THE EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. NEVHCV2018/0112
Between:-

DELTA PETROLEUM (NEVIS) LIMITED

Claimant/Respondent

And

NEVIS ELECTRICITY COMPANY LIMITED

Defendant/Applicant

Before:
Master Yvette Wallace (Ag)

Appearances:
Ms. Dia Forrester and Mr. Gyan Robinson of Counsel for the Defendant/Applicant
Mr. Victor Elliott-Hamilton of Counsel for the Claimant/Respondent

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2018: December 4
2019: February 28

RULING

[1] Wallace, M (A.g.).: This is an application for stay of proceedings by the Applicant pending an arbitration proceeding under the provisions of a Fuel Supply Agreement dated 18th July 2013 ("the Agreement").

[2] Clause 18 of the Agreement provided:

> **"**In case any dispute or difference shall arise between the parties thereto touching or relating to this Agreement the same shall be referred to an Arbitration panel. One person each to be appointed by both parties and the nominees to select a third person who shall be the Chairman. The ruling of the Arbitration panel shall be advisory only between the parties as they seek to settle the dispute. Where the parties cannot settle the dispute any one of the

parties can institute court proceedings with respect to the dispute. The costs of the Arbitration panel under this Agreement shall be borne equally by the parties to this Agreement."

[3] A dispute arose between the parties and the Respondent filed a claim on the 27th September 2018 without invoking the procedure under the Clause 18 provision.

[4] The Applicant filed this application on 24th October 2018 seeking an order that the proceedings be stayed under Section 4 of the UK Arbitration Act 1950. The St. Christopher and Nevis Arbitration Act mandates that the 1950 UK Arbitration Act governs arbitration matters in this jurisdiction. The application was supported by affidavit setting out the factual background.

[5] At the hearing before me I directed that counsel for both parties address the court on whether it may consider the application under its inherent jurisdiction by filing written submissions with authorities at the close of oral arguments. Both parties have complied with the directive and the Court now considers the application.

Contention of the parties

[6] Learned Counsel for the Applicant submitted that the parties are required to proceed in a particular manner by virtue of the Agreement, i.e. they are to refer the matter to an arbitration panel. The parties are required to await the decision of the panel before instituting proceedings. The obligation is to engage in the alternative dispute resolution method. Clause 18 of the Agreement is a valid, legally enforceable contract that the parties freely entered into and that includes the dispute resolution provision and is a consensual position on how any dispute is to be resolved. Use of phrase "shall be referred to an arbitration panel" confirms that this is a condition precedent to court proceedings. Further, there is sufficient certainty in the phrasing of the Clause for the court to determine whether that step has been taken. Counsel made reference to Cable & Wireless plc v IBM United Kingdom Ltd[1] in support of this contention.

[1] [2002] 2 All ER (Comm) 1041.

[7] Counsel invited the court to have regard to National Transport Co-operative Society Limited v The Attorney General of Jamaica[2] in which the general position of the courts has been that the court is reluctant to hold that a provision in a document that is plainly intended to have contractual effect is of no effect in the law. If those procedures can be measured and if the court can identify what has to be done, then the provision ought to be upheld.

[8] Learned Counsel for the Applicant Ms. Forrester further submitted that if there is any contention that Clause 18 is ambiguous, then the interpretation most favourable to the consumer shall prevail. The Consumer Affairs Act section 33 provides that a supplier shall ensure that any written term of the contract should be in plain and intelligible language. Where there is any doubt in the meaning of written term of a contract it is to be interpreted against the supplier. In this case the Applicant is the consumer in the Agreement, she submitted. In light of this, and the principles of *Contra Proferentem,* if there is any consideration that the clause is ambiguous, the it must be interpreted against the Respondent who was the drafter and proposer of the contract itself.

[9] Ms. Forrester submitted that the court usually stay proceedings to allow the parties to submit to arbitration and invited the court to consider Ocean Conversion Limited v The Attorney General of The Virgin Islands[3].

[10] Counsel referred the affidavit evidence that applicant was ready and continued to be ready to proceed with the arbitration proceedings. The Respondent has ignored the obligation to go to arbitration and has commenced these proceedings. This ought not to be allowed.

[11] Counsel for the Respondent Mr. Elliott-Hamilton in opposing the application submitted that the court should look at the nature of the application. The application is made pursuant to section 4 of the Arbitration Act which provides that any party to an arbitration agreement may, before taking any steps in the proceedings, apply to the court to issue a stay in the proceedings. The Respondent's position, he submitted, is that Clause 18 is not a valid arbitration agreement within the meaning of the Arbitration Act. Therefore, it is not binding on the parties.

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[2] [2009] UKPC 48 para 60 - 62 PC.

