

**BARBADOS**  
**[Unreported]**

**CV 199 of 2013**

**IN THE HIGH COURT OF JUSTICE**

**CIVIL DIVISION**

**IN THE MATTER OF AN APPLICATION UNDER  
SECTION 24 OF THE BARBADOS  
CONSTITUTION**

**IN THE MATTER OF AN ARBITRATION  
BEFORE HENRI C. ALVAREZ Q.C. AND  
MICHAEL LEE CONDUCTED UNDER THE  
INTERNATIONAL ARBITRATION RULES OF  
THE INTERNATIONAL CENTRE FOR DISPUTE  
RESOLUTION AND THE INTERNATIONAL  
COMMERCIAL ARBITRATION ACT 2007**

**BETWEEN:**

**AUTO-GUADELOUPE INVESTISSEMENT S.A.**

**CLAIMANT**

**AND**

**HENRI C. ALVAREZ**

**FIRST RESPONDENT**

**MICHAEL LEE**

**SECOND RESPONDENT**

**ATTORNEY GENERAL OF BARBADOS**

**THIRD RESPONDENT**

**Before the Hon. Madam Justice Elneth O. Kentish, Judge of the High Court**

**2013: February 28**

**April 4**

**Mr. Garth Patterson Q.C. with Ms. Tammi Pilgrim of Lex Caribbean for the Claimant**

**Mr. Patterson Cheltenham Q.C with Ms. Natasha Green of Charlton Chambers for the  
First Respondent**

**There was no appearance on behalf of the Second Respondent**

**Mrs. Corlita Babb-Schaefer and Mrs. Margreta Jordan for the Third Respondent**

**Mr. Ramon Alleyne with Ms. Shena-Ann Ince of Clarke Gittens Farmer for Caribbean  
Fiber Holdings L.P. the First Intervener**

**Mr. Dale Marshal, Q.C. and Mr. Andrew Thornhill of George Walton Payne and Co. for Columbus Holdings France S.A.S and Columbus Acquisitions Inc. the Second Intervener**

**DECISION**

**BACKGROUND**

[1] By way of a Fixed Date Claim Form filed 6 February 2013 and revised by an Amended Fixed Date Claim Form filed 4 April 2013, Auto-Guadeloupe Investissement S.A., the Claimant, (“AGI”) sought the relief more specifically set out at Paragraphs 8 to 17 of its Amended Fixed Date Claim therein, including:

1. First, a declaration that arbitrator Alvarez was not independent and impartial by reason of his multiple undisclosed conflicts of interest.
2. Second, a declaration that by reason of Alvarez’s lack of independence and impartiality the arbitration proceedings conducted by Alvarez violated the Claimant’s fundamental right under *section 18(8)* of the *Constitution* to a fair hearing conducted by an independent and impartial tribunal.
3. Third, an order quashing, annulling and/or setting aside all proceedings before, and all awards made by, Alvarez in the course of the Arbitration, including but not limited to the Partial Award on Liability rendered on 29 March 2011 (the “Award”), on the grounds that it was made in contravention of the said fundamental rights of the Claimant.
4. Fourth, an order staying all proceedings in the Arbitration being conducted by the arbitrator Lee on the grounds that the same is founded on, and accordingly tainted by, the impugned proceedings before, and awards made by, arbitrator Alvarez, including in particular the Award.
5. Fifth, an order quashing, annulling and/or setting aside all proceedings before, and all awards made by, Lee in the course of the Arbitration.
6. Sixth, in the alternative to the reliefs claimed above, a declaration that, insofar as *section 47(4)* of the *International Commercial Arbitration Act 2007* (the “Act”) operates as a bar to setting aside an arbitral award that is tainted by the lack of independence and/or impartiality of the arbitral tribunal, it contravenes the Claimant’s fundamental and absolute right under *section 18(8)* of the *Constitution* to a fair hearing conducted by an independent and impartial tribunal, and to that extent is, accordingly, null and void.
7. Seventh, in the further alternative, a declaration that, insofar as *section 47(4)* of the Act operates so as to bar the Claimant’s access to the Court of Appeal under *section 47(2)* of the Act for the purposes of making an application to set aside an arbitral award that is tainted by the lack of independence and/or impartiality of the arbitral tribunal, *section 47(4)* contravenes the Claimant’s fundamental and absolute right under *section 18(8)* of the *Constitution* to a fair hearing within a reasonable time.
8. Eighth, an interim order staying the Arbitration, or alternatively, an injunction to restrain Lee from proceeding with the Arbitration,

pending the hearing and determination of the application under *section 24* of the *Constitution*.

