IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV2006/0771

BETWEEN:

JADA CONSTRUCTION CARIBBEAN LTD

Applicant

and

THE LANDING LTD

Respondent

Appearances :

Mr. Peter Foster with Ms. R. St Rose for Applicant
Ms. N. Glitzenhirn Augustin for Respondent

2006: October 10, 16.

JUDGMENT

INTRODUCTION

[1] EDWARDS, J.: This is a judgment for 2 Applications; one made by the Landing Limited for the discharge, and the other made by JADA Construction Caribbean Ltd for the continuation of an interim injunction granted by this Court on 29th September 2006. The Judgment is arranged in sections captioned as follows:-

Background Facts – paragraphs 2 to 5; The Agreement – paragraphs 6 to 16; the Documentary and Other Evidence – paragraphs 17 to 33; The Applications – paragraphs 34 to 37; The Law and Submissions of Counsel – paragraphs 38 to 49; The Injunctive Relief – paragraphs 50 to 67; The Arbitration and Termination Clauses – paragraphs 68 to 72; The Arbitration Act – paragraphs 73 to 77; Arbitration Before Repudiation – paragraphs 78 to 80; Conclusions - paragraphs 81 to 85.

BACKGROUND FACTS

[2] JADA Construction Caribbean Ltd (JADA) is a company incorporated under the Laws of Barbados with its registered office at Spring Hall, St. Lucy, Barbados.

[3] The Landing Ltd (L.L.) is a Company incorporated under the Laws of St. Lucia, with registered office at 20 Micoud Street, Castries.

[4] L.L. owns 19.09 acres of land at Pigeon Island Causeway, Gros Islet on which it is presently creating a resort comprising 228 residential units in 24 residential buildings, 2 service buildings, 1 security building, roadways, swimming pools, a harbour and docks with other facilities.

[5] JADA is in the business of building construction, project management and property development, and provides services as contractors, civil engineers, project managers and developers for major developments in Barbados. JADA is also engaged in developments in St. Lucia; Puerto Rico, Antigua, Bahamas and St. Croix.

THE AGREEMENT

[6] On 13th January 2006 the parties entered into a Construction Management Contract. By this agreement JADA is required to manage the construction of the

residential and Pavillion components of Phase I of the Resort development. The target substantial/practical completion dates for the Phase I buildings are listed in the Appendix B to the Contract as follows:

Building B2	-	September 1st, 2006
Building B1	-	October 30th, 2006
Building L8	-	August 16th, 2006
Building H1a	-	August 28th, 2006
Building H1b	-	September 22nd, 2006
Building H8	-	March 15th, 2007
Building P1	-	March 15th, 2007

The construction management period is stated to be 20 months in JADA's confirmation letter, Appendix A to the Contract.

[7] Article 2.3.3. of the Contract provides:

> "The Construction Manager shall provide administrative, management and related services to co-ordinate scheduled activities and responsibilities of the various Contractors, Sub Trades and Suppliers with each other and with those of the Construction Manager, the Owner and the Architect/Project Manager to endeavour to manage the Project in accordance with the latest approved estimate of Construction Costs, the agreed Project Schedule and the Construction Documents. The Construction Manager will provide all site supervisory staff required to ensure that all work performed is in strict compliance with the quality and standards set out in the contract documents. In the event the local trades and practices require amendments to the contract documents the amendments will be reviewed and approved by the Owner prior to any changes being

made in the documents. The quantity of site supervisory staff is detailed in the JADA proposal letter attached hereto as Appendix A."

[8] The JADA proposal letter detailed as Appendix A to the Contract lists the quantity of site supervisory staff as follows – ". . 2. Management team – project manager (1 No.), project engineers (4 No.), building foremen (7 No.), finishing foreman (2 No.) and site check (1 No.).

[9] Article 2.3.4. of the Contract provides that: "The Construction Manager shall attend weekly site progress meetings. The Owner's Project Manager team will take minutes at these meetings and prepare and distribute the meeting minutes within 48 hours of the meeting taking place. All parties agree that additional site meetings and or coordination meetings may be required on an ongoing basis and the Construction Manager undertakes to ensure that the Construction Management team will be available to attend such meetings as required."

[10] Article 2.3.21 of the Contract states that:

> "The Construction Manager shall record the progress of the Project. The Construction Manager shall keep a daily log containing a record of weather, each Contractor's work on the site, number of workers, identification of equipment, work accomplished, problems encountered, and other similar relevant data as the owner may require."

[11] Article 2.3.25 states that: "When the Construction Manager considers each Contractor's Work or a designated portion thereof substantially complete, the Construction Manager shall, jointly with the Contractor, prepare for the Architect a list of incomplete or unsatisfactory items and a schedule for their completion. The Construction Manager shall assist the Architect/Project

Manager in conducting inspections to determine whether the work or designated portion thereof is substantially complete."

[12] Article 2.3.26 provides that:

> "The Construction Manager shall co-ordinate the correction and completion of the work. Following issuance of a Certificate of Substantial Completion of the work or a designated portion thereof, the Construction Manager shall evaluate the completion of the work of the Contractors and make recommendation to the Architect/Project Manager when work is ready for final inspection. The Construction Manager shall assist the Architect/Project Manager in conducting final inspections."

[13] Article 4.10 requires: "Prompt written notice shall be given by the Owner to the Construction Manager and Architect/Project Manager if the Owner becomes aware of any fault or defect in the Project or non conformance with the Contract Documents."

[14] By Article 8.1, the parties have agreed that: "Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by arbitration in accordance with the arbitration Act of Saint Lucia currently in effect unless the parties mutually agree otherwise."

[15] Article 8.2 states how Arbitration proceedings should commence:

> "Demand for arbitration shall be filed in writing with the other party in accordance with the Arbitration Act of Saint Lucia. A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen . . ."

[16] Article 9.1 stipulates that "This Agreement may be terminated by either party upon not less than seven days written notice should the other party fail substantially to perform in accordance with the terms of the Agreement through no fault of the party initiating the termination."

THE DOCUMENTARY AND OTHER EVIDENCE

[17] It appears from the Affidavit and documentary exhibits for the 2 Applications that up to 10th May 2006, Mr. Mark Benoit, the Vice President-Design and Development for L.L., had led Mr. Bjorn Bjerkhamn the Director and Chairman of JADA, to believe that he was satisfied that the work on the site was progressing well despite some challenges from Presconco.

[18] The site meetings minutes disclose that L.L.'s Owners had raised the issue of the quantity of JADA's on site staff at the meeting held on 30th June 2006. This issue was apparently never satisfactorily addressed by JADA as far as L.L. was concerned. Consequently it was an ongoing concern for L.L. for several subsequent meetings held on 7/7/06, 14/07/06, 21/07/06, 28/7/06, 4/8/06 and 11/8/06.

