EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: BVIHCV2018/0125

Between BLAYCO Corporation Ltd.

Claimant

and

James Todman DCK Construction (SPV) Limited
DCK Worldwide LLC
James Todman Construction Ltd

Defendants

Before: MASTER Ermin Moise

Appearances:

Ms. Ayodeji Bernard of Counsel for the Claimant
Mr. Sydney Bennett Q.C. with Ms. Pauline Mullings of Counsel for the 1st and 2nd Defendants
Ms. Christina Hart of counsel for the 3rd defendant

2018: November, 6th
2019: January,

JUDGMENT

[1] MOISE, M.: Before me are three applications. The 1st defendant has applied for a stay of the proceedings pending the outcome of arbitration pursuant to rule 10.3(4) of the Civil Procedure Rules 2000 (CPR) and the BVI Arbitration Act 2013. The 2nd defendant has filed an application requesting that the claim against it be struck out on the grounds that the court has no jurisdiction to entertain the claim and the pleadings disclose no reasonable grounds for bringing the claim in the first place. The 3rd defendant's application is for an order to be removed as a party to the claim. For the most part, this application is based on the same premise as that of the 2nd defendant.

The Claim

[2] On 15th June, 2018 the claimant brought this action for breach of contract against the defendants pursuant to contract dated 6th September, 2016. At paragraph 6 of the statement of claim the

claimant asserts that ***"on or about 6th*** *September, 2016 an agreement was entered into between the claimant and the defendants, bearing the name of the first defendant as the* ***contractor and signed by the claimant as subcontractor regarding "Little Dix Bay Resort Renovation Project."*** By virtue of this contract the claimant agreed to provide the necessary supervision, labour, materials, cartage services, equipment, machinery, tools, hoisting, scaffolding and other items proper or necessary to complete certain building works outlined in the contract. It is of note that the contract was reduced to writing and signed by the claimant and the 1st defendant only. Despite this, the claimant asserts that all 3 defendants are parties to this contract.

[3] The claimant asserts, in its statement of claim, that performance of the contract began and on 3rd September, 2017, by way of email correspondence, the claimant was informed that the work would be suspended due to an imminent hurricane. At that point, it is asserted, only 16% of the work remained to be complete and the claimant had submitted certain invoices for payment pursuant to the contract. These invoices, according to the claimant, remained outstanding.

[4] The claimant further asserts that in the aftermath of hurricane Irma, it was forced to evacuate equipment out of the British Virgin Islands to Saint Lucia and Panama. Further, some equipment which was left in storage facilities provided by the defendants was removed without the claimant's consent. Despite initial engagement and dialogue with a view to return for completion of the work subsequent to the passage of hurricane Irma, the claimant asserts that by email correspondence dated 9th March, 2018 the defendants terminated the contract. In fact, the claimant states that the email was received from the 2nd defendant and stated that ***"once we r****econcile the payments that are due from Blayco to dck for material yet to be provided and work yet to be performed, we will close this subcontract as appropriate. At this point, I do not anticipate Blayco* ***performing any additional work on this project."*** Allegedly, this was done after the claimant had made much effort in arranging a return to the BVI in order to complete the works under the contract. On that basis the claimant commenced this action for damages for breach of contract and other remedies as outlined in the statement of claim.

The Application for Stay of Proceedings

[5] Section 14 A and B of the contract between the parties is of particular importance to the application of the 1st defendant. The section states as follows:

> ***"Subcontractor agrees that any dispute of any kind, nature or description or any*** *controversy or claim arising out of or relating to this subcontract or the breach thereof may, solely at the contractor****'s election,*** *be settled by non-binding mediation or by binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. In any such arbitration, full discovery will be allowed in accordance with the Federal Rules of Civil Procedure, and any remedy or relief granted by the arbitrator(s) shall not be empowered or authorized to add to, subtract from, delete or in any other way modify the terms of this subcontract. If arbitration is elected by the contractor, then judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. If the contractor elects to proceed by arbitration, the venue of such proceedings shall be Pittsburg, Pennsylvania.*
>
> *Contractor shall have the right to elect to proceed to no-binding mediation or binding arbitration, as described in paragraph (b) above, at any time prior to the commencement of a judicial proceedings by the contractor, or in the event a judicial proceeding is instituted by the subcontractor, at any time prior to the last day to* ***answer and/or appear to a summons and/or complaint of the subcontractor."***