- [2] On 4 April 2013 the Claimant also filed an Amended Statement of Claim in which the prayer for relief repeated the relief sought in the Amended Fixed Date Claim Form.
- [3] On 14 February 2013 the Claimant filed an “**APPLICATION WITHOUT NOTICE FOR STAY OF ARBITRATION PROCEEDINGS**” (“the Without Notice Application”) for an order, *inter alia*, that:
1. all proceedings pending before Arbitrator Michael Lee (“Lee”) pursuant to a Partial Award on Liability handed down on 29 March 2011 and rendered by the sole Arbitrator Henri C. Alvarez (“Alvarez”) in an international commercial arbitration (the “Arbitration”) that was commenced in July 2009 in the American Arbitration Association’s International Centre for Dispute Resolution (“ICDR”) between Columbus Acquisitions, Inc. Columbus Holdings France S.A.S., together with the Columbus Acquisitions Inc., (“Columbus”); Caribbean Fiber Holdings L.P. (“CFH”), and the Claimant, be stayed forthwith pending the hearing and determination of the proceedings filed herein or until further order;
- [4] The grounds of the application are as follows:
1. The Application is made without notice.
  2. The Claimant has filed these proceedings seeking various declarations and orders, *inter alia*, that
    - (i) Alvarez was not independent and impartial by reason of his multiple undisclosed conflicts of interest;
    - (ii) that by reason of Alvarez’s lack of independence and impartiality, the arbitration proceedings conducted by Alvarez violated the Claimant’s fundamental right under *section 18(8)* of the *Constitution* to a fair hearing conducted by an independent and impartial tribunal;
    - (iii) an order quashing, annulling and/or setting aside all proceedings before, and all awards made by, Alvarez in the course of the Arbitration proceedings, including but not limited to the Award, on the grounds that it was made in contravention of the said fundamental rights of the Claimant;
    - (iv) an order staying all arbitration proceedings being conducted by Lee on the grounds that the same are founded on, and accordingly tainted by, the impugned proceedings before, and awards made by, Alvarez, including, in particular, the Award.
  3. The Claimant also claims in the alternative, a declaration that, insofar as *section 47(4)* of the *International Commercial Arbitration Act, 2007* of the *Laws of Barbados* operates as a bar to setting aside an arbitral award that is tainted by the lack of independence and/or impartiality of the arbitral tribunal, it contravenes the Claimant’s fundamental and absolute right under *section 18(8)* of the *Constitution* to a fair hearing conducted by an independent and impartial tribunal, and to that extent is, accordingly, null and void.
- [5] On 7 November 2011, the Claimant made an application to the American Arbitration Association’s International Centre of Dispute Resolution (“ICDR”) challenging the appointment of Alvarez on the basis that he was neither independent nor impartial. It was contended for the Claimant that at the time of

his appointment Alvarez had failed to disclose without delay any circumstances likely to give rise to justifiable doubts as to his independence or impartiality, as required by the applicable rules.

- [6] On 9 December 2011, the ICDR notified the parties that it had rejected the Claimant's application and it also advised that Alvarez had tendered his resignation.
- [7] On 26 June 2012, against the objection of the Claimant, the ICRD appointed Lee to act as sole arbitrator in the damages phase of the arbitration proceedings.
- [8] The Claimant subsequently renewed its application before Lee for a stay and contested Lee's jurisdiction and any continuation of the damages phase on the grounds, *inter alia*, of the lack of independence and impartiality of Alvarez due to his undisclosed conflicts of interest. Lee conducted a hearing of the Claimant's application in New York on the 4 October 2012, and on the 14 November 2012 made a partial Award rejecting the Claimant's claim, and ordering that the damages phase of the proceedings was to proceed. In doing so, Lee relied on Alvarez's previous Partial Award on Jurisdiction, and held that the Claimant was estopped from rearguing the jurisdiction point that the Applicant had previously decided.
- [9] When the Without Notice Application, as filed under an urgent certificate, came on for hearing before this court on 28 February 2013, Counsel for Caribbean Fiber Holdings L.P ("CFH") and Columbus Holdings France S.A.S and Columbus Acquisitions Inc., (collectively referred to as "Columbus"), appeared having learnt of the Without Notice Application.
- [10] On the same date, an order was made giving Counsel for CFH and Columbus leave to file applications on behalf of their respective clients to be joined as parties to the substantive action.

