SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV2008/0158

BETWEEN

BARON GABRIEL VAN DER ELST

Claimant

AND

(1) LPA INTERNATIONAL, INC
(2) LANE PETTIGREW ASSOCIATES (ST.LUCIA) LTD
(3) JON LANE PETTIGREW

Defendants

Appearances:

Hilforde Deterveille QC and Nandy Deterville with him for the Claimant/ Respondent
Sydney A. Bennett QC with him Patricia Augustine for the Applicant, 2nd Defendant

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2011 April 13th
2012 July 26th

Decision

[1] **Belle J:** On the 20th October 2010 the Second Defendant Company in this matter Lane Pettigrew Associates (St. Lucia) Ltd applied for a stay of proceedings pursuant to Section 7 of the Arbitration Act, Cap 2.06 of the Laws of Saint Lucia. The grounds of the application were:

(i) That Article 8 of the Construction Management Agreement Constitutes an Arbitration Agreement between the Claimant and the Second Defendant.

(ii) That the Claim against the Second Defendant is within the scope of the Arbitration Agreement.

(iii) That the Defendant has not delivered any pleadings or taken any other step in the proceedings.

(iv) That there is no reason why the matter should not be submitted to Arbitration; and as otherwise stated in the Affidavit sworn to by Jon Lane Pettigrew of even date herewith and filed in support accompanying this application.

[2] Consistent with the grounds of the Application Jon Lane Pettigrew the President and Director of the Second Defendant stated in his affidavit that he believed that the matters raised in the Claimant's claim could be characterised as "Claims disputes or other matters in question between the parties to this agreement arising out of or in relation to this Agreement" and are therefore within the scope of the Arbitration clause at Article 8.1 of the Construction Management Agreement.

[3] Mr Pettigrew also stated that he was further advised and verily believed that the matters must be referred to Arbitration by the Claimant by way of the procedure agreed by the parties under section 8.2 of the Construction Management Agreement.

[4] Mr. Pettigrew insisted that the second Defendant was ready and willing to settle the claims and disputes with the Claimant by way of Arbitration and presently there was no reason why the claims and disputes should not be referred to Arbitration.

[5] Article 8.2 of the Construction Management Agreement states:

> *"Demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitation.*

[6] Article 10.1 of the Construction Management Agreement states that, *"unless otherwise provided, this Agreement shall be governed by the law of the place where the project is located.*

[7] There was no dispute that the project was located in Saint Lucia.

[8] In resisting this application the Respondent / Claimant's counsel made submissions and set out in his written submissions dated 12th April 2011, a summary of relevant facts in the following terms which the court adopts.

[9] The parties entered into an agreement whereby the Second Defendant agreed to be a construction manager for the Claimant in circumstances where the construction manager is not the contractor. The contract is dated 10th January 2003.

[10] Pursuant to Article 8.1 of the Agreement "claims, disputes or other matters in question between the parties in this Agreement arising out of or relating to this Agreement or reach thereof shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise."

[11] The Claimant filed a claim on 15th February, 2008. In that claim the Claimant claimed against the First Defendant for breach of a written architectural agreement, fraudulent misrepresentation and deceit. Against the Second Defendant the Claimant claimed breach of the construction management agreement, fraudulent misrepresentation and deceit, and against the third Defendant for breach of a presumed building contract, in that the third Defendant acted as contractor, and for fraudulent misrepresentation and deceit.

[12] The Claimant served the third Defendant/ Applicant on 13th May 2008 by leaving it with the secretary of the Second Defendant, Angela Gustave at its registered office and principal place of business in Massade, Gros Islet, Saint Lucia.

[13] The Third Defendant is the sole shareholder and director of the Second Defendant.

[14] The Claim was amended on 4th August 2008 and served on the legal practitioner for the third Defendant.

[15] The Claimant filed an application on 25th May 2010 for default judgment to be entered against all three defendants. In response the First and Second Defendants filed an application on 28th May 2010 to strike out the Claim against the First and Second Defendants on the ground that the claim was not served on either of them, further that the claim form has therefore expired.

[16] In Supplemental Submissions filed on April 26th 2011 The Claimant stated:

"The Claim Form, Statement of Claim and other documents were served on the second Defendant on 13th May 2008. The fact of the valid and effective service of Claim Form and Statement of Claim on the Second Defendant has been admitted by the Second Defendant (Applicants).