[6] Rule 10.3(4) of the CPR stats that ***"[i]****f the defendant within the period set out in paragraph (1), (2) or (3) makes an application under any relevant legislation relating to arbitration to stay the claim on the grounds that there is a binding agreement to arbitrate, the period for filing a defence is extended to 14 days after the determination of that application."* Counsel for the 1st defendant also refers the court to section 18(1) of the Arbitration Act 2013 which states that:

> ***"A court bef****ore which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that t****he agreement is null and void, inoperative or incapable of being performed."***

[7] The 1st defendant argues that the terms of this provision are mandatory. The court has no discretion but to refer the matter to arbitration if the matter is the subject of an arbitration agreement and a request has been made by a party no later than when his first statement on the substance of the claim is required to be submitted. The only qualification of this mandatory provision is if it can be shown that the agreement is null and void, inoperative, or incapable of being performed. In these circumstances it is argued that section 14 of the contract between the parties is a valid arbitration agreement and that the court ought to stay proceedings at the instance of the 1st defendant and refer this matter to arbitration.

[1] The 1st defendant further asserts that, despite what is the unilateral discretion provided for in the section 14 of the contract, it is entitled to make an election to have these proceedings referred to arbitration. Counsel for the 1st defendant refers the court to the case of *Woolf v. Collis Removal Services*[1] in which the court was called upon to assess the validity of an unequal arbitration clause. In his judgment Asquith L.J stated that ***"there is nothing*** *in its unequal operation to* ***divest it, in our view, of the character attributed to arbitration clauses in general …"*** Reference was also made to the case of *Pittalis v. Sherefettin*[2] where Fox LJ observed that:

> ***"Looking at the matter apart from authority, I can see no reason why, if any*** *agreement between two persons confers on one of them alone the right to refer the matter to arbitration, the reference should not constitute an arbitration. There is a fully bilateral agreement which constitutes a contract to refer. The fact that the option is exercisable by one of the parties only seems to me to be irrelevant. The result in my view is that the parties are entitled, if they so choose, to confer a unilateral right t****o insist upon arbitration."***

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[1] (1948) 1 K.B 11
[2] 1986 2 All ER 227

[2] On the basis of these authorities, it is argued that there is a valid arbitration clause which clearly provides a unilateral right to the 1st defendant to insist upon arbitration. The 1st defendant further refers the court to section 17(1) of the Arbitration Act which states as follows:

> ***"'Arbitration agreement' is an agreement by the parties to submit to arbitration all or*** *certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate* ***agreement."***

[3] In summary, the 1st defendant argues that *the instant agreement is a valid arbitration agreement within the contemplation of the Arbitration Act and the dispute relates to matters falling within the scope of the agreement.* On that basis it is submitted that the 1st defendant is entitled to invoke the provisions of section 18(1) of that act, which mandates the court to stay the proceedings pending the outcome of arbitration.

[4] The claimant argues that, contrary to the submissions of counsel for the 1st defendant, there is no arbitration agreement within the meaning of the Act. The claimant refers the court to the case of *Kruppa v. Bennedetti et al*[3] in support of the submission that the wording of section 14 of the contract does not constitute a binding agreement for mandatory arbitration. What the section does, according to the claimant, is to give a unilateral option to the 1st defendant to refer the matter to arbitration. In such an instance, the court is not bound to stay the proceedings under section 18(1) unless the 1st defendant exercises the option by referring the matter to arbitration within the time prescribed by the contract; or perhaps the legislation itself.

