EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
CLAIM NO. BVIHCV (COM) 2012/0135

BETWEEN:

APPLIED ENTERPRISES LIMITED
Claimant/Applicant

AND

INTERISLE HOLDINGS LTD.
First Defendant/First Respondent

QUORUM ISLAND (BVI) LIMITED
Second Defendant/Second Respondent

BLENHEIM TRUST (BVI) LIMITED
Third Defendant/Third Respondent

Appearances: Mr Paul Dennis QC, Ms Willa Tavernier and Ms Nadine Whyte for the Claimant

Mr Robert Nader for the first Defendant

The second and third Defendants were not represented and did not appear

JUDGMENT

(2013: 17, 21 June)

(Section 6(2) Arbitration Ordinance 1976 – approach to be taken when application for a stay is met with an application for summary judgment by claimant – **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd**[1] considered – **Hayter v Nelson**[2] followed)

[1] **Bannister J [Ag]:** This is an application by the first defendant, Interisle Holdings Ltd, a BVI registered co ('Interisle'), for a stay of these proceedings on the grounds that the agreement upon which they are based ('the Agreement') contains an arbitration clause which, says Interisle, requires this particular dispute to be referred to arbitration. It is met with an application by the Claimant, Applied Enterprises Limited ('Applied') for summary judgment.

[1] [1993] 1 All ER
[2] [1990] 2 Lloyds Rep 265

[2] Applied is a Hong Kong registered company which, at the time when the Agreement was entered into, owned the entire issued share capital in the second Defendant, Quorum Island BVI Ltd ('Quorum'). There were 10,000 shares in issue. Quorum was the owner of a substantial holding of land on Beef Island, Tortola, upon which it was hoped to develop a resort, marina and golf course ('the site').

[3] On 2 December 2005 Quorum entered into a development agreement with the Virgin Islands Government to develop the site and submitted planning applications on 6 August 2006. On 11 August 2006 it entered into Agreement with Applied and Interisle.

[4] The underlying intention behind the Agreement was for Interisle to acquire 50% of Quorum's stock from Applied, but it was structured to achieve this by way of a redemption by Applied of 50% of its holding with a simultaneous allotment by Quorum to Interisle of the same number of shares. The nominal price payable by Interisle for the allotment was US$21 million, but it was open to Interisle to satisfy at least US$13 million of that sum by the payment of 50% (US$7.5 million) direct to Applied. That option was subject, however, to the agreement of the provider of the Development Loan from which, at any rate initially, it was envisaged by all parties that the payments would be made. The terms were that there was to be an initial payment of US$8 million, followed by two further payments, secured by a promissory note, of US$2.5 million (or a direct payment, with the lender's consent, to Applied of US$1.25 million) and US$10.5 million (or a direct payment to Applied of US$5.25 million. The initial payment, US$8m, was paid by Interisle, upon which 5,000 shares were allotted and issued to Interisle, in the first place conditionally. That condition was fulfilled in June 2007 and since then Interisle has been an equal shareholder with Applied in Quorum, with equal board representation. Qourum is thus deadlocked.

[5] The second instalment was paid in December 2007, which left a balance of US$10.5m (or US$5.25m if payment was to be made to Applied direct). The arrangements were subsequently amended to take account, it would appear, of the difficulties which Interisle was having in raising finance after the 2008 credit freeze and on 9 April 2010 a final due date of 9 April 2011 was agreed for the payment of the final amount. The amendments under which this was done, unlike the Agreement itself, contained no reference to the payment being funded from any Development Loan. The final payment has not been made.

[6] In those circumstances Applied relies upon provisions in the Agreement which provide for Interisle to surrender the shares for which it has not paid (2,500 out of the 5,000 which it currently holds) and for those shares to be reallotted to Applied.

In addition, upon the failure of Interisle to pay Quorum the balance of the redemption price (or of Interisle to pay Applied 50% of that balance) Applied became entitled to an allotment of additional shares in Quorum such that it would become holder of 80.17% of the entire issued share capital of quorum and Interisle's holding would be correspondingly reduced to 19.63%.

