BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: 21 of 2017

BETWEEN

C.O. WILLIAMS CONSTRUCTION LIMITED **CLAIMANT**

AND

THE ATTORNEY GENERAL **DEFENDANTS**
COASTAL ZONE MANAGEMENT UNIT

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

Date of Decision: 2020: June 29

Appearances:
Mr. Bryan Weekes, Attorney-at-Law for the Claimant

Ms. Donna Brathwaite, Q.C. Attorney-at-Law for the Defendants

DECISION

INTRODUCTION

[1] It has become common practice in construction contracts to provide that, if a party wishes to bring a claim under the contract, it must follow a prescribed procedure. This often requires the claiming party to give a particular notice, sometimes followed by a further notice and/or more detailed information, to the other party, which may have to be in a particular format and meet specific requirements as to content. These notice provisions also contain a 'time bar' provision

and what this means is that the claiming party must give the notice(s) within a specified period of time. If the time bar is a condition precedent, then a failure to comply with the provisions of the contract will mean that the claiming party loses its entitlement to bring the claim, no matter how strong its claim would have been.

[2] In the instant case the Claimant is applying to the court for the appointment of a single arbitrator to determine the claims for sums due and owing to them. The Defendants however contends that since the Claimant did not comply with the arbitration clause of the contract, the arbitration process cannot commence and therefore the court should exercise its discretion against the appointment of an arbitrator.

BRIEF FACTS

[3] The Claimant contracted with the Defendants to provide services, namely the procurement of works – the Holetown Waterfront Improvements Project. The contract included an arbitration clause (**clause 20**) and provided at **clause 20.6** that any unsolved dispute would be referred to arbitration.

[4] A dispute arose between the Claimant and the Defendant with regards to the following:

(i) Claimant's claim for payment;

(ii) Appointment of an arbitrator.

[5] The parties could not arrive at an agreement on these matters, so the Claimant applied to the court for an order, in accordance with **section 12** of the **Arbitration Act, Cap. 110** for the appointment of an arbitrator.

[6] The Claimant submitted the name of four persons and suggested the appointment of one of them as arbitrator or alternatively the appointment of some other person as arbitrator, as the court may deem appropriate.

[7] The Defendant is not in agreement with the appointment of any of the suggested arbitrators and believes that the arbitrator should be a person of experience in the works being undertaken and the Defendant supplied a list of such persons.

[8] The Defendant further disputes the Claimant's claim and contends that since the Claimant did not comply with the pre-conditions/condition precedent in the arbitration clause of the contract, the arbitration process cannot be triggered.

[9] In light of what the Defendant perceives as the Claimant's non-compliance with the pre-conditions, the Defendant contends that as provided for at **sub-clause 20.1(2)**, they are discharged from all liability in connection with the claim.

THE ISSUE

[10] The question to be determined is, whether this court, rather than an arbitrator should decide arbitrability where a pre-condition to arbitration has not been satisfied.

[11] It should be noted that where a court is called upon to decide the arbitrability of the jurisdiction of an arbitrator over a particular dispute, such as, the Claimant's claim for payment in the instant case, it should decide that question alone and not the merits of the dispute, and that is what is being undertaken here.

LAW AND ANALYSIS

[12] It is necessary at this stage to examine the contract terms which form a part of the General Conditions of Contract, in particular **clause 20**.

[13] **Clause 20** of the General Conditions of Contract provides for Claims, Disputes and Arbitration. **Clause 20.1** provides:

> "If the Contractor considers himself to be entitled to any extension of time for completion and/or any additional payment, under any clause of these conditions or otherwise in connection with the contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstances.
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> If the Contractor fails to give notice of a claim within such period of 28 days, the time for completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Contracting Agency shall be discharged from all lability in connection with the claim. Otherwise, the following provisions of this sub-clause shall apply."

[14] Paragraph 5 of **clause 20.1** continues:

> "Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:
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> (a) this fully detailed claim shall be considered as interim;
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> (b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further

particulars as the Engineer may reasonably require; and

(c) The Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer."

[15] The final paragraph of **sub-clause 20.1** states:

"The requirements of this sub-clause are in addition to those of any other sub-clause which may apply to a claim. If the Contractor fails to comply with this or another sub-clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this sub-clause."

[16] **Sub-clause 20.6** entitled Arbitration provides as follows:

"Any dispute between the Parties arising out of or in connection with the contract not settled amicably in accordance with sub-clause 20.5 above and in respect of which the DB's (Dispute Board's) decision (if any) has not become final and binding shall be finally settled by arbitration. Arbitration shall be conducted as follows:

…

(b) if the contract is with domestic contractors, arbitration with proceedings conducted in accordance with the laws of the Employer's country."

[17] By **sub-clause 20.8**

"If a dispute arise between the Parties in connection with, or arising out of, the contract or the execution of the works and there is no Dispute Board in place, whether by

reason of the expiry of the Dispute Board's appointment or otherwise:

(a) Sub-clause 20.4 [Obtaining Dispute Board's Decision] and sub-clause 20.5 [Amicable Settlement] shall not apply, and

(b) The dispute may be referred directly to arbitration under sub-clause 20.6 [Arbitration]."

[18] The provisions of the **Arbitration Act, Cap. 110** which are relevant to the matter at hand are **sections 8** and **12**.

[19] **Section 8** provides:

"Unless a contrary intention is expressed therein, every arbitration agreement shall, where no other mode of reference is provided, be deemed to include a provision that the reference shall be to a single arbitrator."