[5] Whilst both parties have referred extensively to English authority in support of their submissions, it would appear that the court in the British Virgin Islands has adjudicated on this very issue in the case of *ANZEN LTD. Et al v. HERMES ONE LTD*[4]*.* The parties to the action in that case were each subject to the terms of a shareholders agreement which contained an option to refer disputes to arbitration if they so arise. The claimant commenced an action in the commercial court pursuant

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[3] [2014] WLR(D) 250
[4] [2016] UKPC 1

to the agreement and the defendants applied for a stay of the proceedings pending arbitration pursuant to section 6(2) of the Arbitration Act[5]. The judge in the high court dismissed the application on the basis that there was no binding arbitration agreement and that in order to be entitled to a stay, the defendants were to have commenced identical arbitration proceedings prior to the filing of their application. The defendants appealed to the court of appeal where the learned judges agreed with the decision of the trial judge. After assessing a number of authorities on the issue, Webster JA summarized the principles emerging therefrom in the following manner:

> *(a) An arbitration clause which provides for an option to arbitrate (as in this appeal) does not create an immediately binding contract to arbitrate;*
>
> *(b) As soon as one of the parties invokes the arbitration clause by referring the dispute to arbitration there is a binding agreement to arbitrate which is covered by section 2 of the Act.*
>
> *(c) If one of the parties by-passes the arbitration clause and files a claim in court (as in this case) the other party still has the option to invoke the arbitration clause, refer the matter to arbitration and apply for a stay of the court proceedings.*
>
> *(d) If the counter party, having been sued, does not refer the matter to arbitration, or* ***submits to the court's jurisdiction, the dispute will proceed under the court's*** *jurisdiction.*

[6] Despite the fact that this decision was overturned, the first three of these principles were affirmed by the Privy Council. In applying the principles outlined in that case it seems to me that the claimant is correct in its assertion that section 14 A of the agreement is not a binding agreement for mandatory arbitration. The agreement to arbitrate only becomes binding if the 1st defendant exercises the option to refer this matter to arbitration. Indeed, if one examines the statement made in the case of *Pittalis v. Sherefettin,* referred to by the 1st defendant, this does not necessarily contradict the claimant's assertion. There Fox LJ concluded that ***"there is a fully bilateral agreement which constitutes a contract to refer."*** This is not the same as saying that there is a binding agreement to arbitration, but rather an agreement giving one party the unilateral option to refer the matter to arbitration. It only becomes binding if that party exercises this option.

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[5] The terms of section 6(2) are somewhat similar to the provisions of 18(1) of the Arbitration Act currently in force

[7] I pause to note that counsel for the 1st defendant also referred the court to the case of *Wilson Taylor Asia Pacific Pte Ltd. V. Dyna-Jet Pte Ltd*[6]. This was a decision of the court of appeal of Singapore delivered on 26th April, 2017. In that case, the contract between the parties stated that ***"if no amicable settlement is reached through discussions, at the election of Dyna****-Jet, the* ***dispute may be referred to and personally settled by means of arbitration proceedings."*** In the interpretation of that clause, the Singaporean court of appeal determined that ***"the clause*** *constituted a valid arbitration agreement between the appell****ant and the respondent."*** At first glance it would seem that this is clear authority for the proposition put forward by the 1st defendant that there is a binding arbitration agreement giving rise to a mandate to have this matter stayed. However, to my mind, this statement is not easily reconciled with that of Webster JA in our own court of appeal in the case of *ANZEN LTD. Et al v. HERMES ONE LTD* where he states that ***"****an arbitration clause which provides for an option to arbitrate (as in this appeal) does not create an immediately binding contract to arbitrate.****"*** As I indicated earlier, though this decision was successfully appealed, the Privy Council did not disagree with this statement in general. Therefore, there is no doubt that section 14A of the contract between the claimant and the 1st defendant is valid. However, it is only binding insofar as it gives the 1st defendant the option to refer any dispute to arbitration. This is not the same as a binding agreement to subject disputes which arises under the contract to compulsory arbitration.

