

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No.: 0953 of 2014

BETWEEN

C.O. WILLIAMS CONSTRUCTION LTD. DEFENDANT/CLAIMANT

AND

3S (BARBADOS) SRL

APPLICANT/DEFENDANT

AND

Civil Suit No.: 1599 of 2014

BETWEEN

RAYSIDE CONSTRUCTION LIMITED DEFENDANT/CLAIMANT

AND

3S (BARBADOS) SRL

APPLICANT/DEFENDANT

Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court

2016: July 11

2017: April 4

Appearances:

Ms. Shelly-Ann Seecharan, Attorney-at-law, led by Sir Richard Cheltenham, Q.C., on behalf of C.O. Williams Construction Ltd.

Ms. Gale

Prescod and Ms. Stephna Greenidge, Attorneys-at-law on behalf of Rayside Construction Limited

Mr. Roger Forde, Q.C., Attorney-at-law on behalf of 3S (Barbados) SRL

DECISION

- [1] The Applicant/Defendant has applied to the court by Notice of Application filed on November 5, 2014, to stay the proceedings in this matter pursuant to section 6 of the Arbitration Act, Cap. 110.
- [2] The grounds of the Application are as follows:
- (i) By an Agreement made in or about the month of July, 2008 which was partly in writing and partly by conduct during the period July 2006 to 2008, the Claimants and the Defendant agreed that matters in dispute which touch and concern the said Agreement shall be referred to and decided by arbitration.
 - (ii) The matters in respect of which this action is brought are matters within the terms of the agreement and are matters in dispute.
- [3] The Defendants/Claimants strenuously opposes the application and urges the court not to stay proceedings.

Background

- [4] In or around 2006 by way of a Memorandum of Understanding and a subsequent Supplemental Memorandum of Understanding, the Applicant/Defendant was contracted by the Government of Barbados acting through the Ministry of Transport and Works (MTW) to carry out inter alia, road widening works on the Adams, Barrow and Cummins Highway (ABC Highway).

- [5] To execute the road widening of the ABC Highway, the Applicant/Defendant subsequently in or around July 2006 sought to subcontract the Defendants/Claimants.
- [6] The Applicant/Defendant sent letters of intent to the respective Defendants/Claimants both dated July 17, 2006. The letters stipulated that the Defendants/Claimants were to commence with the road widening works on various sections of the ABC highway on July 24, 2006.
- [7] Pursuant to the letters, the Defendants/Claimants were required to submit a detailed programme for this section of the works, detailed temporary traffic and pedestrian management proposal for review and subsequent approval; method statements, risk assessments and safety policy, the provision of all qualify management (inspection) procedure that the First Claimants intended to implement.
- [8] One of the terms of the letters of intent was that they would be superseded by the execution of a subcontract – the proposed form of the subcontract was to be the amended ICE Blue Form of subcontract, a copy of which was appended.
- [9] Under the heading termination, it was stated that upon the execution of the subcontract and the main contractor executing the main contract, the letters of intent would be terminated or by force majeure.

- [10] Another express term of the letters of intent related to price and payment where it stated that the unit rates identified in the bills of quantities would be utilized for interim payments, insofar as the main contractor is certified and paid the equivalent amount. It also noted that the value of works would be ascertained and determined by net measurement.
- [11] In respect of interim payments, the unit rates were provisional and subject to agreement by the Ministry of Transport and Works (MTW). As such it was noted that the subcontractor maybe called upon to assist the main contractor with aspects of the agreement of all unit rates that were associated with the subcontractor's work.
- [12] It was also pointed out that the valuation date of the works were to be the last working day of each calendar month and the subcontractor would submit their valuation seven (7) days prior to the valuation date.
- [13] Additionally it was a stated term that the main contractor would submit a request for payment and corresponding payment certificate on the first working day of the subsequent calendar month and the subcontractor would be paid within thirty (30) days of the submittal.
- [14] The letter also stipulated that the Defendants/Claimants would be paid \$2,000,000.00 in advance.