[19] From 7/7/06 the Minutes noted the L.L. Owner's perception that they were incurring costs due to the lack of on site co-ordination. Then on 28th July, 2006, it was also noted that Interborough Electric was concerned about co-ordination of the drywall framing contractor's works. L.L.'s Vice President Mr. Benoit, therefore asked JADA to amend their schedule and supervision of this trade accordingly.

[20] Despite these concerns, at a meeting where JADA's Mr. Bjerkhamn, Mr. Philip Tempro JADA's Managing Director, and Mr. Benoit were present, Mr. Benoit had apparently discussed negotiating the Phase 2 contract with JADA. According to Mr. Benoit, L.L.'s Owners were then "cautiously optimistic that the

reorganization of JADA's on site team to be augumented by newly appointed staff, might have helped to resolve the issues."

[21] It would seem that the reorganization of JADA's on site team was ineffective. At the site meeting held on 24/08/06 the previously mentioned concerns were again mentioned as not having been addressed by JADA. There was also a complaint at the meeting held on 1/9/06 about some schedule that the team workers of JADA had prepared at the request of L.L.'s owners, which were noted in the Minutes of the Site Meeting 1/9/06 as wholly inadequate.

[22] On 24th August 2006, Mr. Benoit sent Mr. Bjerkhamn an E-mail, requesting a meeting at the Hilton Barbados at 9:00 a.m. on 6th September, 2006 "to review in an amicable and cordial manner the challenges we are having with JADA as the construction manager for the Landings."

[23] The E-mail continued –

> "Once we review the issues we would like to then discuss the options available including negotiating several aspects of our existing agreement to the satisfaction of both parties.
>
> As per discussion this morning you requested that I provide you with a summary of our major concerns. To this end please see the following list of issues.
>
> (1) The questionable attitude and support that JADA head office has offered to date to the Landing project.
>
> (2) The apparent value/contribution of the JADA head office to the contract and the project in general.

(3) The insufficient size and experience level of the site JADA team, and the lack of support provided to this team by the head office.

(4) The minimal contribution that JADA has made and continues to make towards the procurement of materials and labour for the project.

(5) The real costs that have been incurred by The Landing as a direct result of inexperienced site supervision provided by JADA.

(6) The contract obligations that to date have not been fulfilled by the JADA team.

As noted earlier Bjorn, we are interested in charting a course forward and resolving these matters in a professional manner. I hope that we can speak openly and effectively next Tuesday and leave the meeting with sufficient solutions in hand.

I look forward to meeting with you next week."

[24] The meeting which was held as planned on 6th September 2006, was attended by Mr. Bjerkhamn, Mr. Philip Tempro and Mr. Michael Rees representing JADA, and Mr. Benoit and Mr. Jim Enright representing L.L. Apparently the representatives of L.L. expressed the following views –

(a) JADA's team does not have sufficient construction experience to carry out the requirements of the Construction Management Contract.

(b) Several issues of concern were identified as demonstrating that the inexperience of JADA's team had caused delays and errors on site. A recent example of JADA's substantial failure to perform

was the late and problematic assembly of the roofs on Buildings B1 and B2, and the fact that the B1 roof as constructed had not complied with the structural requirements of the contract documents. This had necessitated extensive remedial works, and such delay, errors and remedial works had cost L.L. financial hardship.

(c) Although the Contract clearly delineates that JADA will provide administrative and management staff sufficient to carry out the requirements of the contract, JADA up to that time had not provided a team capable of carrying out the requirements of the contract.

(d) Though JADA's head office staff were supposed to be monitoring and participating actively in the construction management of its project, there had been no such participation, and up to then the head office participation was at best minimal, non existent or detrimental to the interests of L.L.

(e) 95% of the trades and suppliers on the project had been brought to the project by L.L., with little or no assistance from JADA.

(f) JADA has twice requested its site team to assist JADA's head office to secure additional St. Lucia based work; and for this to be done during working hours contractually committed to L.L., with the use of L.L's office, telephones, e-mail and fax infrastructure.

[25] The parties dispute whether L.L. had indicated at this meeting that they were prepared to terminate the construction management agreement for cause. Mr. Bjerkhamn has denied that the L.L. representatives had made such a statement. However there seems to have been a suggestion by L.L's representatives that

they would consider renegotiating certain aspects of the contract, and a suggestion from JADA's representatives that L.L. should put forward the proposal detailing what aspects of the construction management contract might be renegotiated.

[26] On 7th September 2006 Mr. Benoit sent Mr. Bjerkhamn the following e-mail:

> "Pursuant to our meeting of yesterday morning, Wednesday September 5th please be advised as follows:
>
> (1) At our meeting we agreed that The Landing Ltd would issue a letter to JADA outlining a proposal for the renegotiation of various aspects of the current construction management agreement. Please be advised that this proposal will not be issued by Friday of this week as previously discussed but will be issued early next week.
>
> (2) Also at the meeting JADA requested some insight as to whether or not JADA would be considered for the management of Phase 2 works. At the meeting JADA stated that their response to the listed Phase I issues may well be influenced by their eligibility for the Phase 2 works. JADA stated that the reason for this view is that JADA feels that the procurement of suitable staff to address the Phase I concerns may be difficult to procure if the ultimate contract duration is limited. Ultimately this challenge be it real or perceived is a matter/challenge for JADA to resolve and not The Landings Ltd and as such from the Landings perspective, Phase 2 discussions are irrelevant to Phase I issues. Please be advised that the Landing Ltd will not entertain discussions regarding Phase 2 management

contracts until, such time as the Phase I contract issues are resolved.

(3) Upon arrival on site yesterday afternoon it became abundantly clear that the roofs on both Buildings B2 and B1 are now seriously behind Schedule. When prompted for an updated schedule for the roof work the Schedule provided by JADA was not only inaccurate but non viable from a construction perspective. The schedule did not envisage a plan for the completion of the aforementioned roofs nor a plan for the completion of subsequent roofs. Given this The Landings Limited will have no option but to prepare the near term schedule for the roof work with their own resources. As such please be advised that all costs associated with the preparation of these schedules will be charged back to JADA. Please also note that this event is one in a series of failures on the part of JADA to comply with the contract requirements set out in clauses 2.3.14 and 2.3.5 of the construction management contract.

(4) Please be advised that the lack of completion of the roofs on Buildings B1 and B2 are causing significant delays in the interior works of these buildings. Further to this the lack of completion of these roofs is also significantly impacting on the cash flow requirements of this development. Given this The Landings Ltd has no choice but to proceed proactively with resolving the roof issues as stated in item #3.

As noted we will issue our proposal letter early next week."