[8] It cannot necessarily be said that the claimant has bypassed the arbitration clause by filing an action in court, as the option to refer this matter to arbitration is entirely unilateral and rests with the 1st defendant. Upon the filing of the claim however, the 1st defendant retained the right to refer the matter to arbitration. The question for determination is whether that option has been exercised. The claimant argues that to date there has been no referral of this matter to arbitration. The 1st defendant argues in response that by applying to have these proceedings stayed and referred to arbitration, the 1st defendant is exercising the option contained in section 14 A of the contract. When this issue came up for consideration in the commercial court in the case of *ANZEN LTD. Et al v. HERMES ONE LTD* the judge at the high court level stated the following at paragraph 8 of his decision:

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[6] 2017SGCA 32

If, as here, a party to the SHA chooses not to exercise the right, but instead to commence legal proceedings, another party to the SHA may, before submitting to the jurisdiction, refer the subject matter of the proceedings (assuming it to fall within clause 19.5) to ICC arbitration and, thus, be able to maintain that the claimant in the proceedings has agreed, under clause 19.5, that the dispute should be referred to arbitration. In those circumstances, it seems to me that the party making the reference would arguably be entitled to a stay under section 6(2), although it is not necessary for present purposes for me to decide the point. What a party is plainly not entitled to do is to shut down legal proceedings, commenced without infringing clause 19.5, without first having referred the identical subject matter to ICC arbitration. Otherwise clause 19.5 is converted, contrary to its express terms, into a binding multilateral agreement that all disputes arising under or relating to the SHA are to be referred to arbitration. That is not what clause 19.5 says."[7]

[9] This was upheld in the judgment of the court of appeal and Webster JA went further to say at paragraph 18 of his decision that the appellants' *"failure to refer the disputes to arbitration means that there was no agreement to refer the disputes to arbitration, and a stay under section 6(2) was not available to them. In common parlance the appellants could not have their cake (by not referring the matter to arbitration) and eat it too (by securing a stay of the court proceedings under section 6(2)). The judge was entitled to come to this conclusion on the facts and there is no basis for interfering with his decision."*

[10] However, I note that this aspect of Webster JA's decision was determined to be wrong by the judges of the Privy Council and this decision is worth some analysis. In their joint judgment Lords Mance and Clarke accepted as correct, the notion that a contractual clause with an option to refer a dispute to arbitration is not in and of itself a binding arbitration agreement. At paragraph 8 of their judgment their lordships noted that ***"[e]****ven if one could in loose terms describe a conditional agreement to arbitrate as an arbitration agreement, the Board would not regard it as such within the meaning of section 6(2). In any event, unless and until any option required to be* ***exercised has been exercised, there is no "matter agreed to be referred" within the***

[7] Claim No. BVIHC(COM)2014/001

*language of section 6(2).***"** Their Lordships went on to note that the determination of that case hinged on the interpretation of the clause contained within the contract. Insofar as that was the case, the Privy Council considered 3 possible analyses for the interpretation of such clauses. These were as follows:

(a) ***The words "any party may submit the dispute to binding arbitration" are not only*** *permissive, but exclusive, if a party wishes to pursue the dispute by any form of legal proceedings (analysis I):*

(b) *The words are purely permissive, leaving it open to one party to commence litigation, but giving the other party the option of submitting the dispute to binding arbitration, such option being exercisable either by:*

i. *commencing an ICC arbitration, as the respondent submits and Bannister J and the Court of Appeal held (analysis II); or*

ii. *requiring the party which has commenced the litigation to submit the dispute to arbitration, by making an unequivocal request to that effect and/or by applying for a corresponding stay, as the appellants have done (analysis III).*

[11] For analysis I to be correct it would mean that the court would adopt a less literal interpretation of the word "may" and conclude that, despite its use of that term, there is a mandatory provision to arbitration, which prohibits a party from commencing litigation. At paragraph 13 of their judgment their lordships concluded that ***"… there is an obvious linguistic difference between a promise*** *that disputes shall be submitted to arbitration and a provision, agreed by both parties, that* ***"any party may submit the dispute to binding arbitration". This clear contrast and the evident risk that the word "may" may be understood by parties to mean that litigation is*** *open, unless and until arbitration is elected, are, in the Bo****ard's view, important pointers away from analysis I."*** At paragraph 30 of that judgment their lordships also noted the absence of any suggestion in common law jurisdictions, other than the United States, that the use of the word "may" in commercial arbitration clauses ***"…****has ever been seen as mandatory, prior to either party insisting on arbitration."* In the present case the circumstances are even more apt for a

conclusion that analysis I is not to be accepted. This is the case as the terms of section 14 of the contract gave a unilateral right to the 1st defendant to refer the matter to arbitration. Therefore, when the claimant commenced legal proceedings it was exercising the only option available under the terms of the contract. The clause would therefore only become binding if the 1st defendant exercised its option to have this matter referred to arbitration within the time prescribed under the contract.