#### **The Applications for Joinder**

- [11] By notice of application filed 21 March 2013 Columbus sought an order, *inter alia*, that they be added as respondents to the action. The notice of application was supported by an affidavit of Ms. Shontelle Nicole Murrell, Attorney-at-Law filed on the same date.
- [12] A similar application was filed by CFH on 22 March 2013. That application was supported by an affidavit of Ms. Shena-Ann Ince, Attorney-at-Law, also filed on the same date, in which the historical background to this action was outlined on the basis of information supplied to her by Mr. Johnathan Ellison, international counsel of CFH.
- [13] The affidavit recounted at Paragraphs 10 to 13 inclusive the various challenges made by the Claimant against former arbitrator Mr. Henri Alvarez, the First Respondent and against the subsequent appointment of Mr. Michael Lee, the Second Respondent as an arbitrator.
- [14] Upon the hearing of the matter, Counsel for CFH and AGI made oral and written submissions to the court.
- [15] Counsel for Columbus made no oral or written submissions, but adopted the submissions of Counsel for CFH.

#### **THE ISSUE**

- [16] The issue for the court's determination is whether the court should allow CFH and Columbus to be joined as parties to the substantive action.

#### **THE SUBMISSIONS**

- [17] Mr. Ramon Alleyne, Counsel for CFH, submitted that CFH should be joined as a party to this action as it is an integral party to the arbitration proceedings from which

the present proceedings emanate. He pointed out that AGI had launched similar actions before the ICDR and the Barbados Court of Appeal and that those actions had been successfully resisted by CFH. He argued that the Claimant, having failed in its earlier challenges, has sought to reignite its challenges against different respondents in the hope of collaterally attacking the previous decision of the Barbados Court of Appeal in *Auto-Guadeloupe Investissement S.A. v Columbus Acquisitions Inc., Columbus Holdings France S.A.S and Caribbean Fiber Holdings L.P., Civil Appeal No. 11 of 2011 (02 October 2012)*, in which the Claimant's application for a stay of proceedings was denied.

- [18] He argued further that the Claimant's failure to join CFH as a party does not accord either with the spirit of the objective of the international commercial arbitration regime or with the spirit of *The Supreme Court (Civil Procedure) Rules 2008* ("the CPR") as such a failure will not allow the court to deal with the substantive action justly.
- [19] He argued that whilst the proceedings were brought against Alvarez and Lee the relief sought was, in reality, against CFH and Columbus, the parties to the arbitration, who have not been joined as parties in this claim. He contended that if they were parties in the matter before the Court of Appeal, they ought also to be parties in the present action.
- [20] He further argued that the substance of the instant action was the same, that is, that Counsel for the Claimant is seeking to achieve the setting aside of the partial arbitral award granted by Alvarez, by relying on a claim for constitutional redress.
- [21] The applications for joinder have been strongly resisted by Counsel for AGI, Mr. Garth Patterson Q.C., on the basis that there is no issue in the current action which relates to the proposed interveners. The present action is, he argued, a constitutional motion brought under *Section 24 of the Constitution of Barbados* ("the Constitution") against Alvarez and Lee only, and that motion relates to the alleged infringement of the fundamental rights of the Claimant by a "someone" other than the proposed interveners.
- [22] He argued that no allegations were being made against CFH or Columbus, but against the First and Second Respondents. Further, Counsel submitted that *section 24* of the *Constitution* speaks only to redress and that a party against whom no redress is being sought ought not to be added to these proceedings.
- [23] Counsel for AGI submitted that the Court must have a clear understanding of the issues that constitute the matters in dispute in the current action prior to making a determination as to the desirability of adding a party, as it is those disputed matters that form the core feature linking any proposed intervenor to the proceedings. He cited in support *Vandervell Trustees Limited v White* [1970] 3 ALL E.R. 16 and the dicta of Viscount Dilhorne that *The Civil Procedure Rules 1998* ("the English CPR") do not provide that a party may be added on account of matters in dispute in another cause or matter. Counsel also relied on the decision of the Barbados Court of Appeal in *Brondum A/S v Caribbean Financial Services Corporation* (2007) 72 WIR 26 for the submission that the fact that CFH and Columbus are likely to be affected financially by the action is not a sufficient basis on which to allow them to be joined as parties. With the latter submission Counsel for CFH agreed.