[27] Following this e-mail, Mr. Benoit wrote to JADA a WITHOUT PREJUDICE letter dated 12th September 2006. This letter outlined in substance the following proposed changes to the Construction Management Agreement -

(1) The Management team of JADA contemplated by the contract was 16, but the staffing level of JADA between February 6 to August 6 on the site had been: February 06 – total staff 2; March 6 – total staff 9/10; April 6 – total staff 11; May 6 – total staff 11; June 6 – total staff 11; July 6 – total staff 10; August 6 – total staff 12. The proposal therefore was for L.L. to pay JADA the exact cost of the JADA team for this 7 month period plus an agreed mark up of 15% which represents the overhead and profit for the head office – estimated as US$800,000 plus 15% or US$920,000.00. Since JADA had already been paid US$1,647,556.00 JADA would refund US$727,556 approximately with JADA providing accurate audited costs associated with the on site management team, including vehicle leases costs and computer purchases costs and any other costs which may form part of the overall costs. This proposal of L.L. had taken into account that many of JADA's staff are inexperienced and had contributed little or nothing to the project; so in L.L.'s view it was a generous proposal as a good will gesture.

(2) L.L. would take over the construction management of this development and bring in new executive level construction management staff. JADA would then provide a construction management 'support' team comprised of their following 8 team workers – John Stebbings, Colin Brown, Richard Clifton, Ken Robertson, Esther Thomas, Darius Springer, Richard Monrose and Carl Gustave. The performance of the 2 JADA team workers John Durrant and Keith Mattock who recently arrived on the site is to be assessed with a view to determining their suitability to the project. The other team workers of JADA presently on the site would be removed

from the project. The remuneration to JADA for these named persons comprising their "support" team would be as follows:

(i) L.L. would pay JADA on a monthly basis, at straight costs, the salaries, housing and benefits of these persons as per current rates and agreements.

(ii) L.L. would pay JADA a construction fee for the use of this staff at an agreed rate of 15% of the total labour cost on a monthly basis.

(iii) L.L. would pay JADA their monthly costs associated with the supply of office computers, fax machine and the lease of the site vehicles plus a mark up of 10%.

(3) JADA's team members under the proposed management "support" agreement would take directions from L.L.'s construction management team. JADA would have no professional liability to the project or carry any risk associated with non-performance of JADA's team members. L.L. would reserve the right to reduce the size of the 'support' team as the work load of Phase I decreases; and with such reduction the monthly costs will reflect this change. JADA's "support" team members would work on any aspect of L.L.'s project as instructed by L.L.

[28] Mr. Benoit's letter has the following as its closing paragraph:

"As all parties are aware the way to resolve these issues is through prompt conciliatory discussion, however for reasons stated above time is truly of the essence and as such the Owners can only extend this offer until 12:00 p.m. EST on Friday September 15 2006. We

hope that over the next three days we can arrive at a suitable amicable solution."

[29] JADA's Mr. Bjerkhamn by letter dated 15th September 2006, replied:

"We have received your letter of the 12th September 2006 setting out your views on the performance of the Management Contract by our Company.

We must say at the onset that we were surprised at the change of attitude you have exhibited in your letter now under reply. A review of the correspondence passing between your company and ourselves and the voluminous site meeting minutes do not reveal any dissatisfaction with our performance, indeed the contrary view is revealed.

You will recall that our Mr. Bjerkhamn met with you at the end of July and Mr. Tempro met with you one week later and at both meetings you mentioned negotiating a contract for Phase 2 of your project.

Your e-mail of August 24 2006 is the first mention by you of inexperienced staff on the JADA Team. Yet in your letter now under reply you are prepared to employ directly all of the team less two.

Your letter of 12th September 2006 is the first mention that you are prepared to terminate the contract for cause. That statement was certainly never made at the meeting of 6th September 2006. We do not believe that you have that right and simply state that if you do terminate the contract we will be looking to you for damages for breach of contract.

Purely for the record you stated in the meeting on 6th September 2006 that you wanted to re-negotiate the Management Contract and you advised JADA that your proposal would be forwarded in due course.

Whether the Management Contract does state that JADA will provide sufficient personnel to carry out the requirements of the agreement as detailed in our letter of 13th December 2005 it was never intended that we would have 16 men on site from the beginning of the works and this was discussed with you and it was agreed that we would provide staff as the work justified, as per our staffing schedule.

We note that you have not sought to terminate the present contract even though you state that you expect that JADA will repay approximately US$727,556.00. No mention has as yet been given of the alleged breaches of contract by us which would justify your position.

In conclusion we must inform you that your proposed re-negotiated contract terms are not acceptable to us."

[30] Before JADA wrote this letter, there had been a Site Meeting on 14th September 2006. The Minutes for this meeting were the only Minutes tendered by JADA when it approached the Court on 29th September 2006 for the interim injunction without notice.

(31) It is important to note that JADA's Project Manager Mr. Colin Brown wrote a letter to Mr. Benoit dated 16th September 2006, correcting Item 24.2.2 of the Minutes among other items. This letter was not disclosed by JADA in its Without Notice Application. The correction was as follows -

"With reference to the Site Meeting No. 33 issued on 15th September 2006, we wish to make the following comments/amendments:-

Item 24.2.2:- the meeting with JADA Barbados representatives took place on 6th September 2006 and not 29th.

CB stated quote "now that the third structure is complete JADA will transfer Senior Supervisor/Engineer and in the next 3 weeks an additional Senior Supervisor will be transferred to Site. Further ongoing changes will be implemented in line with Site requirements and the Staffing Schedule" end quote.

Andrew Lobban is due to arrive on September 25th JADA/CMB to advise The Landings of the names of the personnel following the Site Meeting."

[32] Then on 20th September 2006 Mr. Benoit sent the following E-mail to JADA's Project Manager Mr. Colin Brown –

"We have received the attached schedule and we make the following comments:

(1) This schedule should have been produced in August as required. It is now September 19th and this schedule does not get us any nearer to determining whether or not the resources that we have are suitable to meet the Master Schedule deadlines. As mentioned on numerous occasions we need to work PROACTIVELY. This Schedule is reactive and does not take into account 80% of the factors that may impact on the drywall schedule.

(2) The schedule AT MINIMUM must include the following interior trades in order to determine the viability of our overall schedule.

a. Internal materials procurement – Western Millwork, Aster, Sicea Marmi

b. Sequencing of MEP sign off and approvals for close in

c. Sequencing and installation of floor tiling

d. Sequencing and installation of store thresholds

e. Sequencing and installation of temporary shutters

f. Sequencing and installation of exterior doors-swing and sliding

g. Sequencing and installation of bathroom tiling

h. Sequence and scope for the removal and installation of protection sequencing

i. Sequencing and installation of the millwork – doors, casings, frames, base and crown mouldings

j. Sequencing and installation of final paint finishes

k. Sequencing and installation of kitchen and bathroom cabinetry

I. Final clean and inspection

(3) The schedule currently has several line errors that make the schedule confusing. It is important to note that this schedule should be used to drive all trades and as such it needs to be complete, accurate and readable. Having the B2 works start and stop of the same day is clearly incorrect, but more importantly it suggests that the schedule was not prepared with a high level of care. When a trade reads a schedule that has errors, they often dismiss the schedule as irrelevant.