[12] Rejecting analysis I meant that the Privy Council was left to consider analyses II and III in order to determine the issues arising in that case. At paragraph 32 it was concluded that analysis II did not make commercial sense. Their Lordships considered the possibility that ***"the party commencing*** *litigation may have no interest in pursuing or ability to pursue arbitration in the manner or* ***forum prescribed"*** by the clause in question. No doubt this is the case in the current claim before the court. The claimant had no ability to pursue arbitration and therefore commenced these proceedings. The issue for consideration however, was whether the option to arbitrate ***"connote[s] and require[s] the actual commencement of an arbitration."*** In the opinion of the judges of the Privy Council this was not necessarily the case. In fact, their lordships concluded that the exercise of the option to arbitrate was ***"not inextricably linked to the actual commencement of*** *arbitration"* and concluded that ***"… the court has under section 6(2) of the Arbitration*** *Ordinance power to order a stay pending arbitration."* Although the Privy Council came to that conclusion on the express terms of section 6(2) of the Arbitration Act, their lordships went further to state at paragraph 34 that analysis III was to be preferred as a matter of general principle. In adopting this analysis the Privy Council concluded that ***"[i]t enables a party wishing for a*** *dispute to be arbitrated, either to commence arbitration itself, or to insist on arbitration, before or after the other party commences litigation, without itself actually having to commence arbitrat****ion if it does not wish to."***

[13] I observe that the decision of the Privy Council in that case rested heavily on the express terms of the clause in question and on the provisions of section 6(2) of the Arbitration Act as it was then in force. However, I am of the view that the analysis is applicable to the outcome of the present case, despite the obvious distinguishing elements. I do not agree with the claimant that section 18(1) of the Act can only be invoked by the actual commencement of arbitration proceedings by the 1st

defendant. It makes commercial sense, even in the circumstances of the present case to determine otherwise. I also note the decision of Blenman JA in the case of *South East Asia Energy Holding Ag v Hycarbex-American Energy Inc.*[8] where, in her reference to the *Anzen* case, she states that ***"[t]he Privy Council held that the option to "submit the dispute to binding arbitration" could be exercised by applying for a stay."*** In the present case, the parties have agreed that, at the instance of the 1st defendant, disputes arising under the contract would be subject to arbitration proceedings in accordance with the terms of section 14 of the agreement. The 1st defendant is entitled to insist on arbitration either *before or after the [the claimant] commence[d] litigation,* ***without itself actually having to commence arbitration if it does not wish to."***

[14] I note that the claimant has argued that, quite apart from the issues outlined above, the 1st defendant has subjected itself to the jurisdiction of the court by filing an acknowledgement of service and can therefore no longer insist on arbitration. In response, counsel for the 1st defendant refers the court to the Arbitration Act, the relevant section of which was referred to at paragraph 5 of this decision. It is submitted that, pursuant to section 18(1), the court may refer a matter to arbitration *not later than when submitting his first statement on the substance of the dispute.* If this is the provision which determined the date of election, it is submitted that the 1st defendant is entitled to make such an application any time prior to the filing of a defense.

[15] I am not at all sure that the provisions of section 18(1) are helpful in this particular argument. The parties willfully entered into the contract and are bound by its terms. It is to the provisions of section 14B of the contract that the court must turn. This section speaks to the election of the 1st defendant having to take place ***"at any time prior to the last day to answer and/or appear to a summons and/or complaint of the subcontractor."*** For my part, I do not agree with the submissions of the claimant that the time for electing to arbitrate expired when the 1st defendant filed an acknowledgement of service. I am not at all convinced that the filing of an acknowledgment is similar to the requirement to appear to a summons and/or complaint. However, the clause clearly indicates that the 1st defendant may elect to arbitrate any time prior to the last day to answer. To my mind the prudent approach for the 1st defendant to have taken was to file an acknowledgment of having received the claim form and statement of claim and provide the information required by the