[3] [2009] ECSCJ No. 4

[12] Mr. Elliott-Hamilton asked the court to consider the dicta in O'Callaghan v Coral Racing Ltd[4] in which a referral to "arbitration" in a bookmaker's rules was considered as "establishing a procedure that was devoid of any legal consequences whatsoever" and so was unenforceable. Counsel submitted that the tribunal which carries out the process must make a decision that is binding on the parties. The hallmark of arbitration is that it is a procedure to determine the legal rights and obligations of the parties with binding effect which is enforceable in law. In David Wilson Services Limited v Survey Services Ltd and another,[5] it was stated by Longmore LJ that:

> *"The necessary attributes of an arbitration agreement are set out in the second edition of Mustill and Boyd,* Commercial Arbitration *(2nd edn, 1989) p 41. But, for present purposes, the important thing is that there should be an agreement to refer disputes to a person other than the court who is to resolve the dispute in a manner binding on the parties to the agreement. That is what this clause in my opinion does, and it is therefore an arbitration agreement within the meaning of s 6 of the 1996 Act"*

[13] Mr. Elliott Hamilton also referred to the case of Kruppa v Benedetti and another[6] to buttress the point that for an arbitration agreement to be considered to be within the meaning of the Arbitration Act it must determine the matter. Counsel contended that the clause did not determine the matter and as such the procedure was merely to provide a non-binding way of assisting the parties to coming to a settlement. In those circumstances it did not amount to an arbitration agreement.

[14] Counsel contended that the parties did not agree to refer disputes to arbitration in the sense required by the Act. There is a clear distinction in endevouring to resolve a dispute through arbitration and an agreement to refer the dispute to arbitration. The former, he argued, is more akin to a mediation clause.

[15] Regarding the Consumer Affairs Act and the *Contra Proferentem* Rule, Counsel for the Respondent asked the court to observe that section 3(2) of that Act refers to consumers who are natural persons and so the Applicant cannot rely on that section. Moreover, reliance on the common law principle of

[4] [1998] All ER 607

[5] [2001] EWCA Civ 34

[6] [2014] 2 All ER (Comm) 617

Contra Proferentum is only applicable where there is an ambiguity. He submitted that Clause 18 was quite clear in that It was advisory.

[16] Learned Counsel Mr. Elliott-Hamilton submitted that the Cable & Wireless plc case was not applicable to the case at bar as it was not one for a stay under the Arbitration Act. It concerned a special procedure. The question was whether the court in its inherent jurisdiction could stay the proceedings. This Application is for a stay under the Arbitration Act. No application was made under the inherent jurisdiction of the court. Colman J emphasized that the Alternative Dispute Resolution procedures set out in a clause must be sufficiently certain in order to be enforceable.

[17] Counsel further submitted that Clause 18 of the Agreement does not provide the same level of certainty as the procedures in Cable & Wireless plc. as it is not an arbitration agreement within the Arbitration Act, 1950. Learned Counsel concluded that the Applicant was therefore not entitled to rely on the Arbitration Act to enforce Clause 18 as in the Agreement the panel was advisory only. Consequently, the court should not grant a stay.

[18] Regarding the exercise of the court's inherent jurisdiction, Counsel for the Applicant Ms. Forrester contended that the court in this matter has an inherent jurisdiction to stay proceedings, a case management power to stay proceedings and a statutory right to stay proceedings based on the Arbitration Act 1950. The various principles for the statutory jurisdiction and the court's inherent jurisdiction do overlap, but it was incorrect to assert that the court's inherent jurisdiction has not been invoked in the grounds of the Application.

[19] Ms. Forrester submitted that the underlying purposes of the principles for a stay of proceedings in the court's inherent jurisdiction are used when considering if a stay should be under the court's powers pursuant to Civil Procedure Rules, 2000 (As amended) (CPR) Rule 9.7A and/or its statutory jurisdiction, neither are materially different and both can be exercised in any instance as may be needed.

[20] Several authorities were submitted to buttress the Applicant's argument. In Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd.[7] and Texan Management Limited et al v Pacific Electric

[7] [1993] AC 334

Wire & Cable Company Limited[8] the courts referred to the use of its inherent power to stay proceedings brought before it in breach of an agreement to decide disputes by an alternative method.

[21] Learned Counsel concluded that each jurisdiction of the court has been invoked on the grounds advanced and so it is not open to the Respondent to attempt to narrow the grounds of the Applicant's Application.

[22] In his response Counsel for the Respondent submitted that the jurisdiction of the court with respect to Arbitration clauses is statutory and not derived from any inherent power. Further, even if the court could enforce alternative dispute procedures on the basis of some inherent jurisdiction (which is denied), the court cannot rely on Cable & Wireless plc. as its facts and those of this case are distinguishable.

