THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2016/0005

BETWEEN

CANISBY LIMITED

Appellant

and

FLAT POINT DEVELOPMENT LIMITED

Respondent

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. John Carrington	Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Anthony Astaphan, SC and Ms. Rika Bird for the Appellant
Mr. Frank Walwyn, Ms. Jacqueline Walwyn and Mr. Wesley George for the Respondent

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2016: October 27;

2017: February 13.

Interlocutory appeal – Application by defendant in court below to stay proceedings in favour of arbitration – Construction of arbitration clause in Preliminary Sale Agreement – Determination of existence of a dispute between the parties with respect to a matter to be referred to arbitration – Role of the court and the arbitration tribunal with respect to disputes – Whether the master erred in finding that the appellant had failed to discharge the burden of showing there was no dispute between the parties

The appellant, a Manx company, entered into a written agreement (" Preliminary Sale Agreement") as joint purchaser with S.I.T.I. srl of Milano, Italy with the respondent, an Antiguan company, for the purchase of a resort in Antigua to be constructed by the respondent.

The appellant commenced proceedings against the respondent in the High Court contending that the respondent had failed to complete its obligations under that agreement, in particular by May 2009 it failed to submit the quarterly work-in-progress report signed by the architect.

The Preliminary Sale Agreement contained an arbitration clause which provided, inter alia, that any issues between the parties regarding its interpretation, execution and termination shall be dealt with through an arbitration procedure. The respondent applied in accordance with section 5 of the Antigua Arbitration Act for, inter alia, a stay of the claim for the parties to submit to arbitration.

In response to this application, the appellant contended that there was no dispute or controversy between the parties and thus the need for arbitration did not arise and that the jurisdiction of the High Court was properly engaged.

The respondent's application was heard by the master who ruled that the causes of action pleaded in the statement of claim were "matters agreed to be referred" under section 5 of the Arbitration Act. He found that there was a dispute between the parties as to whether the respondent had breached any of the specific terms of clause 9 of the Preliminary Sale Agreement and further whether certain actions by the appellant or its principals may have been the source of any non-performance by the respondent. He concluded that it was for the arbitration panel to determine this dispute and stayed the proceedings accordingly.

The appellant appealed the decision of the master with leave of the Court of Appeal.

Held: dismissing the appeal and awarding costs to the respondent to be assessed by a master of the High Court if not agreed by the parties within 21 days, that:

1. Arbitration agreements generally establish as a prerequisite to the right to arbitrate that there must be controversy, that is, a dispute or difference between the parties regarding a matter covered by the arbitration agreement. In order to determine whether there is a controversy, firstly the precise nature of the dispute should be ascertained; secondly, it should be determined whether the dispute is one that falls within the arbitration clause; and thirdly the court should determine whether there is a sufficient reason why the matter in dispute should not be referred to arbitration. The onus on the second and third matters is on the party resisting the referral to arbitration.

   Ocean Conversion Limited v Attorney General of the Virgin Islands BVIHCVAP2007/0330 (delivered 12th January 2009, unreported) followed; **Heyman and Another v Darwins Limited** [1942] AC 356, applied.

2. It is within the Court's jurisdiction to determine as a preliminary issue whether a controversy exists. The discretion or obligation to grant a stay therefore does not arise until there has been a preliminary finding that there is in fact a dispute between the parties with regard to the matter to be referred to arbitration and a secondary determination that there is no sufficient reason why the matter should not be referred to arbitration.

   Section 5, **Arbitration Act**, Cap. 33, Revised Laws of Antigua and Barbuda, 1975 applied.

3. A court must bear in mind the following principles when making a determination as to whether a dispute exists: (i) there is a dispute unless and until the defendant makes a clear admission of the claim; (ii) a dispute or difference may exist even if it can be immediately determined beyond doubt which side is right; (iii) it is the function of the arbitrators and not the court to determine whether or not the claim is in truth disputable, i.e. whether the defendant has a good defence to the claim; and (iv) the court's function is to distinguish between whether the defendant is raising a dispute at all (that is, he has not admitted the claim) which is a question for the court itself and whether the issue merely is whether the claimant is very likely to overcome the defence raised by the defendant (which is properly a question for the tribunal).

