BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Nos. 1946 of 2005 and 1945 of 2005.

BETWEEN:

BRONDUM A/S **PLAINTIFF**

AND

CARIBBEAN FINANCIAL SERVICES **DEFENDANT**

Before **The Hon. Madam Justice Jacqueline A. R Cornelius, Judge of the High Court.**

2006: February 06, 10

Mr. Ramon Alleyne and Mr. Kevin Boyce of Clarke, Gittens and Farmer for the Plaintiff.

Mr. Garth Patterson of Lex Caribbean for the Defendant.

Mr. Bryan Weekes of Weekes and Kissoon for the proposed intervener.

JUDGMENT

[1] These are identical applications by Electric Sales and Services ("ESSCO") to intervene in actions for enforcement of guarantees between the Plaintiff and the Defendant.

[2] ESSCO is a local company which contracted to supply and install air conditioning works on the refurbishment at the Grantley Adams International Airport ("the contract") with Brondum A/S ("Brondum"), an external registered company engaged in construction in Barbados. In pursuance of that agreement, and as a prerequisite thereto, ESSCO executed a document which the parties have variously referred to as a "performance bond", or a "bond to guarantee ESSCO's performance" under the contract, but is agreed by all parties to be a guarantee. This guarantee was put in place through the Defendant, Caribbean Financial Services Corporation ("CFSC"), who provides services of this kind.

[3] The contract between Essco and Brondum ended in rancour, with the Plaintiff alleging repudiatory breach of the contract by Brondum. Brondum promptly brought an action by writ of summons (suit number 1945/2005 dated 12 October 2005) against the Defendant for

payment under the guarantee, alleging, inter alia, that ESSCO, in breach of their contractual obligations, carried out the contract works defectively, failed to remedy the defective works and/or failed to complete the works.

[4] The Defendant filed its defence on 21 November 2005, denying the characterisation of the guarantee as a bond. It says that even if the guarantee is enforceable, which it denies it is entitled not to pay because the relevant demand was made out of time, and that even so, the demand was not made in good faith.

[5] In the sister suit, 1945/2005, the Plaintiffs allege that it contracted with ESSCO to grant an advance payment loan of a maximum of $400 000.00 provided that an advance payment guarantee to secure payment in the event of ESSCO's default in repayment. The loan was duly made, and the Plaintiffs allege that ESSCO has not repaid the monies and seek to enforce this guarantee, which was made through CFSC as well. Again, CFSC in its defence, disputes the enforceability of this guarantee, and argues further that it is entitled not to pay because the demand made was not made, inter alia, in good faith.

[6] Arbitration proceedings have now commenced on both these matters and will be heard in the next few months. The actual technical grounds of the arbitration are not revealed to the court.

[7] In addition, a Mareva injunction was granted in another suit (796/2005) on ESSCO's application freezing Brondum's assets in Barbados. The parties are awaiting a decision on an application for discharge brought by Brondum.

ESSCO's Application:

[8] ESSCO seeks to be joined as a defendant under Order 15 rule 6 (3) b of the Rules of the Supreme Court and a stay of proceedings pending the outcome of the application for discharge of the injunction. The application in both cases is made by summons filed on 14 November 2005.

[9] Counsel for ESSCO argued that ESSCO is a proper party because if Brondum is successful in its claim against it, ESSCO will be required to indemnify the Defendants. It will therefore be directly affected in its commercial interests, as any judgment of the court will be enforceable either directly or indirectly against it. Counsel relies on ***Gurtner v. Circuit*** [1968] 2 Q.B 587, [1968] 1 All E.R 328 in this regard.

[10] In relation to the stay of proceedings, Counsel for ESSCO argues that the matters should not be heard until the decision in the application for injunctive relief is heard, as these proceedings have a direct bearing on the case.

[11] Brondum parries with the argument that the action lies solely between it and CFSC for failure to pay the bonds on demand. Their Counsel argue that ESSCO's presence is not necessary for the court to adjudicate on these matters, and settle all questions adequately. More significantly, counsel seeks to distinguish ***Gurtner***, relying instead on the earlier case of ***Amon v. Raphel Tuck & Sons Ltd*** (1956) 1 QB 357 which permits intervention in cases only where the proprietary rights affected are legal rights and not commercial interests. They say that ESSCO has no legal right, only a commercial interest.

[12] They ask the court to refuse the stay because, inter alia, ESSCO has not shown that it will suffer any loss should the stay be refused, whereas their client will be severely prejudiced.

The Law:

[13] Order 15 r 6 (2) (b) provides:

> "(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application
>
> ….
>
> (b) order any of the following persons to be added as a party namely
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well between the parties to the cause or matter."

[14] The proposed intervener should have some interest which is directly related or connected with the subject matter. The jurisdiction of the court under this rule is entirely discretionary, but it is accepted that intervention can only be insisted upon in three cases:

(i) in a representative action where the intervener is one of a class whom the plaintiff claims to represent;

(ii) where the proprietary or pecuniary rights of the intervener are directly affected by the proceedings, or where the intervener may be rendered liable to satisfy any judgment directly or indirectly; and

(iii) in actions for specific performance of contracts where third persons have an interest in the question of the manner in which the contract should be performed.

See Williams CJ, quoting the Supreme Court Practice (the White Book) in **Williams v. Payne (1990) High Court, Barbados, No. 29/1990.**

[15] What interest does ESSCO have here? In the Court of Appeal case of ***Gurtner v Circuit***, Lord Denning MR declined to follow the narrow construction of ***Amon v Raphael Tuck & Sons*** that the matter at hand must affect the proposed intervener, not in his commercial interests, but in the enjoyment of his legal rights in order for the intervener to show that his presence was necessary under the rule.