[7] Despite demand being made, Interisle has refused to surrender the certificate for the outstanding 2,500 shares and, since Qourum is deadlocked, Applied has no means of bringing that about, or of effecting the other changes to which I have referred, without the assistance of the Court or the making of an arbitral award in its favour. Applied therefore commenced the present proceedings on 18 December 2012, seeking appropriate relief, including an order for the rectification of Quorum's register of members to reflect Applied's entitlements following Interisle's alleged default. On 5 February 2013 Interisle applied for a stay in reliance upon an arbitration clause contained in the Agreement. On 9 April 2013 Applied applied for summary judgment. Quorum has, for obvious reasons, played no active part at all.

[8] The two applications have come on together and in accordance with the practice which had developed in England and Wales prior to the enactment in that jurisdiction of the 1996 Arbitration Act, Applied's summary judgment application was heard first, on the assumption that should it be determined in that application that Interisle had no real prospect of defending the claim, it would follow that there was no dispute capable of going to arbitration and therefore neither reason nor grounds for granting a stay.

[9] The arbitration clause in the agreement reads as follows;

> 'Any dispute relating to this agreement or the performance by the parties of their respective obligations under this Agreement that is not resolved after the parties' good faith attempt at mediation and that does not require for resolution the joinder of persons that are not a party to this Agreement will be finally settled by arbitration. If such a dispute arises, either party hereto may initiate arbitration proceedings by serving on the other party a demand for arbitration. Any such arbitration shall be conduction by two (2) arbitrators selected from the American Arbitration Association roster of arbitrators and an umpire selected by both arbitrators.'

[10] Mr Paul Dennis QC, who appeared together with Ms Willa Tavernier and Ms Nadine Whyte, for Applied, submits that the arbitration provision has no

application. He says that one of Applied's claims for relief is an order for rectification of Quorum's register of members and that is something which can be ordered only by the Court. While the Court may order rectification of a company's register of members pursuant to s 43 of the Business Companies Act, 2004, there is no reason why such an order should not be made by an arbitral tribunal: **Artemis Trustee Lt v KBC Partners**[3]; so there is nothing in that point.

[11] Next, Mr Dennis says that before rectification can be ordered, Quorum's registered agent must be a party to the proceedings in which the order is made. Since the Registered Agent, which is the third named Defendant, is not party to the arbitration agreement, an award of rectification would thus, submits Mr Dennis, be ineffective. There is nothing in this point either. The award would be against Quorum. There are ample powers for the Court, on application made, to ensure that Quorum's register of members was altered if Quorum did not act, without the need for it to have been party to any arbitration in which such an award was made.

[12] That, however, does not exhaust Mr Dennis' points in objection to the application for a stay. He relies upon the terms of section 6(2) of the Arbitration Ordinance, 1976 ('section 6(2)', under which Interisle's application is made:

> 'If any party to an arbitration agreement, other that a domestic arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed of that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.'

[13] Mr Dennis submits that in this case the Court should be satisfied that *'there is no dispute between the parties with regard to the matter agreed to be referred,'* so that section 6(2) has no application.

[3] BVIHCV (COM) 137 of 2012, 12 March 2013

[14] Mr Dennis bases himself on **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd**[4] at 680:

> 'The appellants submit that even if s1 of the 1975 Act applies to cl 67, a stay should nevertheless be refused because "there is not in fact any dispute between the parties with regard to the matter agreed to be referred'. In summary, they say that there is only one ground upon which the respondents could even attempt to justify their stance in threatening to stop work whilst at the same time purporting to keep the contract in existence, namely that the matter falls within the civilian doctrine of *'l' exception d'inexécution'*, that it is common ground that this doctrine is capable of exclusion by express provision in the contract and that such an express exclusion is to be found in the words of cl 67(2), which provide that 'the Contractor shall in every case continue to proceed with the Works with all due diligence...' Thus, according to the appellants, the respondents really have no case at all, and since they have no case there cannot be any 'dispute between the parties with regard to the matter agreed to be referred'.
>
> It will be recalled that this qualification on the right of the defendant to a mandatory stay had its origin in the MacKinnon committee report (Report of Committee on the Law of Arbitration (Cmd 2817 (1927)), under the chairmanship of MacKinnon J, para 43 of which read:
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> *'Our attention has been called to a point that arises under the Arbitration Clauses (Protocol) Act, 1924. Section I of that Act in relation to a submission to which the protocol applies deprives the English Court of any discretion as regards granting the stay of an action. It is said that cases have already not infrequently arisen, where (e.g.) a writ has been issued claiming the price of goods sold and delivered. The defendant has applied to stay the action on the ground that the contract of sale contains an arbitration clause, but without being able, or condescending, to indicate any reason why he should not pay for the goods, or the existence of any dispute to be decided by arbitration. It seems absurd that in such a case the English Court must stay the action, and we suggest that the Act might at any rate provide*

[4] [1993[1 All ER 664 at 680

that the Court shall stay the action if satisfied that there is a real dispute to be determined by arbitration...'

