BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

No. 1320 of 2001

BETWEEN:

BARRACKCONSTRUCTION LTD.

(Plaintiff)

AND

NATIONAL HOUSING CORPORATION
(Defendant)

Before The Honourable Mr. Justice Carlisle S. Payne, Judge of the High Court.

2002: January 22

Mr. Andrew Thornhill for the Plaintiff with Miss Shelley Stuart and Mr. Gregory Nicholls.

Mr. Alair Shepherd, Q.C.,for the Defendant, with Miss Samantha Cummins.

DECISION

Bya contract dated 13thAugust 1998 the Plaintiff agreed to construct a five storey officecomplex at Warrens, St. Michael for the Defendant.

Adispute has arisen between the parties and the Plaintiff wishes to proceed toarbitration. He is seeking an orderthat the parties proceed to arbitration within 14 days.

TheDefendant contends that the dispute, which relates to a certificate of thearchitect as to the date that the works should reasonably have been completed,is not referrable to arbitration at this stage, but only after one of theevents mentioned in clause 35(2) of the JCT Standard Form, which wasincorporated into the agreement. [1]

ThePlaintiff's case is that clause 35(2) of the standard form is in conflict withclause 22 of the agreement and that the agreement should prevail. Counsel relies on the rule of interpretationexpressed as follows at paragraph 8.12 in The Interpretation of Contracts, 2ndEdition by Kim Lewison, Q.C.:-

"Wherea contract incorporates the terms of another document and the terms of thatother document conflict with the terms of the contract, the terms of thecontract will prevail."

Clause22 of the agreement is as follows:-

"In case any dispute ordifference shall arise between the Employer and the Contractor either duringthe progress or after the completion or abandonment of the works as to theconstruction of the Contract or as to any matter or thing arising hereunder orin connection therewith either party may forthwith give to the other notice inwriting of such dispute or difference and the same shall be and is herebyreferred to arbitration in accordance with the Arbitration Act Cap. 110 of Barbados."

Clause 35 of the JCT Standard Form is as follows:-

" (1) Provided always thatin case any dispute or difference shall arise between the Employer or theArchitect on his behalf and the Contractor, either during the progress or afterthe completion or abandonment of the works, as to the construction of thiscontract or as to any matter or thing or whatsoever nature arising thereunderor in connection therewith (including any matter or thing left by this Contractto the discretion of the Architect or the withholding by the Architect of anycertificate to which the Contractor may claim to be entitled or the measurementand valuation mentioned in clause 30 (5) (a) of these Conditions or the rightsand liabilites of the parties under clauses 25, 26, 32, or 33 of theseConditions), then such dispute or difference shall be and is hereby referred tothe arbitration and final decision of aperson to be agreed between the parties, or, failing agreement within 14 daysafter either party has given to the other a written request to concur in theappointment of an Arbitrator, a person to be appointed on the request of eitherparty by the President or a Vice-President for the time being of the BarbadosInstitute of Architects.

(2) Such reference, except on article 3 orarticle 4 of the Articles of Agreement, or on the questions whether or not the issueof an instruction is

empowered by these Conditions, whether or not acertificate has been improperly withheld or is not in accordance with theseConditions, or on any dispute or difference under clauses 32 and 33 of theseconditions, shall not be opened until after Practical Completion or [2] alleged PracticalCompletion of the Works or termination or alleged termination of theContractor's Employment under this Contract, or abandonment of the Works,unless with the written consent of the Employer or the Architect on his behalfand the Contractor."

Mr. Shepherdsubmits that clause 35 (2) above is merely a proviso to 35 (1), which is ineffect the same as clause 22 of the agreement. He contends that there is no conflict between clause 35 (2) of the JCTStandard Form and clause 22 of the agreement.

InPagnan SpA v Tradax 1987, 3AER565 it was a special condition of a contract ofsale that the sellers would provide for an export certificate. The contract also incorporated the terms ofGAFTA Form 119, clause 19 of which was a standard force majeure clauseproviding for cancellation of the contract where the sellers could not obtainthe export certificate. The contractcontained an "inconsistency clause", which stated that the special conditionswere to prevail over the standard terms. The sellers were unable to obtain the necessary export certificate.