(4) The tasks need to be linked so that the schedule can be adjusted easily with minimal effort. If the schedule can be easily adjusted the team can easily react to unforeseen conditions as they arise and react quickly.

(5) Presently the schedule has final painting occurring immediately after taping has occurred. This cannot be correct. One primer coat can be installed after taping and then the millwork trade must go in and complete work. Final painting is the LAST trade out of the unit.

As I noted during our discussions today, Colin I am very concerned about the scheduling efforts. It has now taken over 6 weeks to produce the most rudimentary of project schedules and we still do not have schedules that are viable. I am at a loss as to how to proceed with your team as far as scheduling is concerned. We have asked, coached, provided base templates and even with all this assistance we still cannot get proper schedules.

Presently we have no construction management document or statement that confirms the ability of the on site trades to meet the required contract dates. Today I asked when you might be able to provide a comprehensive schedule

and you noted that you would need until the end of this week for the interiors and you will need until next week for the external finishes schedule. We requested this work to be done over 6 weeks ago and simply put we do not have until next week to sort this out. Please have your team prepare and issue to Jim and myself for review proper schedules for both the internal and exterior areas of B1 and B2, H1a, H1b by the end of this week . . ."

Mr. Colin Brown also wrote another letter on the 20th reporting to LL about faults he had found with tiling works. Then on 21st September, Mr. Benoit wrote a Without Prejudice letter to JADA, in response to their letter of the 15th. This letter was not disclosed by JADA in its Without Notice Application for the Injunction.-

[33] It is against this background that on 22nd September 2006. L.L.'s Mr. Benoit wrote the following letter to JADA:

> "Dear Mr Bjerkhamn,
>
> Pursuant to our Without Prejudice letter of September 21st 2006 please accept this "open" letter as formal notice that The Landing Limited will be terminating the current management agreement for cause seven working days from the date of the said without prejudice letter, dated September 21st. In the interim, should JADA wish to reconsider the previously issued without prejudice offer dated September 12th 2006 we are more than happy to pursue an expeditious and fruitful negotiation. Should we not hear from you during the next 7 working days we will assure that you are unwilling to negotiate and you will receive our formal termination letter consequent upon the herein given Notice on October 2nd 2006 . . ."

THE APPLICATIONS

[34] By an Application Without Notice filed on 29th September 2006, JADA obtained an Order against L.L., which granted injunctive relief to JADA in the following terms –

> "IT IS HEREBY ORDERED AS FOL.L.OWS:
>
> 1. The Respondent is restrained by itself, its servants, agents, officers or otherwise from removing the Applicant and or its officers and or members from the construction site of The Landings Development Project situate at the Pigeon Island Causeway in the quarter of Gros Islet until further hearing of the application and or further order of the Court.
>
> 2. The Respondent is restrained whether by itself, its servants, agents, officers or otherwise from terminating the contract between the Respondent and the Applicant dated 13th January 2006 until the further hearing of the application and or further order of the Court.
>
> 3. The Respondent is restrained whether by itself, its servants, agents, officers or otherwise from doing anything that would cause, prevent and or hinder the Applicant in the carrying out of its obligation and or responsibilities and or duties in accordance with the terms of the contract between the Applicant and the Respondent dated 13th January 2006 until the further hearing of the application and or further order of the Court.
>
> 4. The Respondent is restrained whether by itself, its servants, agents, officers or otherwise from doing anything that would

prevent the parties from maintaining the status quo under the contract between the Applicant and the Respondent dated 13th January 2006 until the further hearing of this application and other further order of the Court.

5. That the Applicant is to file a Claim Form and Affidavit in Support within . . . (14) days of the date of this Order.

6. This Order is returnable on Wednesday the 4th day of October 2006 at 9:00 a.m.

7. The Application filed herein is set for further consideration on 4th October 2006 at 9:00 a.m.

VARIATION OR DISCHARGE OF THIS ORDER

8. Any Respondent shall have leave of this Court to vary or discharge this Order but if her or she wishes to do so, he or she must file and application and give 72 hours notice to the Applicant's Solutions.

9 - 11. . ."

[35] By its Application filed on 3rd October 2006 L.L. applied to the Court for an order that -

"1. The operation of the Interim Injunction Order dated 29th September 2006 granted to the Applicant herein be DISCHARGED as against the Respondent.

2. Any further Court proceedings by the Applicant be STAYED on the grounds that there is a binding agreement to arbitrate and that the parties should as a consequence submit any claim, dispute or other matters in question arising out of the Contract between them or any breach thereof to Arbitration.

3. The Court declares that the Respondent be granted the right to terminate the Construction Management Contract entered into between the parties in accordance with the provisions under Article 9 thereof.

4. The Respondent be paid damages by the Applicant by way of compensation for the wasted costs and expenses incurred by virtue of the operation of the pre-action interim Injunction imposed against it.

5. The Applicant pay the costs hereof."

[36] On 3rd October 2006 JADA filed another Application requesting that "The Order made by the Honourable Justice Sandra Mason Q.C. on 29th September 2006 . . . without notice to the Respondent . . . be continued until after final judgment in this action or further order of this Court."

[37] Apparently, on 4th October 2006 the Court extended the injunction to 10th October 2006 for the hearing of the 2 Applications, one to discharge, and the other to continue the injunction respectively.

THE LAW AND SUBMISSIONS OF COUNSEL

[38] Learned Counsel Mr. Foster in substance argued as follows:-

1. Applying the well established principles for the grant of an interim injunction as stated in American Cyanamid Co v Ethicon Ltd [1975] A.C. 396:

A. There is a serious issue to be tried, the issue being, whether or not JADA has failed to substantially perform in accordance with the agreement.

B.(i) Damages are not an adequate remedy for JADA should JADA be successful at the trial, since JADA in the absence of the injunction, would suffer serious severe and irreparable damage to their goodwill and reputation, having had an unblemished record in their professional past, and a reputation for efficiency, reliability and reputable performance. Any damage to JADA's goodwill and reputation will affect their bids on contracts in the future throughout the Caribbean particularly as The Landings project is high profile and known throughout. Mr. Foster relied on the judicial statements of Sachs L.J. in Evans Marshall & Co v Bertola S.A. [1973] 349, who stated at page 380.

> "The Courts have repeatedly recognized that there can be claims under contracts in which, as here, it is unjust to confine a plaintiff to his damages for their breach. Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damage which cannot be taken into monetary account in a common law action for breach of contract: loss of goodwill and trade reputation are examples – see also: in another sphere, the judgment of Jenkins L.J. in Vine v National Dock Labour Board [1956] 1 Q.B. 658, 676 which, albeit a dissenting judgment was unanimously adopted in toto in the House of Lords. Generally indeed, the grant of injunctions in contract cases stems from such factors."