- [15] The Defendants/Claimants commenced work on the project in question on July 24, 2006 and received the advance payment in or around August, 2006.
- [16] Throughout the course of dealings, there were issues in relation to the applicable rates. The First Defendant/Claimant contends that the applicable rates were agreed as are contained in a letter dated November 8, 2006 from the Applicant/Defendant to the First Defendant/Claimant.
- [17] There was also an issue with regards to the amount to be paid to the Applicant/Defendant in respect of the project. A meeting was held with all interested parties to address the issue on November 13, 2007. The First Defendant/Claimant contended that the Applicant/Defendant compromised their claim for BBD \$124 million and eventually agreed to accept BBD \$117 million. Essentially, the First Defendant/Claimant contended that it never compromised any rates and the applicable rates were that agreed to in the letter dated November 8, 2006.
- [18] Conversely, the Applicant/Defendant contended that at the said meeting the First Defendant/Claimant, the Applicant/Defendant and the Government agreed to compromise and reduce the value of measured works to BBD \$117 million exclusive of certain costs and denies that the applicable rates are those referred to above.

- Ultimately, the Applicant/Defendant submitted that a dispute arose regarding the applicable rates.
- [19] The First Defendant/Claimant was paid for work done up until February 2008 but the invoices for work done after were not paid in full. The Second Defendant/Claimant submitted its valuation to the Applicant/Defendant for measured works for the period ending July 2008 and received written confirmation of an interim payment for the sum claimed. However, the Applicant has not to date honoured the Certificate of Payment No. 20.
- [20] As a result of this on June 13, 2014 the First Defendant/Claimant filed a claim form and statement of claim pursuant to Rule 8.14 claiming against the Applicant/Defendant the sum of BBD \$12,632,080.14 with interest at the rate of nine percent (9%) per annum as money owed to the First Defendant/Claimant by the Applicant/Defendant for services rendered, namely, road widening of the ABC Highway.
- [21] On June 30, 2014, the Applicant/Defendant filed an acknowledgment of service indicating its intention to defend the claim.
- [22] On July 1, 2014, the Applicant/Defendant made an application pursuant to **section 6** of the Arbitration Act, Cap. 110 seeking a stay of the proceedings.
- [23] On October 24, 2014, the Second Defendant/Claimant filed a claim form and statement of claim seeking payment of sums owed by the

- Applicant/Defendant for services rendered under a contract for services with respect to road widening works on the ABC Highway for the Barbados Road Network Infrastructure Improvement Project.
- [24] The Applicant/Defendant on November 3, 2014 filed an acknowledgment of service and an affidavit in support of the defence filed on November 5, 2014 and on November 5, 2014 filed a notice of application to have the proceedings brought against it by the Second Defendant/Claimant stayed on the grounds stated above.
- [25] The Applicant/Defendant then filed a notice of application on September 21, 2015 to have both matters consolidated on the grounds that the claims by both Defendants/Claimants are similar as they were contracted under the similar contracts; there is a strong overlap of facts between the said actions and the issues that will arise in both actions will be identical.
- [26] On November 25, 2015, the court ordered the two matters Nos. 953 and 1599 of 2014 respectively, to be consolidated.

Applicant/Defendant's Submissions

- [27] Counsel for the Applicant/Defendant submitted that before the court can determine whether the matter should proceed to Arbitration, it should examine the Agreement between the parties and determine

whether the Agreements provided for Arbitration and in what circumstance have the parties agreed to arbitrate.

[28] Counsel contended that in construing contracts the court is concerned with the objective intention of the parties and not the personal intention of the parties. He pointed out that the objective intentions of the parties was that the relationship would be governed by the ICE Blue Form Agreement which was attached to the letter of intent dated July 17, 2006.

[29] He also submitted that it was the parties' intention that the payment of work would be determined by measurement and that the rates to be used in the measurement process were to be agreed between the Defendants/Claimants and the Crown acting through the MTW.