[20] **Section 12** further provides for the power of the court to exercise a discretion and appoint in certain cases an arbitrator or umpire. It states:-

"In any of the following cases –

(a) where an arbitration agreement provides that reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator,

(b) …

(c) …

(d) …

any party may serve the other parties or the arbitrators, as the case maybe, with a written notice to appoint, or as the case may be, concur in appointing an arbitrator, umpire or third arbitrator, and if the appointment is not made within seven clear days after the service of the notice, the

> court may on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by the consent of all parties."

[21] The position is that for pre-conditions to be mandatory, the conditions need to set out specific steps that must be taken by the parties to enable the court to determine if it has been followed – where the clause lacks certainty then it cannot be enforced by the court.

[22] According to **sub-clause 20.1 -** "If the Contractor considers himself to be entitled to any additional payment in connection with the contract, he shall give notice to the Engineer with regards to the claim, describing the event or circumstance giving rise to it." The notice must be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have been aware of the event or circumstance surrounding the claim.

[23] Furthermore by paragraph 2 of the same sub-clause - "If the contractor fails to give notice of a claim within the required 28 days, the Contractor shall not be entitled to additional payment, and the Contracting Agency shall be discharged from all liability in connection with the claim."

[24] A reading of these provisions would suggest that these time limits or conditions are pre-conditions which must be satisfied before any dispute resolution can commence and furthermore that failure to comply with same nullifies said claim and arbitration cannot be triggered.

[25] The language in these clauses is clear and unambiguous, with the language being mandatory, that is, "shall" as oppose to discretionary,

"may". The questions which a court must ask itself are – "what was the intent of the parties in setting up these time limits and conditions?" Did the parties intend these time limits or conditions to limit the arbitrability of the dispute or to limit the arbitrator's authority in deciding the dispute?

[26] According to the sworn affidavit of David Turner, Senior Engineer, filed on 2nd June, 2017, the following situations with regard to the claims occurred:

> (a) The circumstances giving rise to claim #548-1 for $180,603.75 arose on the 5th November, 2012. The Claimant indicated orally at a meeting of the 11th November, 2012, and it was to follow in writing, of the intention to make the claim. A letter dated the 3rd December, 2012 was received by the Engineer informing of the intention to file a "Notice of Intent to Claim". This was never done and no claim amount figures were given.
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> (b) The circumstances giving rise to claim #548-2 for $578,875.50 arose on the 1st December, 2012. The Engineer received an email dated the 12th February, 2013 informing of the intention to present a 'Notice of Intent to Claim'.
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> (c) The circumstances giving rise to claim #548-3 for $787,996.86 arose on the 18th June, 2013. The notice of intention to make this claim was given orally to the engineer on the 16th September, 2013 at a meeting. The estimated amounts of the contemplated claim were given at another meeting on the 27th September, 2013."

[27] Based on the above even if the oral notice is accepted as a means of notification, the 'notices of intention' with the exception of claim #548-1 were all given after the 28 days deadline.

[28] Furthermore the requirement of **sub-clause 20-1**, paragraph 5 to submit within 42 days, a fully detailed claim including full supporting particulars, was not complied with.

[29] The court has noted however that the allegations of fact contained in the affidavit of David Turner have been challenged in the affidavit of Ronald Dale Dreyer, a Consultant engaged by the Claimant. He deposes at paragraph 6 and 7 of his affidavit that the Applicant (Claimant) did comply with the provisions of the contract in every request for payment which it filed monthly after each of the claims relevant to this matter became known. Also that each of the claims which are relevant to this application were discussed in very great detail at numerous site progress meetings involving Mr. Turner and other consultants on behalf of the Government of Barbados.

[30] With these two differing positions, as stated before the court is not prepared at this stage to embark on a substantive investigation of the merits of the Claimant's case and the Defendant's defence without a trial.

[31] The court cannot help but to note that one of the reasons why such mandatory pre-arbitral conditions are included in these types of agreements is to provide both parties with an opportunity to avoid the expense and disruption of an arbitration and also that if the arbitrator is not appointed, the Claimant would have to file an action in the High Court and litigate the merit of its claim there which would also be time-consuming and expensive. However to appoint an arbitrator at this stage, would be to ignore the terms of the construction contract.

[32] Furthermore it is the opinion of the court that it would not be in the Claimant's interest to commence arbitration proceedings and expend

time and money, only to end up with it being annulled at a later date for failure to follow a procedural step.

CONCLUSION

[35] The parties in this matter included in the contract an arbitration clause which included pre-conditions that were to be fulfilled prior to arbitration being commenced. The understanding from the wording seems to be that if any of these conditions were not fulfilled or satisfied then it would not be possible to resort to arbitration.

[36] Since the issue of whether or not the pre-conditions have been complied with, still needs to be addressed, this would first have to be answered before the court can proceed to appoint an arbitrator. The court has to be careful not to act prematurely in appointing the arbitrator as this could leave the Claimant's case open to attack that the arbitrator does not have jurisdiction to hear the dispute failing satisfaction of the agreed pre-conditions.

[37] In the circumstances having reviewed the submission of Counsels for the Claimant and the Defendant, the court finds that the determination of whether or not the pre-conditions to arbitration have been complied with and what would be the position if they have not, still needs to be addressed. The court therefore exercises its discretion at this stage against the appointment of an arbitrator.

PAMELA A. BECKLES
Judge of the High Court