   Applied Enterprises Limited v Interisle Holdings Ltd (BVIHCV(COM) 2012/0135 (delivered 21st June 2013, unreported) cited; **Hayter v Nelson** [1990] 2 Lloyds Rep. applied.

4. The evidence before the master by the respondent in its prima facie defence to the claim is that the parties had varied their agreement and this was the reason the respondent did not meet its obligations under the terms of the original contract and as such did not accept that the appellant's right to terminate the Preliminary Sale Agreement had arisen. Based on the foregoing, it was open to the master to conclude, in light of the low threshold to be met by the respondent in establishing the existence of a dispute, that the respondent disputed the appellant's claim and that the nature of the dispute was in relation to the execution, i.e. performance by parties of their obligations under the Preliminary Sale Agreement, and the validity of a purported termination of that agreement by the appellant. Both of these matters fall within the matters agreed to be referred to arbitration under the agreement.

   Ocean Conversion Limited v Attorney General of the Virgin Islands BVIHCVAP2007/0330 (delivered 12th January 2009, unreported) followed; **Heyman and Another v Darwins Limited** [1942] AC 356 applied; Section 5, **Arbitration Act**, Cap. 33, Revised Laws of Antigua and Barbuda, 1975 applied.

JUDGMENT

[1] **CARRINGTON, JA [AG.]:** The appellant, Canisby Limited, the claimant in the court below, appeals with leave of this Court, the decision of the master to stay the proceedings in the High Court on the appellant's claim in order for this claim to be dealt with by arbitration proceedings. The appellant advances that in so doing, the master exercised his discretion wrongly in that he failed to properly consider that the arbitration clause in the agreement between the claimant and the defendant was not engaged as there was no dispute between the parties, and that he wrongly concluded that the allegation of the defendant's non-performance of the agreement formed the basis to remit the matter to arbitration.

[2] The appellant is a Manx company and the respondent, Flat Point Development Limited, the defendant in the court below, is an Antiguan company. The statement of claim avers that by agreement of 21st May 2008 ("Preliminary Sale Agreement"), the respondent agreed to sell to the appellant and S.I.T.I. srl of Milano, Italy ("SITI") as joint purchasers the Hotel (as described in the Preliminary Sale Agreement) to be built at Emerald Cove in the parish of Saint Philip in Antigua at a price of €22 million. The appellant and SITI were to acquire respectively 25% and 75% interests in the hotel. The appellant and SITI were jointly referred to as the "Purchaser" in the Preliminary Sale Agreement.

[3] The appellant's case is that it completed its obligations under the Preliminary Sale Agreement, which were to pay to the respondent 25% of the agreed deposit of €1,000,000 and 25% of a loan of €9,000,000 in the total sum of €2,500,000 but that the respondent failed to complete its obligations under that agreement, in particular by May 2009 it failed to submit the quarterly work-in-progress report signed by the architect. The appellant therefore made a written demand for the immediate return of the above sums plus interest on 19th June 2009 by email and again on 19th October 2009 by mail. We are left to assume that this demand was not satisfied by the fact that the appellant subsequently filed the claim, inter alia, for repayment of monies advanced with

interest, or alternatively specific performance of the Preliminary Sale Agreement.

[4] The Preliminary Sale Agreement contained an arbitration clause (clause 12), the material terms of which are as follows:

> "Any controversy between the parties over interpretation, execution and termination of this Agreement shall be dealt with through an Arbitration procedure. The request for an Arbitration Panel can be made by any one of the two parties and the request shall be delivered via certified mail with advice of receipt. … The Arbitration Panel shall settle the dispute without any procedure formalities (sic) and in fairness. The decision issued by the Arbitration Panel is hereby accepted as final and irrevocable by both parties. The Arbitration Panel shall also define the amount of the arbitration costs and which of the parties shall be responsible for their payment."

[5] The claimant's service of the claim was countered with an application by the defendant for a declaration that the court had no jurisdiction to hear the claim and for orders for strike out or stay of the claim until the parties submit to arbitration. The application was brought, inter alia, on the grounds of section 5 of the **Arbitration Act**[1] and that the respondent remained ready and willing to do all things necessary to the proper conduct of the arbitration as agreed by the parties.