(ii) Besides L.L, Mr. Foster argues, would be unable to satisfy any award of damages for JADA's loss of goodwill, whereas JADA has given an undertaking in damages to meet any substantial delays on the completion of the project which L.L. alleges will occur, if JADA is allowed to continue performing its services under the Contract.

C. The balance of convenience lies with JADA since before L.L. can terminate the contract, L.L. must resolve the dispute in accordance with the Clause 8 Arbitration clause in the Agreement, having regard to the contention of each party regarding JADA's performance under the contract. JADA through the Affidavit of Mr. Bjerkhamn, has persistently denied it was in breach of contract.

D. The interim injunction should be allowed to continue to maintain the status quo. Should L.L. be successful at the trial or an arbitration, L.L. will only have to postpone the date to which it is able to embark on the termination of the agreement.

[39] Learned Counsel Ms. Augustin argued –

A. That on the facts put forward by L.L. and the numerous documentary exhibits, there was no serious question to be tried, having regard to Article 9.1 of the Contract, and JADA's only concern being to safeguard their reputation and save face by remaining on L.L.'s construction site. The evidence was overwhelming that JADA had failed to perform under the contract.

B. (i) There was Material Non-disclosure of evidence which was adverse to JADA in its Application Without Notice for the interim injunction. Ms.

Augustin identified the letter dated 16th September 2006, the Without Prejudice letter dated 21st September 2006, the E-mails dated 7th September 2006, the numerous Site Meeting Minutes from 30th June 2006 to 14th September 2006 with other documents, all of which were tendered by L.L.'s Mr. Benoit. The Without Prejudice letter of 21st September had listed the many problems and inadequacies of JADA and JADA's site team performance among other things.

(ii) Counsel referred to the law governing such non-disclosure, and argued that the injunction granted should be discharged as against L.L. by virtue of the irregular manner under which it was granted due to the failure of JADA to fully disclose to and apprise the Court of all information material to the Claim that was available to it at the time of making the Applications. Counsel referred to Network Multimedia Television Ltd v Jobserve Ltd (No. 2) 2001 where it was held by Park J, that the Without notice injunction had to be discharged even though the non-disclosure was not found to have been a deliberate act. Counsel found it significant that most of the undisclosed material contained information disclosing JADA's shortcomings, and which provided clear proof of their consistent substantial failures.

C. Ms. Augustin submitted that in light of Article 9.1 of the Contract which permits termination for substantial non performance, an action for damages was JADA's appropriate remedy, since the Injunction was unjust, oppressive, and had cost L.L. upwards of US$87,000.00 for the 8 weeks that the project is behind schedule. JADA has failed to show any real suffering endured other than to anticipate damage to its reputation she argued. Although damage to commercial reputation is a recognized loss, the situation in this instance is different and does not lend itself to the same considerations. By making the Application for the Injunction, it is JADA who has brought an otherwise private transaction into the public

domain, and with it the possibility of public scrutiny of their reputation. What would have been a simple termination and settlement under the terms of the contract, is now a public charade.

D. The true balance of convenience should be reconsidered since the injunction against L.L. is disadvantageous, unjust, costly and commercially debilitating to L.L. Where L.L. is prohibited from terminating the contract between the parties the resulting effect on the near US$55 million development project cannot be compensated by way of damages by JADA.

E. JADA it appears has no intention to prosecute the substantive claim with due speed as no claim form has been filed Counsel argued. The resulting effect of the present status quo is reflected in the Affidavit evidence of Mr. Benoit. L.L. is at clear risk of receiving claims from existing purchasers if the units under construction are not completed on time and to the standard required for sale. L.L. is likely to lose governmental concessions granted to them for Phase I of the Project; if it is not completed within an agreed time frame. The investment loans that L.L. is servicing are all tied up to the timely completion of the project, Counsel argued.

F. Ms. Augustin referred to the serious ebb in productivity on site, the low morale of the remaining JADA and other site workers, the likely confusion on the work site should L.L. be forced to continue the contract with JADA.

G. She urged the Court to consider the risk of injustice to be suffered by L.L. if the situation was left unaddressed by them, when weighing up the overall balance of convenience as to whether or not to discharge the injunction.

[40] Ms. Augustin urged the Court to consider the following matters as special factors:

(a) L.L. has no confidence in the ability of JADA to manage the contract without constant and direct supervision of the Applicants by themselves. Nor can the relationship between the parties which has broken down to such an extent, be reconciled so as to allow the respective obligations of L.L. and JADA to be harmoniously exercised to ensure that the project is delivered on time and to budget. This would leave the Employer to complete the works as and when he wished and the contractor to seek a remedy against the Employer for breach of contract.

(b) She referred to the case Scheldebouw BV v St James Homes (Gruesnor Duck) Ltd [2006] EWCH 29, as her authority for saying that it would be bizarre if the Employer were entitled at will to replace an architect or various engineers, but not the Construction Manager. She referred to the New Zealand case Mayfield Holdings Ltd v Moona Reef Ltd [1973] INZ LR 309 where it was held, that business efficacy would usually require the implication of a term, that in the event of a complete breakdown in the contractual relationship of the Employer and the Contractor, that the Contractor would surrender the site and the works. This would leave the Employer to complete the works as and when he wished, and the Contractor to seek a remedy against the Employers for breach of contract.

(c) Counsel also referred to the settled law, that contracts involving personal service will as a general rule not be enforced by equity: Wilson v St Helen's B.C. [1998] 3 W.L.R; Chappell v Times Newspapers Ltd [1975] 2 All E.R. 233. She argued that the present Contract between JADA and L.L. is a 'service' contract and it is undesirable to enforce the continuance of this contractual relationship between them with no mutual confidence existing between them. In such circumstances the remedy is damages and not specific enforcement of the contract, she argued.

[41] It is convenient at this point to return to Counsel Mr. Foster's submissions concerning the explanations of JADA for Non Disclosure of the previously mentioned documents, and how the Court should deal with such Non disclosure.

[42] Mr. Foster submitted that JADA had addressed all issues of non disclosure raised by L.L. at paragraph 16 of its Affidavit filed on 6th October 2006. Mr. Phillip Tempro in this Affidavit, concerning the E-mail reproduced at paragraph 32 of this judgment, and the Without Prejudice letter dated 21st September 2006, stated as follows –

> "(i) and (ii) . . .
>
> (iii) I am informed by my Solicitors and verily believe that I was not duty bound to refer to this email or disclose it to the court. In my opinion, this email is completely irrelevant. This was an email generated by Mark Benoit after the Respondent had come to a decision to terminate the contract. The Respondent had already advised the Applicant that they would be renegotiating the contract and sending in their proposal. The content of the email is obviously to the benefit of the Respondent. The Respondent clearly knows that the matters with the roof and any delays caused by the issues with the roofs were the result of the work of the contractor and not the Applicant. The Applicant in fact issued NCR's (Non Conformance Reports) to the contractors for works not in accordance with the documents. Copies of two NCR's regarding the roof works are now shown to me and exhibited hereto and collectively marked PT9. Further this email does not and has not shown in any way or at all that the Applicant

has failed to substantially perform in accordance with the terms of the contract.