[23] Further, the High Court does not have an inherent jurisdiction to supervise arbitrations more extensive than that conferred in it by the Arbitration Act. Counsel made reference to Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corp[9] in support of this contention.

Court's Consideration and Decision

[24] CPR 9.7A provides that:

> "*(1) A defendant who contends that the court should not exercise its jurisdiction in respect of any proceedings may apply to the court for a stay and a declaration to that effect.*
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> *(2) A defendant who wishes to make an application under this paragraph 1 must first file an acknowledgment of service.*
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> *(3) An application under paragraph (1) of this Rule muse be made within the period for filing a defence; the period for making an application under this Rule includes any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed, to extend the time for filing a defence.*
>
> *(4) An application under this Rule must be supported by evidence on affidavit...*
>
> *(5) ...*
>
> *(6)*
>
> *(7) If on application under this Rule the court does not make a declaration, it -*
>
> *(a) may-*
>
> *(i) fix a date for a case management conference; or*

[8] [2009] UKPC Case Ref 46
[9] [1981] 1 All ER 289

(ii) treat the hearing of the application as a case management conference; and

(b) must make an order as to the period for filing a defence if none has yet been filed."

(8) Where a defendant makes an application under this Rule, the period for filing a defence (where none has yet been filed) is extended until the time specified by the court under paragraph (5)(b) and such period may be extended only by an order of the court."

[25] UK Arbitration Act of 1950 is the statute applicable to arbitration matters in St. Christopher and Nevis Arbitration Act. Section 4 of the UK 1950 Arbitration Act provides as follows:

"4.-(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, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, 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, may make an -order staying the proceedings.

(2) Notwithstanding anything in this Part of this Act, if any party to a submission to arbitration made in pursuance of an agreement to which the protocol set out in the First Schedule to this Act 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 legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge 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 agreed to be referred, shall make an order staying the proceedings."

[26] The crux of the Respondent's submissions is that Clause 18 is not sufficiently certain to be independently enforceable as an arbitration clause and as the court does not have an inherent jurisdiction to supervise the conduct of arbitrations more extensive than that conferred on it by the Arbitration Act it has no power to stay the proceedings.

[27] To my mind the court has a wide discretion to grant a stay based on the circumstances that it is just to grant a stay. This court has full power in this case, if it deems the circumstances permit, to grant a stay if that is what is just. When the court applies statutory provisions, it has regard to authorities on the principle of what warrants a stay when there is an agreement to arbitrate. When the court exercises its inherent jurisdiction, it examines whether or not the circumstances at hand warrants a stay. The court has complete power to act under either of its jurisdiction at all times and in this case, where both jurisdictions have been invoked and even if the inherent jurisdiction was not invoked.

[28] I find support for this view in the case of Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd[10] where the House of Lords held that

> *"the court had an inherent power to stay proceedings brought before it in breach of an agreement to decide disputes by an alternative method; and that, accordingly, whether or not the procedure for resolving disputes agreed between the parties amounted to an arbitration agreement falling within section 1 of the Arbitration Act 1975, the court had jurisdiction, which ought in the circumstances to be exercised, to stay the action".*

[29] The following passages from Channel Tunnel Group Ltd are worth citing in their entirety:

> *"First, as to the existence of the power to stay proceedings in a case which comes close to section 1 of the Act of 1975, and yet falls short either because of some special feature of the dispute-resolution clause, or because for some reason an agreement to arbitrate cannot immediately, or effectively, be applied to the dispute in question. It is true that no reported case to this effect was cited in argument, and in the only one which has subsequently come to light, namely Etri Fans Ltd. v. N.M.B. (U.K.) Ltd. [1987] 1 W.L.R. 1110, the court whilst assuming the existence of the power did not in fact make an order. I am satisfied however that the undoubted power of the court to stay proceedings under the general jurisdiction, where an action is brought in breach of agreement to submit disputes to the adjudication of a foreign court, provides a decisive analogy. Indeed until 1944 it was believed that the power to stay in such a case derived from the arbitration statutes. This notion was repudiated in Racecourse Betting Control Board v. Secretary for Air [1944] Ch. 114, but the analogy was nevertheless maintained. Thus, per MacKinnon L.J., at p. 126:*
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> > *"It is, I think, rather unfortunate that the power and duty of the court to stay the action [on the grounds of a foreign jurisdiction clause] was said to be under section 4 of the Arbitration Act 1889. In truth, that power and duty arose under a wider general principle, namely, that the court makes people abide by their contracts, and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach*