[8] SKBHCVAP2016/0015

requisite form. That is precisely what was done. As determined earlier, it was not necessary for the 1st defendant, whether before or after the filing of the acknowledgment of service to refer *the identical subject matter* to arbitration prior to seeking to move the court to stay the proceedings, provided that the time for the filing of a defense had not yet elapsed. In these circumstances, the 1st defendant succeeds in its application for a stay of the proceedings pending the outcome of arbitration pursuant to section 14 of the contract between the parties and section 18(1) of the Arbitration Act 2013.

The 2nd **defendant's application to strike out** the claim against them

[16] The 2nd defendant, in its application, submits that pursuant to rule 9.7 of the CPR 2000, the court has no jurisdiction to try the claim against it. This submission is grounded on the fact that the 2nd defendant is a foreign company registered in Delaware in the United States. It is neither resident, nor does it carry on business in the BVI. The second argument made is that the 2nd defendant is not privy to the contract which the claimant is now attempting to enforce. In support of that application the 2nd defendant refers to the case of *Amsprop Trading Ltd. v. Harris Distribution Ltd*[9] were Neuberger J stated that ***"in common law a contract cannot normally be enforced by or against a stranger to it. This is, of course, because of the doctrine of privity of contract."*** The argument, simply put, is that there is no privity of contract between the 2nd defendant and those who have signed the agreement in question. In summary, the 2nd defendant argues that the claimant ***"seeks to subject a foreigner resident abroad to the jurisdiction of these courts in relation to a claim for breach of an agreement to which it is neither a party nor a principal"***

[17] In response to this, counsel for the claimant argues that the claim in respect of breach of contract against the 2nd defendant relates to matters which arose within the territory of the British Virgin Islands. In that regard, there can be no issue of jurisdiction pursuant to rule 9.7 of the CPR. It is argued further that the issues raised in relation to privity of contract are matters to be determined by the trial judge.

[9] [1997] 1 WLR 1025

[18] Before addressing the specifics of these submissions it is important to remind myself of the general provisions relating to the court's powers to strike out a statement of case. These powers are contained in rule 26.3 of the CPR which states as follows:

> *26.3(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that* **–**
>
> *(a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;*
>
> *(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;*
>
> *(c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or*
>
> *(d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.*

[19] As it relates to the application currently before me, sub rule (b) is of particular relevance. The 2nd defendant asserts that it is not a party to the agreement and as such there is no reasonable ground for bringing the action against it. On that basis the court is asked to strike out the claim against the 2nd defendant.

[20] I wish to reference the case of *Barbados Redifusion Services Limited v. Asha Merchandani et al.*[10] where then CCJ President de la Bastide stated that ***"[a] judge dealing with an application to strike out, should start off by reminding himself that to strike out a party's case and so deny him a hearing on the merits, is an extreme step not to be lightly taken."*** This admonition has been repeated in numerous cases before the court and it is worth repeating that the power to strike out a statement of case is a draconian one which the court should be slow to exercise unless it is necessary to do so. The powers contained in rule 26.3 should not operate as a bar to a party's right to a full and fair hearing of all of the issues to which his or her pleadings relate, unless the circumstances warrant such an intervention at this stage in the proceedings.

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[10] CCJ Appeal No. CV 1 of 2005

[21] The claimant refers the court to the case of *Olga Nichols v Epicurean Holding Limited*[11], where then acting Master Ventose noted that ***"t****he power to prevent a party from pursuing or defending a claim should be reserved for rare cases."* He references the case of *Real Time Systems Ltd v Renraw Investments Ltd*[12] where the Privy Council stated the following at paragraph 17 of that judgment:

> *"There is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against this nuclear option, and that the appropriate course is to order the claimant to supply further details, or to serve an amended statement of case including such details, within a further specified period."*

[22] The authorities therefore encourage that the use of the option to strike out a statement of case is a last resort. It must be observed that such applications are normally filed even prior to the case management requirements of disclosure when a party is likely to provide further details of the evidence on which he or she may rely in support of the pleadings. It is also made prior to actual hearing of evidence. In my view, the power to strike out ought not to be used merely because a party's case may appear to be weak. It should be used sparingly and in circumstances where it is just and equitable to do so or may prevent unnecessary litigation and the costs associated therewith.