(iv) I am advised by my Solicitors and verily believe that I was not at liberty to disclose the letter of 21st September 2006. I would like to disclose this letter to the Court in its entirety to show the Court the Respondent's responses to my letter of 15th September 2006 and to show the Court that the Respondent had still failed to show or particularize anywhere that the Applicant had failed to substantially perform under the contract. I was informed that this was a without prejudice letter from the Applicant to the Respondent. I was advised that I was able to refer to 12th September 2006 without prejudice letter because the Respondent had in the letter of 22nd September 2006 ask that I consider the offer made in the without prejudice letter of 12th September 2006 is not in any way or at all detrimental to our case and in fact, we referred to the letter and disclosed its existence and stated that it contained complaints against the team of the Applicant in not responding to job requirements as quickly as possible and or for errors in the foundations resulting from inadequate supervision of . . . (3) of our team members . . . The Applicant disclosed the letter of 21st September 2006 and indeed I exhibited it in my Affidavit for the continuation of the injunction after Mark Benoit had asked one of our employees to sign each page of that letter . . .

(v) I am informed by my Solicitors and verily believe that it was unnecessary to disclose to the Court the minutes of all . . . (33) site meetings. The Respondent knows that the last site meeting (number 33) includes all the information of the last

> 32 site minutes. The Respondent has chosen to disclose to the Court site minutes 24 to 33 which the Respondent does not refer to anything specific in there to show the relevance in so doing. Site Minutes for the 33rd Meeting contained all the information which could be applicable to this matter and which the Applicant reasonably contemplated ought to be disclosed to the Court.
>
> The Applicant did refer [to] and inform the Court of the existence of the other 32 minutes."

[43] I cannot accept the explanations of Mr. Tempro for not disclosing the Without Prejudice letter dated 21st September 2002, since this letter had also been referred to in the letter dated 22nd September 2006 which has been reproduced at paragraph 33 of this judgment.

[44] I also find that Mr. Tempro's other explanations are unacceptable, in light of the law on such non disclosure as pronounced in Brink's Mat Ltd v Elcombe and Others [1988] 1 W.L.R. 1350 and Memory Corporation Plc v Sidher (No.2) [2000] 1 W.L.R. 1433, which were cited by Counsel Mr. Foster.

[45] It is now trite law that an Applicant applying for an interim injunction without notice, is under a duty to give full and frank disclosure of all matters which are material for the Judge to know, regardless of whether they go against the grant for relief sought. Blackstones Civil Practice 2000 at para 38.26 points out that "this duty extends both to facts within the actual knowledge of the Claimant and to facts which would have been known on the making of reasonable inquiries . . . The duty to make full and frank disclosure is a continuing one until the first hearing or Notice, so the Applicant has a duty to bring to the attention of the Court any material changes in the circumstances after . . . injunction is granted." Facts are material if they are necessary to enable the Court to

exercise its discretion on a proper basis bearing in mind the need to act fairly between the parties, the fact that the Defendant has not been heard, and the inherent hardship and inconvenience caused by the particular injunction in the given circumstances. In my view, the opinion of the Applicant or his Counsel, as to the cogency or reliability of such material facts are irrelevant in the Applicant's performance of this duty to disclose, having regard to the law.

[46] I find that the contents of the above mentioned documents that were not disclosed by JADA on 29th September 2006 were material facts some of which went against the grant of the injunctive relief sought. In particular the E-mail sent on 20th September 2006 and the Without Prejudice letter dated 21st September 2006 should have been disclosed to the Court with the explanations then as to why the Court should not act on them. I find that given the quality of the facts that were not disclosed, the non disclosure was deliberate, intentional and not innocent.

[47] It is important to note the judicial pronouncements made in several cases on this issue, which were reviewed in Memory Corporation supra at pages 1454 to 1455. -

(a) PER Carnwath J in Marc Rich & Co Holding v Krasner (unreported, 18th December:

> "Full disclosure must be linked with fair presentation: The Judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the Applicant. Once that confidence is undermined he is lost."

(b) PER Ward L.J. in Hytec Information Systems Ltd v Coventry City Council [1997] 1 W.L.R. 1666 at 1675:

"Ordinarily this Court should not distinguish between the litigant himself and his advisers. There are good reasons why the Court should not: first, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly it seems to me that it would become a charter for the incompetent (as Mr. Macgregor eloquently put it) were this Court to allow almost impossible investigations in apportioning blame between Solicitor and Counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself."

(c) PER Walker L.J. in Memory Corporation supra at p. 1455 paras E-G:

"The correct view it seems to me, is that the advocate's individual duty to the Court, and the collective duty to the Court, on a without Notice application, of the plaintiff and his team of legal advisers are duties which often overlap. Where they do overlap it will usually be unnecessary, and unprofitable, to insist on one categorization to the exclusion of the other. It will however always be necessary for the Court, in deciding what should be the consequences of any breach of duty, to take account of all the relevant circumstances, including the gravity of the breach, the excuse or explanation offered, and the severity and duration of the prejudice occasioned to the defendant (which will

include the question whether the consequences of the breach are remediable and have been remedied). Above all the Court must bear in mind the overriding objective and the need for proportionality . . .

The relative degrees if culpability of the client and of his lawyers are not irrelevant but will seldom if ever be determinative."

[48] Learned Counsel Mr. Foster has reminded me of the principle to be applied where the Court finds as I have found, that there was non disclosure of material facts. This principle has been stated by Balcombe L.J. in Brink's Mat Ltd supra:

"The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrong doer of an advantage improperly obtained. See Rex v Kensington Income Tax Commissioner, Ex parte Princess Edmond de Polignac [1917] 1 U.B. 486, 509. But it also serves as a deterrent to ensure that persons who make ex parte applications realize that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the Court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained. I make two comments on the exercise of this discretion. (1) Whilst, having regard to the purpose of the rule, the discretion is one to be exercised sparingly, I would not wish to define or limit the circumstances in which it may be exercised. (2) I agree with the views of Dillon L.J. in the Lloyds Bowmaker case at p. B 49C-D, that, if there is jurisdiction to grant a fresh injunction, then there must

> also be a discretion to refuse, in an appropriate case, to discharge the original injunction."

[49] Applying these principles to my present findings, I have concluded that I should not use JADA's past non disclosure as the basis for refusing to continue the injunction requested by JADA.

THE INJUNCTIVE RELIEF

[50] I shall now consider whether or not to continue the injunction, in order to maintain the status quo, pending the determination of the issue, as to whether L.L. had substantial cause to serve the Notice of Termination of Contract on JADA.

