is supported by the citation above and the decision in **Five Oceans Salvage** – is that an arbitrator is "*functus officio*" i.e. his authority has come to an end when he has made a final award and has adjudicated on the matter in dispute. On the other hand, if he has made an interim award, he still has authority to deal with matters not covered by the interim award. In the present matter, true it is that the arbitrator has deferred to the jurisdiction of the Supreme Court to decide on the validity of the arbitration agreement and stayed the proceedings. However, when the application for interim measures was raised, it became a live issue and the arbitrator had jurisdiction to decide it.

Indeed, an examination of the relevant sections of the Act on the respective jurisdiction of the Court and of the arbitral tribunal on the matter of interim measures shows that the arbitral tribunal should be the preferred jurisdiction to deal with the question of interim measures. Further to section 23(3) of the Act which, as we have seen, deals with the power of the Court when the case is one of urgency, section 23(4) provides that where the case is not one of urgency, the Court shall act only on the application of a party to the arbitral proceedings made (a) on notice to the other parties and to the arbitral tribunal; and (b) with the permission of the arbitral tribunal or the agreement in writing of the other parties. Section 23(5) further provides that the Court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

The rationale underlying section 23(5) is that the parties having chosen arbitration to resolve their disputes, should seek as far as possible interim protection of their rights before the arbitral tribunal. The following observation by the learned authors of **Pervasive Problems in International Arbitration** edited by **Loukas A. Mistelis and Julian D. M. Lew, QC** at paragraph 9-2 is apt and accurate:

> "*The main problem is related to the selection of forum to obtain provisional measures: an arbitral tribunal or a court? In today's world, court assistance to arbitration is still necessary for enhancing effectiveness of arbitration and better distribution of justice. Nonetheless, the arbitral tribunal should be the 'natural forum' for acquiring final as well as provisional remedies. This view supported by most national laws, arbitration rules, and scholarly opinions essentially arises from contracting parties' choice of arbitration as a dispute resolution mechanism.*"

In the present matter, the provision of section 23(5) assumes all its importance in the light of our finding that the arbitrator who has not given a final award on the matter in dispute is not "*functus officio*".

For the reasons given above, the present application is set aside. With costs.

A. F. Chui Yew Cheong
Judge

N. Devat
Judge

D. Chan Kan Cheong
Judge

27 May 2014

Judgment delivered by Hon. A. F. Chui Yew Cheong, Judge

For Applicant:	**Mr. Attorney J. Gujadhur** **Mr. M. King Fat, of Counsel**
For Respondents Nos. 1 & 2:	**Mr. Attorney S. Mardemootoo** **Mr. I. Collendavelloo, Senior Counsel** **Mr. R. Chetty, Senior Counsel** **Mrs. P. Balgobin-Bhoyrul, of Counsel** **Miss N. Ahmine, of Counsel** **Mrs. Z. Mirasaib, of Counsel**
For Respondents Nos. 3 & 4:	**Mr. Attorney G. H. de Froberville** **Mr. M. Sauzier, Senior Counsel**