[23] In the statement of claim, the claimant acknowledges that the contract was signed by the 1st defendant. The other defendants are clearly not signatories to this agreement. It is, nonetheless, pleaded that they are all parties to the contract. At paragraph 5 of the statement of claim, it is asserted that the 1st defendant is incorporated as a restricted company and only offers services within the BVI as a vehicle and represents a composite arrangement designed to facilitate the second and third defendants, operating to offer construction and pre-construction services in the BVI. It is further asserted that invoices which were submitted for work done pursuant to the contract were approved by an agent of the 2nd defendant. Paragraph 11 of the statement of case also refers to email correspondence received from the defendants indicating that the work on the project had

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[11] BVIHCV2015/0313
[12] [2014] UKPC 6

been subdued due to the impending hurricane. I also observe the pleading that the email correspondence effectively terminating the contract was issued by the 2nd defendant. In fact, paragraph 12 of the statement of case specifically pleads that there were numerous correspondents between the claimant and agents of the 2nd defendant regarding the costs associated with evacuating machinery out of the British Virgin Islands prior to the passage of the hurricane. Further, in affidavits filed in opposition to this application, the claimant submits emails and other correspondence to substantiate the notion that all defendants were in some way part and parcel on this contractual arrangement.

[24] Quite apart from the claimant's claim for breach of contract, paragraph 14 of the statement of claim also refers to the removal of equipment from storage facilities provided by the defendants, their servants, agents and/or representatives. The cost of this equipment is prayed for in the damages claimed by the claimant.

[25] Having examined the nature of the claim itself I am not inclined to exercise what has been described as the nuclear option of striking out the claim against the 2nd defendant. No doubt the claimant may have some challenges in proving its case at trial, as most claimants do, but I am not of the view that it would be just at this stage in the proceedings to deprive it of the opportunity to do so. I note the 2nd defendant's reference to the decision of Neuberger J where he states that ***"in*** *common law a contract cannot normally be enforced by or against a stranger to it. This is,* ***of course, because of the doctrine of privity of contract."*** While it may not be normal, it is not entirely impossible that an outsider to a contract may find that it may be enforced against him. I do recognize that there are weaknesses in the claimant's case, but they are not so weak that the court should adopt this draconian step at this stage in the proceedings. I would decline to accede to the request of the 2nd defendant and would therefore dismiss the application.

The 3rd **defendant's application to be** removed as a party to the claim

[26] This application is made pursuant to rule 19.2(4) of the CPR. This rule states that ***"t****he court may order any person to cease to be a party if it considers that it is not desirable for that person* ***to be a party to the proceedings."*** The 3rd defendant's assertion is that "*it is not desirable for [it] to be joined to the claim as it is neither a proper nor necessary party to the proceedings;*

it having made no contract with the claimant/or other defendant regarding the project upon ***which the claim is based."*** This assertion is based on two submissions. Firstly, it is argued that there is an absence of privity of contract in that the 3rd defendant was not a party to the contract which the claimant is now attempting to enforce. Secondly it is argued that the claimant has failed to plead a case against the 3rd defendant as it has failed to particularize any breach which it alleges was caused by the third defendant.

[27] As it relates to the first of these two submissions the 3rd defendant refers to the case of *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge Ltd*[13]*.* in which it was determined that in order to establish a case of breach of contract, the claimant must not only prove privity but must also establish that there was consideration given by the defendant. The 3rd defendant argues that these are two distinct rules which must each be proven in order to establish that a contractual relationship existed between the parties. The argument, simply put, is that the claimant has not satisfied any of these requirements to show that there exists a claim against the 3rd defendant. The 3rd defendant goes on to argue that even if it had an interest in the matter it would be for the remaining defendants to seek to have it added as a party in order to claim an indemnity. In its second submission the 3rd defendant asserts that the claimant has also failed to particularize or indicate any breach which can be attributable to the 3rd defendant. It is argued that the claimant is ***"unable to plead a case*** *against the third defendant whether by specific pleadings or by documentary evidence*."