In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the court under RSC Ord 14 to givew summary judgment in favour of the plaintiff where the defendant has no arguable defence. If the plaintiff to an action which the defendant has applied to stay can show that there is no defence to the claim, the court is enabled at one and the same time to refuse the defendant a stay and to give final judgment for the plaintiff. This jurisdiction, unique so far as I am aware to the law of England, has proved to be very useful in practice, especially in times when interest rates are high, for protecting creditors with valid claims from being forced into an unfavourable settlement by the prospect that they will have to wait until the end of an arbitration in order to collect their money. I believe however that care should be taken not to confuse a situation in which the defendant disputes the claim on grounds which the plaintiff is very likely indeed to overcome, with the situation in which the defendant is not really raising a dispute at all. It is unnecessary for present purposes to explore the question in depth, since in my opinion the position on the facts of the present case is quite clear, but I would indorse the powerful warnings against encroachment on the parties' agreement to have their commercial differences decided by their chosen tribunals, and on the international policy exemplified in the English legislation that this consent should be honoured by the courts, given by Parker LJ in Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in liq) [1989] 3 All ER 74 at 78, [1990] I WLR 153 at 158-159 and Saville J in Hayter v Nelson and Home Insurance Co [1990] 2 Lloyd's Rep 265.

Approaching the matter in this spirit I must ask whether the only matter embraced in the writ, namely the question whether the respondents should return to work, is the subject of a dispute. The fact that there are numerous areas of dispute on the events leading up to the respondents, threat to leave the site does not of course mean in itself that there is a dispute about the central issue, namely whether the doctrine of *'l'exception d'inexécution'* has been ousted and if so whether the facts justified its

> application. That the doctrine is a part of the international trade law which is made applicable to the contract by cl 68 is common ground, and it is also common ground (at least for the purposes of these proceedings) that the doctrine is capable of being excluded by consent. Beyond this, however, the parties are sharply at odds, and so also are their experts on foreign law. It is suggested that the court has sufficient material, in the shape of the experts' affidavits, to decide the matter here and now for itself. I am quite unable to agree. Whether the panel and the arbitrators will need help from expert witnesses, or whether they will feel able to use their own knowledge and experience to decide the point on their own, I do not know. What does seem to me absolutely clear on this is that an English court could not properly conclude in the light of affidavit evidence alone that the appellants' claim is so unanswerable that there is nothing to arbitrate. There would have to be cross-examination of the experts, and once one reaches this point it is perfectly obvious that the qualifying words in s 1 do not apply, and that there is no reason to withhold a stay.'

[15] **Channel Tunnel** was decided under section 1 of the English Arbitration Act 1975, which was in the same form as section 6(2) and which contained the words to which reference has been made above. Those words have been omitted from the English Arbitration Act 1996, the provision currently in force in England and Wales, but it is the case that **Channel Tunnel** was decided under a provision in identical terms to out section 6(2).

[16] Mr Dennis submits that he is in a position to show, on his application for summary judgment, that Interlisle has no defence to Applied's claim and, in reliance upon what Lord Mustill said in **Channel Tunnel** about the exception to the otherwise mandatory stay being regarded as being the opposite side of the coin to the Rules governing summary judgments, submits that the stay should be refused on the grounds that Interisle has no defence to the claim for surrender of the 2,500 shares and for adjustment of the parties' shareholdings pursuant to the contractual arrangements which I have mentioned earlier.

[17] Mr Dennis says, in short, that the parties ended up on 9 April 2010 by negotiating an unconditional promise by Interisle to pay the balance of US$10.5m/5.25m by 9 April 2011; that that money has not been paid and that the contractual consequences must follow. Mr Nader, who appears for Interisle on these applications, relies, first, upon clause 18.2 of the Agreement. Clause 18.2 provides as follows:

> 'If the performance by any party of any of its obligations shall be in any way prevented, interrupted or hindered in consequence of an Act of God, war, civil disturbance, riots, strike, lockout, fire, earthquake or other natural calamities, legislation or restriction of any government or other authority, or any other circumstances beyond the control of such party, the obligations of the party concerned shall be wholly or partially suspended during the continuance and to the extent of such prevention, interruption or hindrance; provided, that if the reason for such suspension shall continue for 6 months and be applicable to only one party, the other party hereto may by written notice terminate this Agreement and buy out at fair market value all the Common Stock of the party affected by the event of force majeure.'