[16] In the latter case, Lord Devlin required the proposed intervener to show, at least "some legal right enforceable by him against one of the parties to the action or some legal duty enforceable against him by one of the parties to the action."

[17] ***Gurtner*** is authority for the wider principle that a party who is directly affected not only in his legal rights but in his pocket is entitled to be joined. As Lord Denning said at p. 331 of the judgment:

> "It seems to me that, when two parties are in dispute in an action at law and the determination of the dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the Court at its discretion may allow him to be added as a party on such terms as it thinks fit. By doing so the court achieves the object of the rule. It enables all matters in dispute "to be effectually and completely determined and adjudicated upon" between all those directly concerned in the outcome."

[18] That this statement "rightly overrules" ***Amon*** was accepted by the Privy Council in ***Penang Mining Company Ltd v. Choong Sam*** (1969) 2 Malayan Law Journal 52, PC. (see the Supreme Court Practice 1999, paragraph 15/6/8).

[19] In this case, if Brondum is successful, ESSCO will be required by CFSC to indemnify it to the amount of the judgment. As counsel for CFSC noted, CFSC is here in name only, because the real claim is against ESSCO. ESSCO will be directly affected by the claim. If the suit against CFSC fails, Brondum will still have a contractual claim against ESSCO for damages on the one hand, and repayment of the loan on the other. They are in danger of having to pay one way or another, and are open to litigation from Brondum and CFSC on these same facts. It should be noted that one of the main purposes of the rule is to avoid a multiplicity of actions with possibly competing decisions (see ***Byrne v Brown*** (1889) 22 QBD 657).

[20] In any event, the success or failure of Brondum's suit depends on proof of breach of contract between Brondum and ESSCO. Surely ESSCO's position on the breach of contract will be of more than passing interest to the trial judge? Even though the Plaintiffs are entitled to pursue the Defendants without referral to ESSCO, the determination of ESSCO's alleged breach of contract is an integral part of the claim under the guarantees.

[21] In ***Gurtner,*** the Motor Insurer's Bureau were added as defendants to a claim between the injured Plaintiff and the tortfeasor in a running down action for personal injuries where the Bureau was bound, by contract with the Minister of Transport to pay such damages to the plaintiff as remained unsatisfied. Despite the fact that the plaintiff himself could not sue the Bureau, as there was privity of contract, the Court found that the Bureau was directly affected not only in their legal rights but in their pocket.

[22] In my view, ESSCO's circumstances are even more persuasive, for as stated before, Brondum has a contractual claim against ESSCO arising from the same facts, and the Court cannot accept the Plaintiff's contention that the financial consequences alleged by ESSCO cannot be the basis for its joinder. Thus, while the action is perfectly well constituted without ESSCO, its presence must be "necessary" if the matter is to be "effectually and completely determined and adjudicated" and its joinder "just and convenient" under the rule.

<u>The Stay of Proceedings</u>

[23] ESSCO also applies for a stay of the proceedings until the decision of my brother judge in the application for injunctive relief. In the affidavit of Mr. Geoffrey Noel, Essco's Managing Director, and in the submissions of counsel, it was suggested that the stay be extended until the arbitration was completed. Why incur costs, they say, when many of the matters will be settled by arbitration? The Plaintiff claims in the affidavit of Knut Kristiansen that if it is not allowed to pursue its claim to be paid under the guarantee against the Defendants, it will continue to suffer harsh financial penalty clauses, and will be hindered in its ability to conduct its business.

[24] Yet, they have not moved with any great dispatch to prosecute this matter, at least not in keeping with the degree of prejudice which they allege. Demands under the guarantees were made in June and July 2005. The writ was filed on 12 October 2005, and service was promptly acknowledged by the Defendants on 17 October 2005.

[25] ESSCO's summons was filed on the 14 November 2005, set down for hearing this week. The Plaintiffs very kindly consented to allow the Plaintiffs to file a defence out of time, which defence was filed on 21 November 2005. A reply was filed on the 15th December. And there the matter rested until this week. Counsel says that Christmas intervened, but I do not believe the Plaintiff was bound by any rule to hold

its proceedings in abeyance until this summons was heard. If it was, its counsel has not depended on it in argument.

[26] The duty of the Court is to balance the potential prejudice likely to be suffered by the parties if the stay is granted. If the Plaintiffs had succeeded in urging its suit on the court, it clearly could not have expected this matter to be immediately ripe for trial. On the other hand it is in the interests of all parties to know the decision in the application for injunctive relief. Not enough evidence about the process of the potential arbitration has been given to the court to

determine the state of the arbitration and possible completion date. The court will not order a stay which is so open-ended.

[27] Likewise, while the decision in relation to the discharge of the injunctive relief is necessary, the Plaintiff's case cannot be indefinitely suspended awaiting that judgment and held to ransom by the very system in which it seeks redress. Since the Plaintiff is already under the strictures of a Mareva order, the potential prejudice to the Defendant or ESSCO goes only so far.

[28] The Court orders that ESSCO be added as a Defendant and that the writ of summons be so amended and that it be at liberty to acknowledge service. Further proceedings are stayed until the decision of the application for discharge of the injunction or for six weeks, whichever is the sooner.

[29] ESSCO will pay Brondum's costs of the Application. Defendants costs in the cause.

Jacqueline Cornelius

Judge of the High Court.