The next step taken by the Second Defendant was the application filed on 28th May 2010 to "strike out the claim"

One of the grounds of the application was that "the statement of claim has never been served on the first and second named Defendants." While it is the case that the Second Defendant claimed that the Amended Statement of Claim was not properly served on it, it is not the case that the Statement of Claim has never been served on the second named Defendant. No affidavit of the Second Defendant was filed in support of the application. It is also very clear that there is no allegation that the Claim Form has never been served on the Second Defendant. Mr Marcelo Blzano filed an affidavit on behalf of the First Defendant but no affidavit was filed on behalf of the Second Defendant.

On 4th August 2008 the Claimant amended the statement of claim and served the same on the legal practitioners for the Third Named Defendant.

The Claimant filed a Request for Judgment on 3rd December 2008- see paragraph 15 of the Affidavit of Jon Lane Pettigrew filed 13th September 2010 and paragraph 6 of Redhead J's Judgment dated 30th August 2010.

On 25th May 2010 the Claimant also filed an application for, among other things, a declaration that it is entitled to default judgment against the defendants.

On 30th August 2010 the Learned Judge in the Court below gave judgment on the Claimant's application. The Second Defendant appealed against the judgment and the Court of Appeal overturned the said judgment."

[17] The Issues in the matter are identified as follows:

(a) Whether the filing of the application on 28th May 2010 constitutes taking a step in the proceedings within the meaning of section 7 of the Arbitration Act?

(b) Whether the failure by the Second Defendant to file an application for a stay of the proceedings within 2 years and 5 months after the Claim Form was served on it means that the second Defendant was not ready and willing to do all things necessary for the proper conduct of the arbitration within the meaning of section 7 of the Arbitration Act?

(c) Whether in all the circumstances it is just, convenient and economical to leave the claim with the court.

[18] The process of instituting Arbitration proceedings pursuant to Arbitration Act Cap 2.06 of the Laws of Saint Lucia, 2001 is governed by section 7 of that Act. Section 7 states:

> *"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 step in the proceedings, apply to the Court to stay the proceedings, and the Court, if 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."*

[19] An arbitrator is a person appointed by the parties to settle a dispute. It differs from the adjudication by a judge of the High Court in that the litigant has no choice as to the judge who would preside in any case. Indeed any attempt to choose a judge would give rise to the allegation of forum shopping which is frowned upon in the judicial system since it tends to suggest a preference for a particular judge with the underlying suggestion of bias.

[20] In an arbitration the parties have decided to choose the person who would settle the dispute on the basis of qualification or and neutrality and possibly other reasons. Some of these reasons include confidentiality, since the arbitration is not done in public, and expediency and non-interference from public authorities being other reasons

[21] Counsel for the Applicant began his argument by referring to relevant principles. He referred to the authority Heyman & another v Darwins Limited (1942) AC 356 per Lord MacMillan at 370 where the Court observed that

> *"The first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the Arbitration Clause. Then sometimes the question is raised whether the Arbitration Clause is still effective or whether something has happened to render it no longer operative. Finally the nature of the dispute being ascertained, it having been held to fall within the terms of the Arbitration Clause, and the clause having been found to be still effective, there remains for the Court the question whether there is any sufficient reason why the matter in dispute should not be referred to Arbitration…."*

[22] Counsel for the Claimant did not attempt to refute the point that the dispute and claims made against the second Defendant fell within the Arbitration agreement. Counsel directed his argument toward the nature of the claim and the connection between the parties involved.

[23] In his argument the Claimant/ Respondent's counsel Mr Hilford Deterville Q.C noted that In Cunningham Reid v Buchanan –Jardine [1988] 1 WLR it was held that where the allegations of fraud are being made by the person seeking the stay the Court would normally grant the stay. However where the allegation of fraud was being made by the party opposing the stay, then the fact that it is alleged is not enough to cause the Court to grant a stay.

[24] It has been long held that persons who agree to a bargain should be held to their bargain. In similar vein those who agree to arbitration should be held to their agreement. This was the view taken by the English Court of Appeal in Cunningham Reid and Another v Buchanan –Jardine [1988] 1 WLR 678 where the objection to arbitration was that there was an allegation of fraud against the defendant.