[51] I must point out here that JADA's posture, as articulated by Mr. Tempro in his Affidavit filed on 6th October 2006, at paragraph 16 (v), is as follows:

> "The Applicant [L.L.] stated that the Respondent [JADA] ought to have proceeded to arbitration knowing that there was a dispute between the parties as to the Respondent's right to determine the contract and ought not to have just sent a notice of termination. The Applicant [JADA] is still ready and willing to go to arbitration however the Applicant [JADA] will only proceed to arbitration on the Respondent's undertaking or the Court's order that the Respondent not determine the contract as there would then be no point to go to arbitration."

[52] The guiding principles laid down by Lord Diplock in American Cyanamid Co. v Ethicon Ltd (supra) for the Court's consideration are:-

(a) Whether there is a serious question to be tried.

(b) The adequacy of damages to the Applicant and whether the Respondent would be able to pay the Applicant.

(c) The undertaking in damages by the Applicant and whether this undertaking is an adequate protection for the Respondent.

(d) Deciding where the balance of convenience lies including preserving the status quo.

(e) The merits of the Claim – i.e. where the incompensable damage to Claimant/Applicant and Defendant/Respondent does not differ widely, then as a last resort the Court should look at the relative strength of each party's case on the Affidavit evidence if this evidence is credible and not in dispute, including the balance of convenience.

(f) In addition to those considerations referred to in (a) to (e) "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases:" (Per Lord Diplock at page 409 C - D).

[53] The Court must also bear in mind that interlocutory injunctions are discretionary. There are no fixed rules for granting same, and the Court should not attempt to resolve complex issues of disputed fact or law: (Blackstones Civil Practice 2000 at para 37.27).

[54] It was recognized in Lawrence David Ltd v Ashton [1991] 1 All E.R. 385 that where the trial of the claim to restrain a former employee from working in contravention of a restraint of trade clause in the contract, will not take place until the period of restraint would have expired or almost expired, the judge, when exercising his/her discretion to grant or refuse an interim injunction against the former employee pending trial, is entitled on a wider view of the balance of convenience, to take into account, the likelihood of delay in obtaining a hearing date for trial of the action, and to require the employer seeking injunction, to satisfy him/her, not only that there was a serious issue to be tried, but also that it was more likely than not that the employer would succeed at trial.

[55] I accept Mr. Foster's arguments that there may be difficulty in quantifying the damages that JADA will suffer, and therefore, monetary compensation may not be the appropriate remedy. However, I also have to consider the extent of the injury that would be done to L.L. if the injunctive relief is allowed to continue, and JADA is unsuccessful in any arbitration proceedings or at the trial of its anticipated claim. This consideration is necessary, particularly where the Court is unable to determine when such arbitration proceedings will take place, or when any anticipated claim will be tried. In light of this the Court has to consider the obvious difficulty that L.L. would face in completing Phase I of the project, in the contractual time frame, and according to its estimated construction costs; and also L.L.'s difficulty in claiming and proving damages against JADA for any consequential damage that may result because of the injunctions. Having taken this into account, I find that L.L. also would not be adequately compensated by an award of damages in all the circumstances of this case. Lord Diplock in American Cyanimid at page 409 B – C authoritatively stated: ". . . and if the extent of the uncompensatable disadvantage to each party would not differ widely it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the Affidavit evidence adduced at the hearing of the application. This . . . should be done only where it is apparent upon the facts disclosed by evidence as to which there is no

credible dispute that the strength of one party's case is disproportionate to that of the other party."

[57] I have interpreted this judicial statement to mean that since there is doubt that damages would be an adequate remedy for JADA and L.L, then I may now go on to look at the relative strength of the case for JADA and the case of L.L., as disclosed in the undisputed Affidavit evidence and the documentary exhibits, in deciding whether or not to continue the injunctive relief.

[58] Taking into account also the remaining period for the 20 months contract, and my inability to assess when arbitration proceedings would be determined, or when any anticipated claim will be tried, or whether the interim injunction would be likely to run for a large part of the balance of the 20 months contractual period, if the injunction continues, it is very probable that L.L. will suffer damage which is uncompensatable. Therefore it becomes necessary to consider the relative strength of each party's case.

[59] Having considered the undisputed Affidavit evidence and the documentary exhibits, I have concluded that the strength of the allegation about the substantial non performance by JADA are impressive. I therefore find that the probability is that the strength of JADA's case is not of such as to justify the continuation of the injunction in all the circumstances.

[60] This is not a case in which the risk of damages to JADA is such that the injunction should continue regardless of the strength of the parties' cases. This is not a commercial agreement between trading Companies, as was the case in Evans Marshall & Co Ltd v Bertola S.A. and Independent Sherry Importers Ltd [1973] 1 W.L.R. 349.

[61] The judicial pronouncement of Sachs L.J. in this case, at page 380 (reproduced at paragraph 30 - B (1) of this judgment) has to be viewed within the context of the

type of contractual relationship existing between the parties, in my opinion. Both the Court and Counsel for the parties in Evans Marshal recognized that the Agreement in question was not a service agreement or an agreement for services to be rendered. Although the Court accepted that like a service agreement, it required co-operation and confidence between the parties, the Court observed that the absence of mutual co-operation or confidence in the existing relationship between the parties does not by itself preclude the Court from granting a negative injunction designed to encourage a party to perform their part of the agreement. Sachs L.J. prior to making that pronouncement that Mr. Foster has relied on, had rejected the view posited by Counsel for Independent Sherry Importers Ltd (I.S.I.) that ISI would suffer immeasurable/unquantifiable damage to its goodwill and reputation held for 3 weeks, in contrast to Evans Marshall & Co. Ltd's loss of goodwill and disruption of trade, and the litigation with its sub agents, which would be inflicted on Evans Marshall Co. Ltd, by an abrupt unjustified termination of an agreement by Bertola with 14 years to run, Sachs L.J. found that in such circumstances damages would not be adequate. Sachs L.J. had also considered whether a judgment could be satisfied by Bertola which was a Spanish Company, and he concluded that with Bertola's financial status in Spain being unknown, and given that the share capital of the English company ISI was £5000, the chances of a judgment for the sums canvassed by the parties, were questionable. On this ground also Sachs L.J. found that damages would prima facie not be adequate.

[62] The injunction in Evans Marshall was granted by the Court to ". . . set its face against those who seek abruptly to break contracts", on the basis that such an injunction works "in the interests of justice and also in the interests of the proper conduct of commercial relations."

[63] It is important to note also Sachs L.J. had considered the allegations in the Affidavit evidence before the Court, and had concluded that the Plaintiffs seemed to have a reasonable prima facie case which could lead to success, whilst the defences raised were not impressive.