[30] It was also submitted that it was the intention and understanding of the parties that the monies to be paid by the Defendant/Applicant to the Defendants/Claimants would derive from monies the Defendant received from the Government. Further, that it was never the parties' intention that the Applicant would pay to the Defendants/Claimants more than it received from the Government or that it would pay monies it did not receive from the Crown.

[31] It is of note that on July 7, 2008, the Government ended its relationship with the Applicant/Defendant. The Applicant/Defendant

subsequently instituted proceedings against the Government to recoup outstanding monies owed to it.

First Defendant/Claimant Submissions

- [32] It is the First Defendant/Claimant's submission that after work commenced valuations were submitted and largely honoured by the Applicant/Defendant.
- [33] However, by letter dated June 13, 2008, the Applicant/Defendant advised that it could no longer guarantee payment after that date and that any work undertaken after that date was done at its own risk.
- [34] It was also submitted that the contract between the Government and the Applicant/Defendant was terminated in July 2008.
- [35] The Government subsequently disputed the amount owed to the Applicant/Defendant and challenged its bill.
- [36] The First Defendant/Claimant submitted that notwithstanding the Applicant/Defendant's dispute with the Government, the Applicant/Defendant subsequently agreed the amount owed to it. To illustrate this contention, it was the Defendant's submission that a letter dated August 23, 2010 was sent by its comptroller to the Applicant requesting confirmation of the amount owed as part of its annual audit. The figure owed as at June 30, 2009 stood at \$12,655,080.14.

[37] The First Defendant/Claimant contended the letter stipulated that if the Applicant was not in agreement with the sum owed to show or attach a reconciliation of the difference on the reverse side of the letter and return it. Alternatively, the Applicant was instructed that if it agreed with the calculation it could sign and return the letter to its auditor, Janet Cheeseman at Ernst and Young.

[38] The First Defendant submitted that on December 22, 2010 a director of the Applicant's company faxed a confirmation of the amount to Janet Cheeseman at Ernst and Young. The amount confirmed was \$12,655.079.53 which showed a discrepancy of \$0.61.

[39] The First Defendant therefore contended that there was no dispute on the debt owed to it by the Applicant and the dispute between the Government and the Applicant over rates has ceased to be relevant. Further, if there was an agreement to refer the disputes to arbitration, the Applicant waived its right to do so by December 2010 when it sent confirmation of the amount by sending a fax to the First Defendant's auditors.

Second Defendant's Submissions

[40] The Second Defendant submitted that during the period September 2006 and July 3, 2008, the Applicant/Defendant was presented with

- valuations for works it completed and in return was issued with the relevant certificate of payment authorizing payment of the said works.
- [41] The Second Defendant/Claimant also contended that it submitted its valuation to the Applicant/Defendant for the measured works for the period ending July 7, 2008 and in turn received written confirmation of an interim payment to be received in the sum of \$7,397,071.67 for work done, together with the retention amount of \$1,352,455.42 by way of certificate of payment No. 20 from the Defendant.
- [42] However, although certain works were completed by the Second Defendant/Claimant and valued by the Applicant/Defendant under the certificate of payment No. 20, the Defendant refused or failed to pay the said amount.

Issue

- [43] The sole issue for determination in this matter is whether the court should stay the claims brought against the Applicant/Defendant pursuant to **section 6** of the Arbitration Act, Cap 110 of the Law of Barbados.

The Law

Stay of Proceedings

- [44] **Section 6** of the Arbitration Act provides:

“Where any party to an arbitration agreement or any person claiming through or under him commence any legal proceedings in any court against any other party to

the agreement, or any other 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 willing and able to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings”.