#### THE LAW

- [24] The applicable law on the joinder of parties to proceedings is to be found under *Parts 19.2 and 19.3* of the *CPR* which provide as follows:

*Part 19.2(3)*: The court may add a new party to proceedings without an application having been made to do so, where

- (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
- (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

**Part 19.3(1):** The court may add, substitute or remove a party on or without an application.

- (2) An application for permission to add, substitute or removed a party may be made by:
  - (a) an existing party; or
  - (b) a person who wishes to become a party.

[25] Counsel for CHF referred the Court to the decision of the Barbados Court of Appeal in *Financial Services Commission (Petitioner) and BIPA Inc.(Intended Petitioner) v British American Insurance (Barbados) Limited, Civil Appeal No. 4 of 2012 Decision of 31 October 2012 (“BIPA”)* where Burgess JA in holding that the “desirability test” under *Part 19.2(3)* of the *CPR* replaced the “necessity” and/or “just and convenient” test under the *Rules of the Supreme Court 1982 (“the RSC”)* stated at Paragraphs 14 to 16:

- “14. The first ground relied on by BIPA is that **Beckles J (ag)** “was wrong as a matter of law because the Learned Judge held that on a correct construction of the ‘necessity’ test and the ‘just and convenient’ test the Appellant had failed to meet either standard” in its application to join the judicial management proceedings. Before **Beckles J (ag)**, Mr. Khan, counsel for BIPA, claimed to derive support for the view that the “necessity” test and the “just and convenient” test were the tests which Beckles had to apply from the judgment of **Williams JA** in the Court of Appeal in the case of *Johnston International Limited v Clico International General Insurance Ltd. and Everson R Elcock & Co. Ltd., Civil Appeal 13 of 2006*. **Williams JA** said there at *paragraph [36]*:

*“An applicant...has to pass one of two tests before it can be added as a party to an action. First, it has to fulfill what we conveniently call the “necessary” test or secondly the “just and convenient” test. Whether or not an applicant reaches that threshold requires a judge to make a judicial assessment of the material facts and circumstances relevant to the tests...”*

15. But with all due respect, **Williams JA** was in that case stating the tests based on the then applicable rules for adding a party in **RSC Order 15 Rule 6(2)(b)(i) and (ii)**. Those rules have been revoked by **Part 73.2** of the *CPR* and replaced by **Part 19.3 (3)** of the *CPR*. In fact, BIPA’s application before **Beckles J (ag)** was made pursuant to **Part 19.2 (3)**. This provides that the court may add a new party to proceedings where “(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in

the proceedings; or (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.”

16. The tests in **Part 19.2 (3)** were the applicable tests and not the **RSC Order 15 Rule 6 (2)(b)(i) and (ii)** tests stated by **Williams JA** as contended by BIPA. **Beckles J (ag)** based the exercise of her discretion on an application of the tests in **Part 19.2 (3)**. So that, far from being clearly, blatantly or plainly wrong on the footing of applying the wrong tests as alleged by BIPA, she was decidedly correct. Attention must therefore now be turned to her application of these tests to the facts before her.”

[26] In effect, therefore, Burgess JA overruled the decision of Williams JA in *Johnston International Limited v CLICO International General Insurance Limited and Everson R. Elcock and Co. Ltd. Civil Appeal 13 of 2006 Decision of 19 March 2008* on the basis that the “necessity” test and the “just and convenient” test were based on the then applicable rules for adding a party under *RSC Order 5. rule 6(2)(b)(i) and (ii)* which have now been revoked by the transitional rules under *Part 73.2* of the *CPR* and replaced by *Part 19.2(3)* of the *CPR*.

[27] Counsel for the Claimant, on the other hand, relied on the English cases of *PNPF Trust Co. Ltd (claiming as trustee of the Pilots’ National Pension Fund) v Taylor and others* [2009] EWHC 1963 (Ch) and the observations of Proudman J therein in relation to *Rule 19.2(2) the English CPR*, which is almost identical to the *Barbados CPR Rule 19.2(3)*, and on the case of *Dewrace Limited v Charles Brown* [2007] EWHC 3100 (TCC).