[28] The claimant responds to these by arguing firstly, that the objective of rule 19 of the CPR is to ensure that the court disposes of all the issues which arise on a claim and as far as possible involve all the relevant parties who can assist the court in doing so. In that regard it is argued that the 3rd defendant is a necessary party to the claim in order to finally dispose of all of the issues which arises therein. It is further argued that despite the fact that this application is grounded on rule 19.4 of the CPR, it is tantamount to an application to strike out the statement of case. As such, the court must be careful not to employ this nuclear option of striking out the case against the 3rd defendant unless it is necessary to do so.

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[13] [1915] UKHL 1

[29] On 19th October, 2018, and in response to the application, the claimant filed an affidavit of Jose Blay who describes himself as a director of the claimant company and authorized to swear to the content of the affidavit. He states the following at paragraph 5 of this affidavit:

> ***"On the 6th*** *September, 2016 I, on behalf of Blayco executed an agreement, with the parties being the First named defendant and Blayco. However, it was always understood that Blayco, the second and third defendants that this was being done as a mere formality and that the real parties to the agreement were Blayco, the second and third defendants and that the first defendant was being used as a means though which the second and third defendants would operate in the BVI. As such, when Blayco was presented with the agreement to sign on 6th September, 2016, Blayco did* ***not see it as a major problem."***

[30] Mr. Blay goes on in paragraph 6 of this affidavit to state that, in fact, the 3rd defendant was so intimately involved in this process that it assisted in processing and arranging work permits for employees which were placed under the supervision of the claimant. An email is exhibited to show that at least one worker was registered as an employee of the 3rd defendant and was under the supervision of the claimant. The 3rd defendant responds to this by arguing that the emails do not prove that the 3rd defendant was at all material times part and parcel of the contractual arrangement with the claimant. They only show that an employee of the 3rd defendant advised the claimant's employee of the process for retrieving his colleague's work permit.

[31] Whilst I accept that the statement of claim is somewhat deficient in its pleadings, I do not entirely agree with the submissions of the 3rd defendant. To my mind, the claimant has pleaded that the 2nd and 3rd defendants were part and parcel of the contract. At paragraph 6 it states that the agreement was entered into by the claimant and the defendants, although recognizing that it bore the name of the 1st defendant only. In the preceding paragraph, that is paragraph 5, it states that the 1st defendant was merely a vehicle through which the 2nd and 3rd defendants carried on their business in the BVI. As to the extent to which such an assertion maybe substantiated I am of a view that such matters ought to be left for trial, which would normally take place after full compliance with the duty to disclose. In fact, the court has on numerous occasions been encouraged to consider granting leave to the claimant to amend its statement of case to address deficiencies therein,

rather than employ the nuclear option of striking out. Whilst this application is not couched as a strike out application, its effect would be the same and for the reasons on which the 2nd defendant's application is denied I would also deny that of the 3rd defendant.

Disposal

[32] During oral submissions, counsel for the defendants agreed that if a stay is granted pursuant to the application of the 1st defendant, then the entire proceedings should be stayed, including the claims against the 2nd and 3rd defendants, despite the denial of their applications to strike out the cases against them. In the circumstances I make the following orders and directions:

(a) These proceedings are stayed pending arbitration in accordance with the terms of section 14 of the Contract dated 6th September, 2016 and section 18(1) of the BVI Arbitration Act 2013;

(b) The 1st Defendant is to commence arbitration proceedings in accordance with the terms of the contract within 42 days from the date of delivery of this decision, unless the parties mutually agree to an alternative time table;

(c) The claimant is at liberty to apply to have this stay lifted if there is no compliance with order (b) above within the time prescribed by this order or agreed by the parties;

(d) The claimant will pay costs to the 1st defendant in the sum of $2,000.00US;

(e) There will be no order as to costs in relation to the applications of the 2nd and 3rd defendants

Ermin Moise
Master

By the Court

Registrar