[6] The defendant's application was supported by the affidavit of Mr. Ron Murrain, a legal clerk in the chambers of its legal practitioners, who deposed that the claim is "in relation to the breach of a Preliminary Sale Agreement dated 21st May 2008".

[7] Mr. Michael Barry, who described himself as the appointed representative of the claimant, swore an affidavit in response to the application. He confirmed that the basis of the claim was the defendant's failure to comply with the delivery terms of the Preliminary Sale Agreement which resulted in the claimant's exercising its rights to terminate the Agreement under Article 9 thereof. He acknowledged that pursuant to clause 12, the parties shall go to

[1] Cap. 33, Revised Laws of Antigua and Barbuda, 1975.

arbitration proceedings "where there is any controversy between the parties over the interpretation, execution and termination of the agreement" but deposed that the claimant "is however of the opinion that there is no controversy or dispute between the parties." He added that the defendant "has never made any written submission or contacted the Claimant/Respondent disputing the Claimant/Respondent's right to be reimbursed pursuant to the agreement" and "Moreover by email dated September 16, 2009 the Applicant/Defendant acknowledged and admitted that the Claimant/Respondent ought to be reimbursed pursuant to the agreement." He concluded "In the premise [sic] the Respondent/Claimant submits that no controversy exists between the Applicant/Defendant and therefore the need to arbitrate does not arise. Therefore the jurisdiction of the court to award judgment has been appropriately sought."

[8] Before turning to the response to this affidavit, it is useful to reproduce the email of 16th September 2009 to which Mr. Barry referred. This was from Mr. Poggioli, one of the signatories to the Preliminary Sale Agreement on behalf of the defendant, to Mr Barry. The email stated:

> "As you are surely aware, your company Canisby Ltd has sent a Registered letter to Flat Point reclaiming the immediate return of the payment of Euro 2,500,000 – related to the contract dd May 21st 2008. As seen that you perfectly are aware that the Group (of whom you are part) to which Flat Point belongs wants to redesign the hotel on a different land parcel, the time schedule for progress reports has been delayed and the new designs are not yet ready. According to your fellow shareholders, if it is not possible for Canisby to postpone the request for reimbursement, the only solution is that all the shareholders of the Group, you included, will inject in Flat Point the whole amount of the contract + interests as shareholders (sic) additional payment, in order to allow the Company to reimburse Canisby and SITI and to cancel the Contract. If you have a different proposal, it will be highly appreciated."

[9] Mr. Barry responded by email dated 21st September 2009 stating:

> "… However, I am surprised to receive your e/mail of 16th Sept. As I understand there is a legal agreement between Canisby Ltd and Flat Point Development Ltd. As you are aware Canisby is a company registered and controlled in the Isle of Man and I respectfully suggest

that if Flat Point wish [sic] to discuss any aspect regarding this agreement they should do so directly with Canisby."

[10] There is no indication from the evidence before the master that this invitation to communicate with Canisby Limited was taken up by the respondent save for its request dated 16th October 2015 that the dispute between the parties be set before an arbitration panel.

[11] Mr. Claudio Mareschi, a director of the respondent, swore an affidavit in response to the claimant's affidavit. He deposed that Mr. Barry is the holder of 23.125% interest in the defendant's ultimate owner, Emerald Cove International BV of Amsterdam, Holland and that he believes that Mr. Barry is also the beneficial owner of the claimant. Mr. Mareschi further deposed that after receiving the funds to commence construction, the management of Emerald Cove International BV decided to change the design and location of the resort which would result in a variation of the timelines and additional funds and that this was communicated to Mr. Barry and SITI. SITI agreed in principle, but the claimant refused to agree. He further deposed that since a mandatory restructuring of the holding company under Dutch law, Mr. Barry could no longer be part of the management of the holding company and since then the relationship between him and the rest of the group has become tumultuous and he has commenced proceedings in Antigua and Barbuda and elsewhere with the aim of wrestling control of Emerald Cove International BV and the property owned by Flat Point.