[25] In Cunningham Bingham L.J stated:

> *"The parties in this case incorporated an agreement to arbitrate in their contract at a time when they did not know who would be claiming against whom and at a time when they no doubt reasonably anticipated that there would be no claim to arbitrate at all; it was an agreement which they made for better or worse, for richer or poorer, and the ordinary duty of the court is to give effect to the parties own agreement."*

[26] The learned Lord Justice did not see the allegation of fraud in this context as a good reason to refuse a stay so that the matter could be referred to arbitration in accordance with the agreement between the parties.

[27] In the same case Dillon L.J added his support to the view taken by Bingham L.J and stated that'

> *" A stay will be refused almost as of course if the party charged with fraud objects to a stay and wants to clear his name in open court, but I can see no escape from the conclusion that the House of Lords had laid down that , if the case is the other way around, that is to say, the party charged with fraud is seeking arbitration and the party charging fraud is opposing a stay, then, even if there is a strong prima facie case of fraud in specific respects made out, that is not enough by itself to warrant refusing a stay…"*

[28] Central to Counsel for the Applicant's arguments was that the Arbitration Clause is to be liberally construed and given the widest possible scope. He cited the case of Fiona

Trust & Holding Corp v Privalov (2007) 4 All E R 951 in which Lord Hofffman is reported to have said:

> *" In my opinion the construction of an Arbitration Clause should start from the assumption that the parties , as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The Clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the Arbitrator's jurisdiction."*

[29] In my view this aspect of the law was not disputed. But following on the trend of thought Counsel for the Applicant Mr Sydney Bennett pointed out that while there is a discretion for the court to refuse to stay an action which is brought in breach of an arbitration agreement, the Courts have approached the exercise of this discretion on the footing that in general, those who make a contract to arbitrate should be compelled to do so. Counsel cited two authorities in support of this proposition, Channel Tunnel Group Limited & Another v Balfour Beatty Construction Limited & Another (1993) A C 334 and Etri Fans Limited v NMB UK Limited (1997) 1 WLR 1110.

[30] These cases supported the proposition that in the ordinary case, exercising its discretion judicially, the Court has no option but to grant a stay to an applicant who can fulfil the statutory requirements. The proper exercise of discretion would require the Court to grant a stay in order to cause the parties to abide by their agreement to resolve their disputes by Arbitration. I find this statement of the law most persuasive.

[31] Apart from the issue of fraud being alleged the parties argued about the effect of the multiplicity of claims and the undue delay in indicating an interest in Arbitration. The matter of delay is tied to the final matter raised, and not addressed by the applicant which is the effect of Article 8.2 of the Construction Management Agreement already referred to. Finally the Claimant alleged that the Second Defendant had taken a step in the proceedings.

[32] An issue related to the multiplicity of claims namely the question of lifting the corporate veil was also raised but this argument was rejected by counsel for the Applicant on the basis that there was no evidence that the companies in this case were a mere façade for the true facts, which are that the Second Defendant should enter into a contract

with the Claimant. Counsel cited Woolfson v Strathclyde Regional Council [1978] SLT 159 HL and Yukong Lne Ltd of Korea v Rendsburg Investments Corporation of Lberia and Others (No.2) [1998] 1 WLR 294.

[33] I find that it is doubtful that an argument about the connection between the parties would influence a court in refusing a stay since the claimant would have been aware of the nature of any connection between the defendants when he entered into contracts with them. Consequently even if it may appear more convenient to try all matters before the court it has to be presumed that the decision to provide for arbitration in the Construction Management Contract was deliberate because of the technical nature of the issues involved in such a contract.

[34] The Respondent Claimant also argued that since Claims of multiple nature would arise and they are inextricably linked a referral to arbitration would result in severing the claim against the construction manager while the other claims go before the court.

[35] In Bulk Oil (Zug) A.G v Trans-Asiatic Oil Ltd S.A. [1973] Vol 1 LI. LR 129 the court held that, "a mere balance of convenience is not enough," to cause the court to deny an application for a stay and referral to arbitration since it was essential that the court should give full weight to the prima facie desirability of holding the plaintiffs (parties) to their agreement.