[64] Unlike the Evans Marshall Case, the present case is not one where in the absence of an injunction, L.L. can take advantage of its breach, and enjoy the fruits of any time, effort or money which JADA has expended during the last 7 to 8 months of the Contract. The Construction Management Contract is akin to a contract of personal service in my view or a contract of agency. JADA has no vested interest under this Contract.

[65] The existing injunction is effectively enforcing the performance of the contract. It is a well established principle that the Court will not grant specific performance in contracts for personal services since it is undesirable, and in most cases impossible to compel an unwilling party to maintain continuous personal relations with another. This denial of relief has been extended to contracts of agency: Chinnock v Sainsbury (1860) 30 L.J. Ch. 409.

[66] In Jerome Francis v The Municipal of Kuala Lumpur [1962] 1 W.L.R. 1411, the Board of the Privy Council emphatically stated:

> "In their Lordships view, when there has been a purported termination of a contract of service a declaration to that effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the Courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the Court."

[67] It seems to me also that by prohibiting L.L. in the terms specified in the existing Order, the Court is implying or presupposing that there is a negative covenant or promise or stipulation in the Construction Management Contract. It is important therefore to consider the terms of the Contract, and in particular whether there is a

negative covenant or promise or stipulation harnessed to the Arbitration Clause Article 8.2, and the termination Clause Article 9.1.

THE ARBITRATION AND TERMINATION CLAUSES

[68] The Arbitration Clause has already been set out at paragraph 15, and the Termination Clause at paragraph 16 above.

[69] Learned Counsel for L.L. contended there was no need for the matters of concern set out in the numerous correspondence between L.L. and JADA to be referred to Arbitration by L.L. prior to the termination Notice, since there was no dispute between the parties. I do not accept his argument because the Arbitration Clause in Article 8.1 is wide, and those matters of concern would be trapped by the words "other matters in question between the parties to this Agreement."

[70] She contended further, that the JADA letter to L.L. dated 15th September 2006 (reproduced at paragraph 29 above), by stating ". . . if you do terminate the contract we will be looking to you for damages for breach of contract", conveyed that JADA would claim damages and not seek to enforce specific performance of the contract. In such circumstances it would be the claim for damages that should be referred to Arbitration, Counsel Ms. Augustin argued.

[71] I must confess that at the hearing I was not with Counsel in this submission, but on reflection now, the letter probably did communicate this.

[72] In any event, it is significant that JADA did not opt to refer the matter to Arbitration after receiving the letters of the 12th and 21st and 22nd September, despite it being clear that L.L. intended to repudiate the Contract had JADA not accepted the proposed variation of contract. Had JADA referred the matter to Arbitration then, it is very probable that either the Court or the Arbitration would have granted

injunctive relief to maintain the status quo while the Arbitration proceedings were pending determination.

THE ARBITRATION ACT

[73] Section 3 of The Arbitration Act Chapter 2.06 of the Revised Laws of St. Lucian (2001) states that:

> "An arbitration agreement, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the Court and shall have the same effect in all respects as if it had been made an order of Court."

[74] By virtue of Section 4 of the Act, the following Provisions 4 and 9 of Schedule 1 to the Act, are to be incorporated in the instant contract between the parties:

> "1 - 3. . .
>
> 4 "If the parties to an arbitration agreement between whom differences have arisen are unable to agree as to the terms upon which such differences shall be submitted to arbitration, any party may apply to a Judge in Chambers by petition to be served on the other party to settle the terms of reference.
>
> 5 - 8 . . .
>
> 9 The arbitrators or umpire shall have the same power as the Court to order specific performance of any contract other than a contract relating to land or any interest in land."

[75] Pursuant to Section 30 (1) of the Act. "The Court shall have, for the purpose of and in relation to a reference , the same power of making orders in respect of the matters set out in Schedule 2 as it has for the purpose of and in relation to an action or matter in Court."

[76] Provision 8 of Schedule 2 to the Act states that the Court in relation to Section 30 (1), may make orders for interim injunctions.

[77] Section 7 of the Act provides:

> "If any party to an arbitration agreement, or any person claiming through or under him or her, commences any legal proceedings in the Court against any other party to the arbitration agreement, or any person claiming through or under him or her, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

ARBITRATION BEFORE REPUDIATION

[78] Even where there has been a repudiation of the contract by L.L, this would not preclude either of the parties referring the repudiation to Arbitration in my view since Article 8.1 includes a **"breach thereof"** which "**shall be subject to and decided by arbitration."** It is quite clear to me therefore despite the assertions of

Mr. Tempro, (referred to at paragraph 51 of this judgment), that there is the need for the parties to go to arbitration, since it is obvious that JADA has a claim against L.L. for breach of contract, and the arbitration agreement between the parties state that it must be decided by arbitration in the absence of any mutual agreement otherwise between them.

[79] I have read the Contract as a whole so as to decide whether by implication there is a negative stipulation that L.L. cannot terminate the contract for substantial non-performance before arbitration. I am now of the view that the subsequent Article 9.1 in the Contract seems to override the provision for Arbitration in Article 8.1, given the width of the Arbitration Clause. This in my view precludes inferences or implications that L.L. is forbidden to act under Article 9.1 where Arbitration has not been claimed by JADA, or until the Arbitrator has determined the issue of non-performance between the parties. Consequently, though I may have thought otherwise at first impression, on careful consideration, I now conclude that on this Contract Article 9.1 permits L.L. to terminate for substantial non-performance before proceeding to arbitration.

[80] JADA has provided no reasons why this Court should not stay the proceedings in this Court so that this binding irrevocable Arbitration Agreement can be acted on by the parties. It is L.L. who has applied for the stay of proceedings, and L.L. has indicated that it is ready and willing to do all things necessary for the proper conduct of arbitration.

CONCLUSIONS

[81] This case is therefore one in which justice would be better served by an inquiry as to damages rather than by a decree of specific performance; and the appropriate remedy is damages in lieu of an injunction.

[82] Though there is no evidence led concerning the share capital or the financial status of L.L, based on the evidence before me, I am satisfied that L.L. would be able to pay JADA adequate damages in all the circumstances.

[83] Nevertheless, I shall require L.L. to give an undertaking guaranteeing the payment of damages of up to U.S.$4 million to satisfy any damages that may be awarded to JADA by an Arbitrator or by this Court.

[84] I therefore order that all further proceedings in this matter shall be stayed in this Court pursuant to Section 7 of the Arbitration Act Cap. 2:06, since the Applicant and the Respondent have by the Contract made in writing dated 13th January 2006, agreed to refer to Arbitration the matter in respect of which the proceedings have commenced.

[85] The Applicant, JADA Construction Caribbean Ltd shall pay to the Respondent The Landing Ltd, their costs occasioned by these proceedings, to be assessed by this Court.

DATED THIS 15TH DAY OF OCTOBER, 2006

_____

OLA MAE EDWARDS
HIGH COURT JUDGE