[12] Mr. Mareschi also deposed that there are discussions between the management of the parent company and Mr. Barry concerning the purchase of his interest in the group and payment of moneys due to him. He claims, however, that Mr. Barry has taken steps to hamper members of the group from obtaining funding to realise his interests, and has frustrated the defendant in its attempts to realise funds to service its debts and to assist the group to find someone to purchase his interests. He continued:

> "I say and I verily believe the same to be true that the Defendant Company and management of the group remain interested in settling with Mr. Barry and in keeping with same are seeking to rely on the

Arbitration clause of the agreement dated 21 May, 2008 to arrive at a speedy resolution of this matter."

[13] He also went on to say that:

> "Mr. Barry in his affidavit has stated that no controversy exists that would warrant the use of the Arbitration clause. However, based on what has been said in this affidavit the Defendant Company humbly asks this Honourable Court to find that there are sufficient facts for this Honourable Court to decline to exercise its jurisdiction."

Mr. Mareschi exhibited a copy of the letter dated 16th October 2015 to the claimant to which I referred above.

[14] Section 5 of the **Arbitration Act** is in the following terms:

> "5(1) If any party to an 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 those legal proceedings may at any time after appearance, before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the 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, make an order staying the proceedings.
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> 5(2) Notwithstanding anything in Parts 1 to VIII, if any party to a submission to arbitration made in pursuance of an agreement to which the protocol set out in the First Schedule applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those 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 that court or a judge or magistrate thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter to be referred, shall make an order staying the proceedings."

[15] The material part of Clause 1 of the **Geneva Protocol on Arbitration Clauses, 1923** in the First Schedule to the **Arbitration Act** to which section 5(2) refers is as follows:

> "Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject."

Great Britain ratified this Protocol in 1924 and Antigua and Barbuda succeeded to it in 1988.

[16] The master ruled that the causes of action pleaded in the statement of claim were "matters agreed to be referred" under section 5 of the **Arbitration Act**. He found that there was a dispute between the parties as to whether the defendant had breached any of the specific terms of clause 9 of the agreement and further whether certain actions by the claimant or its principals may have been the source of any non-performance by the defendant. He concluded that it was for the arbitration panel to determine this dispute and stayed the proceedings accordingly.

[17] In his opening submissions on the appeal, Mr. Astaphan, SC for the appellant submitted that the paramount considerations are the terms of the arbitration clause (i.e. whether there was any "controversy between the parties over interpretation, execution and termination of [the Preliminary Sale Agreement]") and that the respondent's application has not shown that there was any dispute that came within that clause.

[18] Mr. Walwyn for the respondent submitted in response that the pleadings in the statement of claim show that the claim is based on an assertion of a right to terminate the Preliminary Sale Agreement based on the defendant's alleged failure to perform and therefore falls directly within the arbitration clause. He submitted further that the issue of whether there was any controversy is one to

be determined by the arbitral tribunal, which was competent to determine whether it had jurisdiction over the matter.

[19] I do not agree with Mr. Walwyn's submission. The arbitration clause is only engaged if there is a controversy between the parties over, inter alia, the termination of the Agreement. Merely raising this issue as a cause of action in the statement of claim is not sufficient to make this a "matter agreed to be referred". The authors of **Halsbury's Laws of England**[2] state that:

> "Arbitration agreements generally make it a precondition of the right to arbitrate that there be a dispute or difference between the parties about a matter covered by the arbitration agreement. A dispute or difference arises when there is disagreement about central issues. …However, the mere making of a claim does not necessarily constitute a dispute or difference. There is no dispute or difference if one party's claim has been expressly or impliedly admitted, or if the other party demonstrably has no defence. There is a dispute or difference if the amount of damages remains in issue although liability is not contested."

[20] In **Union of India v E B Aaby's Rederi A/S**,[3] the issue before the House of Lords was whether a claim for general average contribution was a claim covered by the arbitration clause which contained a limitation period for commencing the arbitration. Lord Morris at page 807 stated:

> "I propose first to express my opinion on the question whether (if there were no special undertaking) a claim for general average contribution would be a claim covered by the arbitration clause. If such a claim was made and if when made it was rebutted or denied it seems to me that a dispute would arise."

[21] The first question for the master to determine therefore would have been whether there was a controversy, i.e. a disagreement or dispute between the parties over interpretation, execution and termination of the agreement.