[28] Counsel also referred to *PR Records Limited v Vinyl 2000 Ltd and Another* [2007] EWHC 1721 (Ch) and the dicta of Morgan J at paragraph 34 that:

“...it is reasonably clear how the court would normally react to an application to join a party. **An application for such an order would normally be expected to explain the nature of the claim which the applicant had against the intended party and the purpose to be served by joining that party.** If the applicant was not able to explain its claim against the intended party and/or was not able to say what purpose was served by joining the intended party, then the court might very well dismiss the application. If, for some reason, it was clear that a joinder of the intended party was an abuse of the process of the court then again the court would be expected to dismiss the application. (my emphasis).”

[29] In essence, Counsel for AGI was submitting that CFH and Columbus had not explained the nature of the claim which they allege to have against AGI in this action nor had they explained the purpose to be served by joining them as parties.

[30] I am satisfied that the relevant principles of law are those propounded by Burgess JA in *BIPA*.

[31] In the applications for joinder before me the crucial questions which I must ask myself are:

1. is there an issue involving CFH and Columbus which is connected to the matters in dispute in the proceedings; and

2. is it desirable to add CFH and Columbus as parties to the action so that the court can resolve that issue?

- [32] Looking at the Amended Statement of Claim, under the heading “**THE PARTIES AND PRINCIPAL ACTORS**”, Columbus is referred to at paragraph 4 thereof and CFH is referred to at paragraph 5 thereof.
- [33] Under paragraph 6 reference is made to the arbitration proceedings commenced by Columbus against the Claimant and CFH, in which Alvarez was appointed as sole arbitrator and Lee subsequently appointed as sole arbitrator on the resignation of Alvarez.
- [34] Under the heading “**FACTUAL BACKGROUND**”, AGI and CFH are referred to as parties to a joint venture agreement whilst Columbus is referred to as maintaining “an extensive network of subsea fiber optic cables which link the western part of the Caribbean.”
- [35] Under the subheading “*The November 2008 Memorandum of Terms*”, Columbus and CFH and AGI are all referred to in relation to the Memorandum of Terms.
- [36] Having regard to the foregoing it seems to me that the Claimant has throughout its Amended Statement of Claim referred to the very parties who are not now joined as parties to the substantive action. The explanation proffered by Counsel for AGI is that it is not possible to file that action without referencing the background as was done.
- [37] It seems to me, however, that the very fact that CFH and Columbus are so intricately woven into the Amended Statement of Claim indicates that the issues to be resolved in this action originate from the contract between the parties, being AGI, CFH and Columbus, the dispute which gave rise to the arbitral proceedings, and the appointment of the Alvarez as arbitrator.
- [38] There is an underlying issue which links these parties together in such a way that it is not possible to sever and disassociate CFH and Columbus from the substantive action.
- [39] In this regard it is instructive to look at the prayer for relief contained in the Amended Statement of Claim which includes a request for an order “staying all proceedings in the arbitration being conducted by the arbitrator Lee on the grounds that the same is founded on, and accordingly tainted by, the impugned proceedings before, and awards made by arbitrator Alvarez and an order quashing, annulling and/or setting aside all proceedings before and all awards made by, Lee in the course of the arbitration.”
- [40] In my view, by virtue of the orders requested, there is an issue involving the intervening parties, that is, CFH and Columbus, which is connected to the matters in dispute in the substantive action. As noted at paragraph [37] above this issue arises out of the dispute relating to the contract underpinning the arbitral proceedings.
- [41] Finally, insofar as it is urged that the nature of this action is a constitutional motion for the infringement by the arbitrator of the rights of the Claimant, the orders referred to above are not divorced from the dispute in the arbitration proceedings to which CFH and Columbus are parties.
- DISPOSAL**
- [42] Accordingly, I am satisfied that CFH and Columbus should be joined as parties to this action as such joinders are desirable and will allow the Court to resolve all matters in dispute in the proceedings.
- [43] The respective applications of CFH and Columbus to be joined as parties to the substantive action are therefore granted.
- [44] I shall hear the parties as to costs.

**Elneth O. Kentish**  
Judge of the High Court