[36] Counsel for the Applicant argued that the court went on to recognise the countervailing principle that a multiplicity of proceedings is highly undesirable, but explained that there were two reasons why this was so. The most important reason was that the risk that two different tribunals dealing with the same subject matter may reach different conclusions. The second and the less important reason was that a multiplicity of proceedings leads to a substantial increase in costs; usually to substantial delay and generally to inconvenience.

[37] In my view that Claimant was not able to discharge the burden of proving that having two disputes heard in court while another is heard by an arbitrator would result in conflicting decisions. Counsel argued that the issue involved did not overlap but even if they did Courts have stayed proceedings so that matters could be referred to arbitration even where there are such overlapping issues.

[38] It is also instructive that in Bulk Oil Kerr J held that in exercising its discretion where there are multiple claims the court would consider whether a stay of the litigation involving one of these disputes would be liable to cause substantial injustice to the party which wants them to be litigated together. In this connection the court will take into consideration whether or not the party seeking to litigate both disputes together is in some way responsible for the dilemma in which he finds himself.

[39] Before dealing with the issue of delay I consider the other matter of central importance which is whether the applicant took some step in the High Court litigation which tends to show that he has chosen to proceed by litigation or is ambivalent or at least is not decisive about his choice of arbitration.

[40] The facts are central to this argument. What happened in this case was that the Claim was filed in 2008. In 2009 an amended statement of claim was filed. It was on the basis of this amended statement of claim that the Claimant/ Respondent in these proceedings, applied to the court for judgement to be entered against the 2nd Defendant/ Applicant. The 2nd Defendant then responded with two applications. One attacked the Amended Statement of Claim on the basis that the Amended statement of Claim had not been properly served. The other application was to the effect that the Claim should be stayed since the Claimant and the Applicant had agreed to refer the matter to arbitration. The latter application was made in 2010.

[41] The Respondent/ Claimant argues that the Applicant took a step in the proceedings and should not be granted a stay. The step they argue was applying for the Amended Statement of Claim to be struck out. A fair construction of Section 7 of the Arbitration Act implies that if the application to strike out the Statement of Claim is a step in the proceedings then the stay should not be granted. If it is not a step then the court still had the discretion to stay the court proceedings.

[42] An application can be seen as a step in the proceedings. It was so held in Eagle Star Insurance Co. v Yuval Insurance Co. Ltd. (1978) Lloyd's Law Reports 357 case. However, if the application is disaffirming of the proceedings then it should not be seen as a step in the proceedings. In this case the application obviously was a disaffirmation action rather than an affirmation of the proceedings. In Eagle Star an application to strike out a writ was held to be a disaffirming act.

[43] The case could not proceed without the amended statement of claim in the Applicant's view. There was no obligation to state why the case could not proceed without the amended statement of claim. Indeed if their view was that the Respondent had no viable case against them prior to the filing of the amended statement of claim then there was no need for them to take any step in the matter other than to apply to strike out.

[44] The amended statement of claim was the last act of the Claimant in institution of proceedings against the Applicant. It is at that time that the applicant took steps to ask for a stay of proceedings. Was this too late? The Respondents seem to be arguing that this depends on how one interprets the time at which the proceedings were instituted. The Applicant takes the view that it does not have to recognise these proceedings until they are properly instituted. Once they were properly instituted and the Applicant filed an acknowledgment of service they took steps to ask for a stay. I think this approach makes sense.

[45] While the Applicant would have been aware of an attempt to institute proceedings against them in 2008, it did nothing to affirm the validity of those proceedings. It merely took steps to stop them not by arguing against the facts but by questioning the very procedure by which they were instituted. In my view this is consistent with the authorities cited and discussed at the hearing as a disaffirming action. See **Bilta UK Limited (In Liquidation) v Nazir 7 Ors** (2010) Bus LR 1634 and **Patel v Patel** (2000) QB 551.

[46] What may complicate this matter is that the Court of Appeal having overturned the decision of Redhead J (Ag) that the service of the Amended Statement of Claim was good and remitting the matter to the high court for case management, the issue of earlier proceedings was left hanging. But this affects the calculation of the date of the commencement of the proceedings which relates to the issue of delay in affirming an interest in Arbitration.