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[2] (4th edn, 1999) vol 2, para 614.
[3] [1975] AC 797.

[22] In **Ocean Conversion Limited v Attorney General of the Virgin Islands**[4] at paragraph 17, this Court adopted the approach of the House of Lords in **Heyman and Another v Darwins Limited**[5] that firstly the precise nature of the dispute should be ascertained; secondly, it should be determined whether the dispute is one that falls within the arbitration clause; and thirdly the court should determine whether there is a sufficient reason why the matter in dispute should not be referred to arbitration. The onus on the second and third matters is on the party resisting the referral to arbitration.

[23] In determining the precise nature of the dispute, the Court must have regard firstly to the statement of claim as this is where the grounds which the claimant advances for seeking relief should be laid out. These grounds will only mature into disputes, i.e. issues for determination by the relevant tribunal, so far as they are traversed by the defendant. Where a defendant is seeking to stay court proceedings, he must do so before he files his defence to the statement of claim. It is therefore in his evidence in support of the application for a stay that the precise nature of the dispute should take form.

[24] The question therefore is: "Is there a controversy between the parties?" To answer this question, one must also ask: "Who is to determine whether a controversy exists?" It seems to me that it is the Court's jurisdiction to determine as a preliminary issue whether a controversy exists as the **Arbitration Act** section 5(1) states that:

> "…the court, if satisfied that there is no sufficient reason why the matter (i.e. the matter agreed to be referred, namely a controversy about the interpretation, execution and termination of the agreement) should not be referred in accordance with the agreement … may make an order staying the proceedings."

Section 5(2) states that:

> "…the court … unless satisfied 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."

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[4] BVIHCVAP2007/0330 (delivered 12th January 2009, unreported).
[5] [1942] AC 356, p. 370.

[25] The discretion or obligation to grant a stay therefore does not arise until there has been a preliminary finding that (on the clause in the instant case) there exists a controversy over the interpretation, execution or termination of the Preliminary Sale Agreement and a secondary determination that (in case of section 5(1)) there is no sufficient reason why the matter should not be referred, or, that (in the case of section 5(2)) there is in fact a dispute between the parties with regard to the matter to be referred. As at this stage the arbitration tribunal is not yet involved, it must be for the Court to make these findings. This jurisdiction is preliminary to and independent of the arbitration tribunal's power to determine its own jurisdiction and to rule on the merits of the dispute. It was therefore within the master's jurisdiction to determine whether there was a dispute between the parties with regard to the matter to be referred. Was his decision blatantly wrong?

[26] Mr. Astaphan, SC submitted that the master fell into error by only looking at the statement of claim without also examining the evidence filed on the application. He argued that this evidence did not disclose any arbitrable matters as (i) by referring to a desire to settle, the defendant had conceded that the demand for payment was proper; and (ii) the defendant had not raised any challenge to the claimant's right to terminate the Preliminary Sale Agreement.

[27] It seems clear on the face of the decision from the master that he did consider the evidence led on the application as he came to the following conclusion:

> "However, it is clear to this court on the facts as disclosed on the claim and on the various affidavits that the parties are at serious variance not only as to whether the defendant performed under the agreement but also as to whether certain actions of the claimant and/or its principles [sic] may have been the source of any non-performance by the defendant. In such circumstances, it cannot be said that there is no dispute as contemplated by clause 12 of the agreement."

[28] In the exercise of his jurisdiction to determine whether there was a controversy, the master had also to determine whether he could properly conclude that the claim nevertheless is so unanswerable that there is nothing

to arbitrate.[6] In **Applied Enterprises Limited v Interisle Holdings Ltd**,[7] Bannister J considered the test for whether "there is not in fact any dispute between the parties with regard to the matter to be referred" and at paragraph 26 approved the reasoning of Saville J in a passage from his judgment in **Hayter v Nelson**[8] that was cited in **Halki Shipping Corporation v Sopex Oils Ltd**.[9] I also approve the reasoning of Saville J in the passage quoted by Bannister J and extract from it the following principles by which a court can determine whether a dispute exists: (i) there is a dispute until the defendant makes a clear admission of the claim; (ii) a dispute or difference may exist even if it can be immediately determined beyond doubt which h side is right; (iii) it is the function of the arbitrators and not the court to determine whether or not the claim is in truth disputable, i.e. whether the defendant has a good defence to the claim; and (iv) the court's function is to distinguish between whether the defendant is raising a dispute at all (i.e. he has not admitted the claim) which is a question for the court itself and whether the issue merely is whether the claimant is very likely to overcome the defence raised by the defendant (which is properly a question for the tribunal).