[18] Mr Nader says that performance by Interisle of its obligation to pay the US$10.5/5.25m has been hindered by circumstances beyond its control, that is to say the general economic downturn and difficulty of obtaining credit.

[19] Mr Dennis relies upon **Tandrin Aviation Holdings Ltd v Aero Toy Store LLC and another**,[5] (where the defendant was unrepresented), as authority for the proposition that changes in economic circumstances or market conditions are not a *force majeure* event. So that Interisle's reliance upon clause 18.2 of the Agreement, he submits, is unsustainable.

[20] It seems to me, however, that each *force majeure* clause must be construed upon its particular wording in the context of the contract within which it appears and against the relevant surrounding circumstances, in order to come to a decision what a reasonable person would have understood the parties to have meant. Clause 18.2 is in very wide terms and it seems to me far from obvious that it cannot be understood as excluding inability to obtain credit – particularly in a case where, initially at any rate, it was envisaged that the payment would be funded by means of the proposed Development Loan.

[21] Mr Nader also relies upon the principle of contractual frustration. This is not the appropriate place for me to go into any detail as to the many factors which he would wish to pray in aid, but in very general terms they are matters which, he would wish to say, show that the project has been so radically affected by external circumstances that it is not longer the project for which the parties made their original arrangements. Mr Dennis QC relies upon powerful authority to the effect

[5] [2010] EWHC 40 Comm

that where a party is not prevented from performing its obligations, the contract cannot be said to have been frustrated, but Mr Nader, in relying upon the doctrine of frustration, is saying not merely that a particular obligation cannot be performed in the present circumstances but that the project as originally envisaged is incapable of being brought to fruition.

[22] Mr Nader would also wish to contend that performance of his client's obligations is suspended by non-fulfilment of certain conditions precedent to which the Agreement was originally subject. Mr Dennis QC says that these conditions have been waived or superseded and that the Agreement has long since become unconditional. This seems to me to be a matter which cannot be resolved by choosing between mere assertions. It demands an inquiry into the course of dealing between the parties.

[23] Despite Mr Dennis' powerful submissions, it seems to me that a summary judgment application is not the proper context for resolving any of these issues, each of which is fact sensitive. I cannot accept that Interisle has no real prosoect of defending the claim if the matter goes to trial. In my judgment Mr Dennis does not show that he is entitled to summary judgment against Interisle.

[24] That leaves Mr Nader's stay application. Strictly speaking, a refusal to give summary judgment on Applied's application disposes of the need to say any more about the stay application, because it must follow in any event from my refusal to give judgment in favour of Applied that there is a dispute between the parties within the meaning of section 6(2), with the consequence that I have no jurisdiction to refuse a stay.

[25] Given, however, that the matter was fully argued and because it is of general importance, I think that I should give my opinion upon what may be described as the **Channel Tunnel** issue.

[26] In my view, the words in section 6(2) *'there is not in fact any dispute between the parties with regard to the matter to be referred'* mean no more than what they say – that there is no dispute. Once, however, a defendant who is *prima facie* entitled to the benefit of an agreement to arbitrate indicates that he is not liable to the claimant as claimed, it is impossible, in my view, to say that there is no dispute. The fact that it may be possible to see that the dispute can have only one outcome does not, I think, entitle the Court to say that the dispute is not a dispute. That is what Saville J (as he then was), said in the passage in **Hayter v Nelson**[6] that was

[6] [1990] 2 Lloys Rep, 265 at 268-269

cited in **Halki Shipping v Sopex Oils**[7] and to which I was referred. I should set the passage out in full:

> 'The proposition must be that if a claim is indisputable then it cannot form the subject of a "dispute" or "difference" within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration. To my mind such propositions have only to be stated to be rejected-as indeed they were rejected by Mr. Justice Kerr (as he then was) in The M. Eregli ([1981] 3 All ER 344), in terms approved by Lords Justices Templeman and Fox in Ellerine v. Klinger. As Lord Justice Templeman put it ([1982] 2 All ER 737 at 743, [1982] 1 WLR 1375 at 1383):- "There is a dispute until the defendant admits that the sum is due and payable." In my judgment in this context neither the word "disputes" nor the word "differences" is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that the dispute did not in fact exist. Because one man can be said to indisputably right and the other indisputably wrong doe not, in my view, entail that there was therefore never any dispute between them. In my view this ordinary meaning of the word "disputes" or the word "differences" should be given to those words in arbitration clauses. It is sometimes suggested that since arbitrations provide great scope for a defendant to delay paying sums which are indisputably due, the Court should endeavour to avoid that consequence by construing these words in arbitration clauses so as to exclude all such cases, but to my mind there are at

[7] [1998] 2 All ER 23

least three answers to such suggestions. In the first place the assumption is made that the arbitrations are necessarily slow processes, but whatever the position in the past, I cannot accept that as a general or universal truth today. As Mr. Justice Robert Goff (as he then was) pointed out in The Kostas Melas ([1981] 1 Lloyd's Rep 18) arbitrators have ways and means (in particular by making interim awards) of proceeding as quickly as the Courts - indeed in that particular case quicker than any Court could have acted. If a Claimant can persuade the arbitral tribunal that in truth there is no defence to his claim (ex hypothesi not on the face of it a difficult task if the claim is truly indisputable) then there is no good reason why that tribunal cannot resolve the dispute in his favour without any delay at all. In the second place, and perhaps more importantly, it must not be forgotten that by their arbitration clause the parties have made an agreement that in place of the Courts, their disputes should be resolved by a private tribunal. Even assuming that this tribunal is likely to be slower or otherwise less efficient than the Courts, that bargain remains - and I know of no general principle of English law to suggest that because a bargain afterwards appears to provide a less satisfactory outcome to one party than would have been the case had it not been made or had it been made differently, that bargain can be simply put on one side and ignored. In the third place, if the Courts are to decide whether or not a claim is disputable, they are doing precisely what the parties have agreed should be done by the private tribunal. An arbitrator's very function is to decide whether or not there is a good defence to the claimant's claims- in other words, whether or not the claim is in truth indisputable. Again, to my mind, whatever the position in the past, when the Courts tended to view arbitration clauses as tending to oust their jurisdiction, the modern view (in line with the basic principles of the English law of freedom of contract and indeed International Conventions) is that there is no good reason why the Courts should strive to take matters out of the hands of the tribunal into which the parties have by agreement undertaken to place them. For these reasons I am satisfied that the present proceedings are in respect of a matter agreed by the parties to be referred within the meaning of s.1(1) of the Arbitration Act, 1975. A difference exists between them in respect of their rights and

obligations arising out of the agreement to which the arbitration clause refers.'

[27] In my respectful opinion, the reasoning of Saville J is impeccable and unanswerable. It was indorsed by Lord Mustill in **Channel Tunnel**:[8] Lord Mustill identified[9] the relevant distinction as being between the situation where the defendant *'is not really raising a dispute at all'* and, in short, disputes. What is meant by *'not really raising a dispute at all'* it is not necessary to explore further, because Lord Mustill made clear that a dispute which a claimant is *'very likely indeed'* to overcome will still qualify as a dispute, or, as Lord Mustill put it at the end of the citation above, give rise to something to arbitrate. The words at page 680j of the decision and which I have summarized in paragraph [16] above, so far from approving the practice of meeting stay applications with applications for summary judgment, are, in my view, no more than descriptive of a practice which Lord Mustill was in fact deprecating except in cases where the defendant was not really raising a dispute at all.

[28] It seems to me that the correct approach, in cases where a defendant applies for a stay under section 6(2) and the claimant responds with an application for summary judgment, is not to begin, as was done in the present case, by deciding whether, in the context of the summary judgment application, the defendant would have a real prospect of success were the matter to go to trial. The correct approach is to ask, first, whether the claim is within the scope of the arbitration agreement and, if it is, whether the defendant disputes it. If it is and if he does, then it seems to me that the Court has no alternative but to decline jurisdiction, grant the stay and decline to entertain the application for summary judgment.

Conclusion

[29] In this case it is not suggested that the claim made in the statement of claim is not covered by the arbitration agreement and it is clear that Interisle disputes it. It cannot be said without abusing language that Interisle is not really raising a dispute at all. In my opinion, therefore, it is entitled to a stay irrespective of the outcome or likely outcome of any summary judgment application.

Commercial Court Judge
21 June 2013

[8] at page 681c
[9] at page 681b