[10] [1993] AC 334

> *of his agreement with the defendant that any dispute between them shall be otherwise determined."*
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> *So also, in cases before and after 1944, per Atkin L.J. in The Athenee (1922) 11 Ll.L.Rep. 6 and Willmer J. in The Fehmarn [1957] 1 W.L.R. 815, 819, approved on appeal [1958] 1 W.L.R. 159, 163. I see no reason why the analogy should not be reversed. If it is appropriate to enforce a foreign jurisdiction clause under the general powers of the court by analogy with the discretionary power under what is now section 4(1) of the Act of 1950 to enforce an arbitration clause by means of a stay, it must surely be legitimate to use the same powers to enforce a dispute-resolution agreement which is nearly an immediately effective agreement to arbitrate, albeit not quite. I would therefore hold that irrespective of whether clause 67 falls within section 1 of the Act of 1975, the court has jurisdiction to stay the present action."*
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> *My Lords, I also have no doubt that this power should be exercised here… The parties here were large commercial enterprises, negotiating at arm's length in the light of a long experience of construction contracts, of the types of disputes which typically arise under them, and of the various means which can be adopted to resolve such disputes. It is plain that clause 67 was carefully drafted, and equally plain that all concerned must have recognised the potential weaknesses of the two-stage procedure and concluded that despite them there was a balance of practical advantage over the alternative of proceedings… Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking quite beside the point*." Emphasis added.

[30] I am of the considered view that when parties to a commercial contract agree a particular sufficiently certain alternative dispute resolution procedure, even if the dispute resolution clause itself contains weaknesses, the court's position is that is where the parties should go first and foremost and not come to court and complain about the weak nature of the Clause.

[31] I also accept find the statement by the Privy Council in Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited[11] to be instructive. In that case the Court stated:

> 51. From the earliest days of the Rules of the Supreme Court it was held that the rules providing for stays of proceedings did not prevent a defendant from seeking a stay under the inherent jurisdiction. Thus in Willis v Earl Beauchamp (1886) LR 11 PD 59 the then rule

[11] [2009] UKPC Case Ref 46

(RSC Ord 25, r.4, replaced from 1964 by RSC Ord 18, r.19(1)) provided for a stay if the action was shown by the pleadings to be frivolous or vexatious, but it was held that resort could be had to the inherent jurisdiction if the requirements of the rule were not met because it was not apparent on the face of the pleadings that the action was frivolous or vexatious. Bowen LJ said (at 63):

"I think this action ought to be stayed as being a vexatious action within the meaning attached to that word by the Courts, because it can really lead to no possible good. It does not fall under the rule as the Lord Justice has said, but the rules, as we have pointed out more than once, do not, and that particular rule does not, deprive the Court in any way of the inherent power which every Court has to prevent the abuse of legal machinery which would occur, if for no possible benefit the defendants are to be dragged through litigation which must be long and expensive." Emphasis added.

[32] I will now consider whether Clause 18 is indeed enforceable. I am of the view that the Agreement sets out a dispute resolution procedure. That procedure is valid and is a procedure the parties must perform. The Claimant/Respondent has opted to ignore the procedure in a document proposed by it and agreed to by both parties. To my mind the obligations are clear and certain to be given legal effect. These are condition precedent to moving forward with court proceedings.

[33] In Wah v Grant Thornton,[12] Hildyard J, stated in relation to agreements to utilise ADR, at paragraphs 59 – 61:

"[59] The court has been in the past, and will be, astute to consider each case on its own terms. The test is not whether a clause is a valid provision for a recognised process of ADR: it is whether the obligations and/or negative injunctions it imposes are sufficiently clear and certain to be given legal effect.

[60] In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement, (a) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach.

[61] In the context of a negative stipulation or injunction preventing a reference or proceedings until a given event, the question is whether the event is sufficiently

[12] [2012] EWHC 3198 (Ch),

defined and it's happening objectively ascertainable to enable the court to determine whether and when the event has occurred."

[34] I disagree with Counsel for the Respondent that David Wilson Services Limited is applicable as that was a case that dealt with the 1995 Act of the UK and not 1950 Act. In **O'Callaghan** there was no legal contract to form the basis of the of the arbitration agreement. That contract was void.

[35] In conclusion, I am of the view that Clause 18 of the Fuel Supply Agreement sets out a dispute resolution procedure. That procedure is valid and is a procedure the parties must perform. The Claimant/Respondent cannot opt to ignore the procedure in a document proposed by it and agreed to by both parties. The obligations are clear and certain to be given legal effect. These are condition precedent to moving forward with court proceedings. The court can measure what has to be done procedurally to satisfy the contractual obligations.

IT IS HEREBY ORDERED AND DIRECTED as follows:-

1. These proceedings be stayed in so far as they concern matters which under the Fuel Supply Agreement between the Applicant and the Respondent dated 18th July 2003 is to be referred to arbitration prior to court proceedings.

2. The Applicant's costs of this application is to be agreed between the parties within 21 days otherwise it is to be thereafter assessed.

Yvette Wallace
Master (A.g)

BY THE COURT

Registrar