[45] The court therefore has discretion to stay proceedings in favour of arbitration. However before the court exercises its discretion to grant a stay there are certain mandatory or threshold requirements prescribed in the section. These requirements have been enunciated by **Kokaram J.** in *Climate Control Limited v. C.G. Construction Services Limited No. 45/2016 TT* at para. 28 and are:

- (1) There must be a concluded agreement to arbitrate.
- (2) The legal proceedings which are sought to be stayed must have been commenced by a party to the arbitration agreement or a person claiming through or under that party.
- (3) The legal proceedings must have been commenced against another party to the arbitration agreement or a person claiming through or under that person.
- (4) The legal proceedings must be in respect of any matter agreed to be referred to arbitration.
- (5) The application for the stay must be made at any time after appearance but before delivery of pleadings on the taking of any other step in the proceedings.”

[43] Apart from statute the court maintains an inherent jurisdiction at common law to stay proceedings where it is appropriate to do so.

Section 38(2) of the Supreme Court of Judicature Act, Cap. 117A provides:

“The High Court and the Court of Appeal respectively, may acting on equitable grounds, and without limiting any other powers exercisable by either court, stay any proceedings on the execution of any process in any cause or matter before the court, subject to such conditions as that court thinks fit.”

[44] Additionally, under the court’s inherent jurisdiction Part 26, Rule 26.1

(2) (d) of the Supreme Court of Judicature Civil Procedure Rules 2008

(CPR) provides:

“Except where these rules provide otherwise, the court may...(d) stay the whole or part of any proceedings generally or until a specified date or event...”

Intention to Create Legal Relations

[45] In Commonwealth Caribbean Business Law, Second Edition at page

77, the learned authors noted the following:

“In commercial agreements there is a rebuttable presumption that parties intend to create legal relations and conclude a contract. The establishment of the intention to create legal relations will be determined by the court on the basis of facts and may be established by evidence. The burden of rebutting the presumption of legal relations in commercial agreements lies on the party seeking to deny the contract.

It is common practice in commercial transactions that businesses engaging in negotiations will often exchange detailed drafts of the proposed agreement. They may be

marked 'subject to contract' or 'Letter of Intent'. Where parties exchange letters of intent or agreements subject to contract and act before the preparation of the formal contract, the court will be required to examine all documentation and oral evidence very carefully to determine whether there existed an intention between the parties to create legal relations...

Nevertheless, where, on examination of all evidence, it appears to the court that the parties came to a consensus on all the essential aspects of the bargain, it will be inclined to conclude that there was an intention to create legal relations and will hold that a contract was formed and is binding on the parties."

[46] Halsbury Volume 9(1) paragraph 674 puts it this way –

“Although the courts will not make a contract for the parties where none exists, they will seek to uphold bargains made between businessmen wherever possible, recognizing that they often record the most important agreements in crude and summary fashion, and will seek to construe any documents fairly and broadly, without being astute or subtle in finding defects. If satisfied that there was an ascertainable and determinate intention to contract, the courts will strive to give effect to an agreement which lays down criteria for determining those matters left open; or machinery for achieving sufficient certainty, even where that machinery fails...Indeed businessmen involved in complicated negotiations do not always find it easy to say when a contract has been concluded: this issue is to be determined by looking at the entire negotiations between them; and a contract once made *prime facie* will not be destroyed by further negotiations between the parties”.

[47] So that in order to determine what the parties intended and whether a binding contract was created it was stated by **Bingham J** in Pagner S.P.A. v. Feed Products Ltd. that –

“The court’s task is to review what the parties said and did and from that material to infer whether the parties’ objective intentions as expressed to each other were to enter into a mutually binding contract. The court is not of course concerned with what the parties may subjectively have intended. As **Lord Denny M.R.** put it in *Storer v. Manchester City Council* [1974] 1 W.L.R. 1403 at p.1408H:

“In contracts you do not look into the actual intent in a man’s mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying, ‘I did not intend to contract’ if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough.”