[47] The fact is that the application for a stay has to be prior to a step in the proceedings and at the earliest opportunity. The choice of the timing for the stay is integrally

connected to 2nd Defendant's recognition of a viable case against them. In those circumstances I do not think that a two and a half year delay is too long. Indeed there was no need to affirm the proceedings earlier if they had no interest in the alleged dispute at an earlier time.

[48] In addition to this, counsel argues and I agree, that this provision is important for the person who perceives that there is a dispute. That person was the Respondent and that person instituted the proceedings before the court rather than in accordance with the agreement.

[49] The final issue raised in argument was whether the timing of the application was calculated to disqualify the Claimant's action because the Article 8.2 of the Construction Management Agreement states:

> *"In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitations."*

[50] Consequently counsel for the Claimant submits that since the Second Defendant argues that it is for him to make the demand, assuming but no admitting that the Claimant has to make the demand and the Second Defendant does not, if the stay is granted the Claimant will now be required to make a demand for arbitration almost 5 years after the date on which the cause of action accrued. This, counsel argues is well beyond the prescription period of three years stipulated in Article 2122 of the Civil Code and the effect of prescription being described in Article 2129 as extinguishing the debt and preventing any action from being maintained. This means that the arbitrator will have no choice but to dismiss the Claimant's claim under Article 8.2 of the Construction Management Agreement at the outset for failure to make the demand within the period of prescription. The fact that this possibility exists means that the Claimant will suffer severe prejudice if the stay is granted.

[51] Article 2122 of the Civil Code states:

"The following actions are prescribed by three years;

1. *For seduction, or lying in expenses*
2. *For Damages resulting from delicts or quasi delicts whenever other provisions don't apply.*
3. *……."*

[52] Article 2129 states:

> *" in all the cases mentioned in articles 2111,2121, 2122, 2123 and 2124, the debt is absolutely extinguished and no actions can be maintained after the delay for prescription has expired except in the case of promissory notes and bills of exchange, where prescription is precluded by a writing signed by the person liable upon them."*

[53] I therefore agree with the Claimant's submission and I would add that for two reasons the court should exercise its discretion to refuse the application for a stay. Firstly the court does not act in vain, and a stay for the Claimant to demand arbitration merely to be told that his application is statute barred would amount to acting in vain. Secondly when the court has to exercise its discretion in matters involving choice of forum as in forum conveniens case the approach of the law is as stated by Gordon JA in IPOC International Growth Fund Limited v L V Finance Group Limited and others BVI Civil Appeal Nos. 20 of 2003 and 1 of 2004 (unreported) delivered 19th September 2005 at para. 27 paraphrasing the governing principles in forum non conveniens cases stated:

> *"The starting point, or basic principle is that a stay on the grounds of forum non conveniens will be granted where the court is satisfied that there is some available forum for the trial of the action. In this context, appropriate means more suitable for the interest of all the parties and to the ends of justice"*

[54] Counsel for the Applicant refers to Ocean Conversion v Attorney General (2010) unreported as a case of possible injustice being caused by imposing a stay where the issue in dispute does not fall under the Arbitrator's jurisdiction. In similar vein the arbitrator can have no jurisdiction after the statutory limitation period of 3 years, imposing a stay in this case would amount to a similar injustice. Indeed the procedure for demanding arbitration is no longer operative and cannot be imposed on the Claimant. See Heyman's case above.

[55] I am also guided by the last few phrases in Section 7 of the Arbitration Act which state:

> *"…. if 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."

[56] I do not see how the court could be satisfied that it is in the interest of justice to force the Claimant to refer the matter to arbitration at this stage even if the Claimant is partly responsible for the fact that there is an arbitration agreement which he is presumed to have entered into willingly. The point is however that after more than 5 years the agreement is now of no use to either party because of the law of prescription in Saint Lucia. The ends of justice therefore cannot be attained by demanding an arbitration which no arbitrator can conduct. In the circumstances I decline to order a stay of proceedings to enable the matter to be referred to arbitration.

[57] The application for a stay is accordingly dismissed with costs awarded to the Claimant/Respondent pursuant to part 65 of the CPR 2000.

Francis H V Belle
High Court Judge