

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity

2008/CLE/GEN/FP/00086

BETWEEN

HARCOURT DEVELOPMENTS (BAHAMAS) LIMITED

Plaintiff

AND

STEEL H. Q. (BAHAMAS) LIMITED

Defendant

Before: The Honourable Mrs Justice Estelle G. Gray Evans

For the plaintiff: Mrs Tiffany Dennison

For the defendant: Mr Joseph Walker

Date of Hearing: 24 October 2013

**DECISION**

Gray Evans, J.

1. The plaintiff is a builder/investor/developer carrying on business in the City of Freeport, in the Island of Grand Bahama. The defendant is a building contractor also carrying on business in the City of Freeport aforesaid.
2. The plaintiff commenced this action on 1 May 2008 by a specially indorsed writ of summons claiming inter alia, the sum of \$220,044.15 being funds had and received by the defendant from the plaintiff, damages, interest and costs.
3. The plaintiff alleges that the claim arose out of an agreement in writing dated 26 January 2007 between the plaintiff and the defendant whereby the defendant agreed to render services to the plaintiff who agreed to pay for the same with regard to development of the plaintiff's property at Suffolk Court Development, Bahamia Marina, Freeport. The plaintiff alleges further that the defendant is in breach of that agreement and as a result of such breaches the plaintiff has suffered loss and damage.
4. The defendant's defence and counterclaim was filed on 23 June 2008 and amended and re-filed on 29 October 2009. The defendant denies the plaintiff's claim and alleges instead that the plaintiff repudiated the agreement. The defendant, therefore, counterclaims for damages for repudiation of the said agreement, interest and costs.
5. The first case management conference was held on 5 May 2011 and directions given for the further prosecution of this case. A review of the file reveals that the parties were well on their way with preparations for trial.
6. However, by summons filed 20 September 2013 on behalf of the defendant, application is made for an order pursuant to the inherent jurisdiction of the Court and section 9(1) of the Arbitration Act, 2009, that all further proceedings in the above action be stayed on the ground that the contract between the parties herein provides for all disputes to be settled by Arbitration and that the cost of and occasioned by the application be costs in the cause.
7. Clause 19 of the said agreement provides that:

"All claims, disputes, and other matters in question arising out of, or relating to, the contract documents, or the breach thereof, including, without limiting the applicability or enforceability of this Clause 19, shall be decided by provisions of the Arbitration Act of the Commonwealth of The Bahamas."
8. That summons is supported by the affidavit of Frederica Gertrude McCartney, a partner in the firm of DuPuch & Turnquest, counsel for the defendants.
9. The Defendant's position is simply that the plaintiff ought not be allowed to proceed with this claim in the Supreme Court and ignore the arbitration process to which the parties agreed for the resolution of all disputes between them.
10. In support of his arguments and submissions, counsel for the defendant relies on the cases of *Chok Yick Interior Design v Engineering Co. Ltd* (2008) HCA; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*. [1993] AC 334; *Home and Overseas Insurance Co. v Mentor Insurance Co. Ltd* [1990] 1 WLR 153 and *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 144.
11. The plaintiff says that the defendant ought not to be permitted, at this late stage of the proceedings, to rely on the arbitration provision, particularly, as counsel for the plaintiff says, attempts to settle the matter have proven fruitless.

12. Counsel for the plaintiff points out further that the defendant has not yet complied with the directions order and she requests that the defence be struck out on the ground of such non-compliance. In her submission, the more prudent course of action would be for this Court to accede to that request either by ordering that the defence be struck out immediately for non-compliance, or by giving the defendant fourteen days within which to comply, failing which the defence is to be struck out.

13. It is clear from Clause 19 aforesaid that the parties intended that all disputes, even the applicability or enforceability of that clause, were to be referred to arbitration.

14. There is no dispute that the defendant has taken several procedural steps to answer the substantive claim. As counsel for the plaintiff points out, not only has the defendant filed a defence and counterclaim to the plaintiff's claim, which defence and counterclaim was subsequently amended, but the defendant has also sought and obtained further and better particulars to the plaintiff's claim. In those circumstances, counsel for the defendant argues that the defendant is prevented by section 9(3) of the Arbitration Act, 2009, from proceeding with this application for a stay.

15. Section 9(3) of the Arbitration Act provides that an application for a stay of proceedings may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim. [emphasis mine]

16. However, counsel for the plaintiff argues that the defendant's application is not being made under the Arbitration Act but rather under the inherent jurisdiction of the Court as well as the Court's admittedly wide case management powers contained in Rules of the Supreme Court (RSC) Order 31A rule 1(e) which provides that the Court's active management of cases may include: "encouraging the parties to use any appropriate form of dispute resolution and facilitating the use of such procedures."

17. I accept counsel for the defendant's submission that such a power must include staying proceedings to enable the parties to go to arbitration in circumstances where they have previously agreed that arbitration would be the appropriate venue to resolve any dispute between them.

18. In any event, the Court has the power by section 18(2)(d) of RSC Order 31A to stay the whole or part of any proceedings generally or until a specified date or event.

19. Counsel for the plaintiff does not dispute that the Court has inherent jurisdiction to order a stay of proceedings. However, she objects to the stay on the ground that too much time has elapsed since this action commenced and too much has already been invested in progressing this matter to trial.

20. The delay in making this application is certainly a consideration when exercising my discretion. I also take into consideration the plaintiff's application for an order that unless the defendant complies with the directions for readying this matter for trial within fourteen days, its defence should be struck out. However, I must also take judicial notice of the fact that even if the parties were ready for trial now, or could be ready within the next two weeks, realistically they will not be able to get a trial date before 2015 and more likely 2016. Counsel for the defendant is confident that if this court accedes to his application and the matter is referred to arbitration, the arbitration procedure would be completed before a trial date in 2015 or 2016.

21. It seems to me that it would, therefore, be sensible for the matter to be referred to arbitration, particularly as the parties agreed by virtue of Clause 19 aforesaid to refer all disputes to arbitration and I agree with counsel for the defendant that the onus was on the

plaintiff, who commenced this action, to comply with the terms of the agreement and refer the matter to arbitration instead of commencing an action in the Supreme Court.

22. So, in the exercise of my discretion, and under the inherent jurisdiction of the court, I order that this action be stayed so that the parties may proceed to arbitration pursuant to the provisions of Clause 19 aforesaid.

23. Costs will be in the cause.

DELIVERED this 26<sup>th</sup> day of November A.D. 2013

Estelle G. Gray Evans  
Justice