[48] Thus the test to be applied in the interpretation of ‘contracts’ is objective. In applying the facts of this case to the law by looking at the objective data, can it be said that the necessary ingredients of a valid contract are present? It would appear that there was an offer and an acceptance, in that the Applicant/Defendant made an offer through the letter of intent and the Defendants/Claimants accepted by commencing the work. There was also consideration since the Defendants/Claimants were paid even if not in full for work done. Where work has been done and paid for, in other words, a transaction has been performed on both sides, it would be unrealistic to argue that

there was no intention to enter into legal relations, so that it would seem that the parties did have intentions to create legal relations.

[49] It has to be noted however that under the heading ‘Form of Subcontract’, the letter of intent stated: “It is intended that this letter be superseded by the execution of a subcontract. The proposed form of subcontract shall be the amended ICE Blue Form of Subcontract, copy appended.” From an objective point of view, it would seem that this term in itself envisaged that there would be a formally executed contract document in due course, however from the facts the subcontract was never executed. It is clear that both parties expected a formal contract to eventuate and in order to expedite performance under that anticipated contract, one requested the other to commence that contract work and the other complied with that request. However since no contract was entered into as expected even though the letter of intent was issued since 2006 and two years later in 2008 the subcontract had yet to be executed, what then is the legal obligation on the party who made the request.

[50] It would appear that negotiations were still going on and/or all the terms were not agreed upon.

[51] Since the subcontract was not executed in accordance with the letter of intent, it cannot be said that it came into existence and therefore **section 6** of the Act is not fulfilled. So that on the authority of *British*

Steel Corporation v Cleveland Bridge and Engineering Co. Ltd.

[1984] All E.R. 504 the letter of intent was not superseded by the execution of a subcontract and the arbitration clause must be deemed as ineffective.

[52] There was also an express term of the letter of intent that it would be terminated after execution of the subcontract and the main contractor executing the main contract or by force majeure. The fact that the subcontract was never executed would suggest that the letter of intent was still the agreement governing the contractual relationship and as previously noted, in the letter of intent there was no express arbitration clause but merely a proposal that the form of subcontract shall be in the amended ICE Blue Form of Subcontract.

[53] Further, **section 2** of the Act defines “arbitration agreement” as “a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.” This indicates that in order for the ICE Blue Form of Subcontract to be binding, it needed not only to be in writing but also to be executed accordingly.

Disposal:

[54] On an examination of all the circumstances of this case, the court finds that the letter of intent was the agreement governing the parties’ relationship, since the subcontract never came into existence as it was

never executed. For the arbitration clause to be binding it had to be expressly incorporated into the subcontract. This was not done and therefore **section 2** of that Act was not satisfied.

[55] The Court being mindful of the overriding objective of the CPR to deal with cases justly believes that it would be the antithesis of justice if the Applicant/Defendant were afforded the opportunity to use this court as an avenue to avoid the payment of a debt which is due and owing. To ask the Defendants/Claimants to wait until the matter between the Applicant/Defendant and the Government is adjudicated would be manifestly unjust – the Defendants/Claimants executed the works on the ABC Highway road widening project at the Applicant/Defendant’s request and the Applicant/Defendant accepted it. The law therefore imposes an obligation on the Applicant/Defendant who made the request to pay a reasonable sum for such work as was done pursuant to the request, for as **Robert Goff J** stated in *British Steel Corp v Cleveland Bridge and Engineering Co. Ltd.* [1984] 1 All E.R. 504 at 509 –

“In most cases, where work is done pursuant to a request contained in a letter of intent, it will not matter whether a contract did or did not come into existence, because, if the party who has acted on the request is simply claiming payment, his claim will usually be based on a quantum meruit, and it will make no difference whether that claim is contractual or quasi-contractual.”

[56] The Defendants/Claimants are to be compensated for the works done by them at the Applicants/Defendants request in the amounts set out in their claims.

[57] In conclusion the application for a stay of proceedings is dismissed.

[58] The Applicant/Defendant, namely 3S (Barbados) SRL has leave to file its Defence within 14 days of the date of this Order.

[59] The matter is adjourned until the 27 June, 2017.

P.A. BECKLES
Judge of the High Court