The Court of Appeal (Dillon, Woolf and BinghamLJJ) held,

quoting from the Headnote tothe report, as follows:-

"The special condition was tobe construed fairly in the context of the contract as a whole and in itsfactual setting in order to ascertain the true intention of the parties. On itstrue construction, the special condition imposed an absolute obligation on thesellers to obtain an export certificate, and prima facie there had been abreach of that obligation. It followed that if there was inconsistency betweenthe special condition and cl 19 of GAFTA Form 119 then, applying the inconsistency clause, the special conditionwould prevail and the sellers would be liable for their failure to obtain theexport certificate. However, the merefact that an apparently wide and absolute provision was subject to limitation,modification or qualification by other provisions did not necessarily makethose other provisions inconsistent or repugnant, since for inconsistency toarise the clauses in question had to be incapable of being sensibly readtogether. In the circumstances, thespecial condition could be read in combination with cl. 19 so that in theevents specified in cl 19, but not otherwise, the sellers would be releasedfrom their contractual obligation to obtain a certificate and the contract orany unfulfilled [3] part of it would be cancelled. Since the circumstances which prevented the sellers from obtaining the export certificate fell within theclosely circumscribed ambit of cl 19, it followed that the sellers were excusedfrom liability by cl. 19. The appealwould accordingly be dismissed."

In Forbes v Git, 1922, IAC 256,the appellantcontracted with the respondents to carry out work in altering theirrestaurant. The contract by its firstclause witnessed that in consideration of $3000 payable by three instalments,the appellant agreed to furnish the materials and perform the services statedin the contract. Details of the workfollowed, and there was a final clause to the effect that the respondents wereto pay to the appellant the value of the materials provided and labour done, eachat 12½ per cent. over cost, whether that value exceeded or was less than$3000. The materials and labourconsiderably exceeded that sum, and the appellant sued for a balance based uponthe final clause.

The Privy Council, reversing a decision of the SupremeCourt of Canada, stated at page 259 per Lord Wrenbury:-

"The principle of law to beapplied may be stated in few words. If in a deed an earlierclause is followed by a later clause which destroys altogether the obligationcreated by the earlier clause, the later clause is to be rejected as repugnantand the earlier clause prevails. Inthis case the two clauses cannot be reconciled and the earlier provision in thedeed prevails over the later. Thus if Acovenants to pay 100l. and the deedsubsequently provides that he shall not be liable under his covenant, thatlater provision is to be rejected as repugnant and void for it altogetherdestroys the covenant. But if the laterclause does not destroy but only qualifies the earlier, then the two are to beread together and effect is to be given to the intention of the parties asdisclosed by the deed as a whole. Thusif A covenants to pay 100l. and thedeed subsequently provides that he shall be liable to pay only at a futurenamed date or in a future defined event or if at the due date of payment heholds a defined office, then the absolute covenant to pay is controlled by thewords qualifying the obligation in manner described.

Furnivall v Coombes (1843) 5 Man. &G.736) is an illustration of the former case: Williams v Hathaway (1877)6 Ch. D.544 is an illustration of the latter.

In the latter case therecould be no question if the later provision of the deed were introduced by theword "but" or the words "provided always nevertheless," or the like. But [4] there is no necessity to find any suchwords. If a later clause says in somany words or as matter of construction that an earlier clause is to bequalified in a certain way, effect can be given and must be given to bothclauses."

I conclude therefore that a clause in the incorporated JCT Standard Formcan be rejected as in conflict or inconsistent with a clause in the agreementonly where the conflict or inconsistency is such that effect cannot fairly begiven to both clauses.

That plainly isnot the case here. Clause 35 (2) of thestandard form merely limits, qualifies or controls, without destroyingaltogether, clause 22 of the agreement. Clause 35(2) is merely a proviso to clause 35 (1), which is in effectthe same as clause 22 of the agreement.

The Plaintiff's summons is therefore dismissed.

Costs for the Defendant to be agreed or taxed. [5]

Carlisle S. Payne

High Court Judge.