[29] I referred to the evidence of Mr. Mareschi earlier in this judgment. I do not agree with Mr. Astaphan S.C that this evidence shows that there was no dispute. To the contrary, Mr. Mareschi's evidence appears to give a preview of the defence to the claim, namely that the parties had varied their agreement and this was the reason the defendant did not meet its obligations under the terms of the original contract and for that reason, the defendant did not accept that the claimant's right to terminate the Preliminary Sale Agreement had arisen. I of course make no comment on the merits of this defence. However, I find that this evidence shows that it was open to the master to conclude, in light of the low threshold to be met by the defendant in establishing the existence of a dispute, that the defendant disputed the claimant's claim and the nature of the dispute was in relation to the execution, i.e. performance by parties of their obligations under, the Preliminary Sale Agreement and the

[6] Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] 1 All ER 664, 680, per Lord Mustill.
[7] (BVIHCV(COM) 2012/0135 (delivered 21st June 2013, unreported), para. 26 et seq.
[8] [1990] 2 Lloyds Rep., 265 at 268-269.
[9] [1998] 2 All ER 23.

validity of a purported termination of that agreement by the claimant. Both of these matters fall within the matters agreed to be referred to arbitration under the agreement.

[30] Mr. Walwyn further submitted that issues of the interpretation of the Agreement also arose under the claim as the arbitration tribunal would have to determine the position of SITI, which was a joint purchaser with the claimant, and also resolve the discrepancy between words and figures with respect to the applicable rate of interest under Article 3 of the Agreement. I agree that this also brings into to play disputes over the interpretation of the agreement and further justifies the master's decision to stay the claim.

[31] The expression of a desire to settle as in the defendant's email of 16th September 2009 does not in my mind amount to an admission of liability. It is a common occurrence in litigation that parties settle without admission of liability because, for example, it makes good commercial sense to do so rather than to litigate. Even if liability is admitted, if quantum of damages (if that is the appropriate relief) is not admitted, a dispute is still in existence.[10] A desire to settle is not inconsistent with a reservation of rights in respect of the quantum of damages to be paid. This is more so where this desire is expressed in the same sentence as the intention to rely on prospective arbitration proceedings. As there was no cross-examination of Mr. Mareschi, he is entitled to the benefit of any doubt as to whether he was conceding either or both of liability and the quantum of damages while wishing to pursue arbitration.

[32] In its written submissions, the appellant argued that only one of four issues arising under the statement of claim can be said to fall within matters to be referred and so it would be just, economical and more convenient that the claim be dealt with by the court. This submission, however, was based on the appellant's premise that issues concerning performance of the agreement did

[10] Halsbury's Laws of England (4th edn,1999) vol 2, para 614.

not fall within the expression "execution of the agreement". This view, in my opinion, is incorrect.

[33] I am therefore of the opinion that there was sufficient basis on the evidence and in law for the master's finding that there was a dispute between the parties with respect to a matter to be referred to arbitration and his decision that the appellant had not discharged the burden of showing why the proceedings on the claim should not be stayed in favour of arbitration.

[34] I would further add that even if I had found that the master had erred in the exercise of his discretion so that this Court was in a position to exercise its own discretion whether to stay the claim, I would have stayed the claim as I am satisfied that there is in fact a dispute over a matter agreed to be referred to arbitration, namely whether the claimant has the right to terminate the Preliminary Sale Agreement due to the defendant's failure to execute its obligations thereunder and if so, what is the appropriate remedy.

[35] I would therefore dismiss the appeal with costs to the respondent and order that such costs be assessed by a master of the High Court, if not agreed by the parties within 21 days.

[36] I wish to record my gratitude to both counsel for their assistance.

I concur.
Mario Michel
Justice of Appeal

I concur.
Anthony Gonsalves, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar