

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO SLUHCV 2006/0771

BETWEEN:

JADA CONSTRUCTION CARIBBEAN LIMITED

Claimant

and

THE LANDING LIMITED

Defendant

Appearances:

Mr. Peter Foster for the Claimant

Mr Mark Maragh for the Defendant

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2011: 8<sup>th</sup> February

2012: 19<sup>th</sup> January

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### DECISION

[1] **BELLE J:** On the 10<sup>th</sup> November, 2010 the Applicant filed an application seeking the following orders:

- 1. The arbitration agreement between the parties dated 13<sup>th</sup> January, 2006 shall cease to have effect and the stay of proceedings ordered by the Court on 16<sup>th</sup> October 2006 is hereby lifted.*
- 2. Leave to the Claimant to file and serve an Amended Claim Form in these proceedings within (7) days.*
- 3. The Costs of the Application be costs in the cause.*

[2] The stated grounds of the Application were:

- 1. By Order of the Court dated 16<sup>th</sup> October, 2006 in Claim No. SLUHCV2006/0771 that the proceedings were stayed and the disputes between the parties were referred to Arbitration in Accordance with the contract between the parties dated 12<sup>th</sup> January, 2006.*
- 2. By Notice dated 7<sup>th</sup> April 2008, E. Anthony Ross QC was appointed Sole Arbitrator to determine the disputes between the parties.*

3. *Despite a preliminary hearing held on 14<sup>th</sup> May, 2008 and directions given subsequent to the hearing the arbitration has to date not commenced and the Claimant is therefore unable to prosecute the claim.*
4. *The parties have since agreed to appoint an alternative Arbitrator but to date have not agreed to an Arbitrator and as such the matter remains in abeyance with the Claimant unable to prosecute its claim.*
5. *The matter will progress further and quicker with the Court at this stage as it has been four years since the proceedings were stayed and the matter referred to Arbitration.*

- [2] The main question for the Court to determine in this case is where the parties to an arbitration appear to have agreed to look for a new Arbitrator to replace the existing one but have failed to agree on a replacement, should the Court intervene to terminate the arbitration, lift the stay on Judicial Proceedings and proceed with the trial?
- [3] It is clear that much time, energy and costs have been expended in moving this matter towards resolution. It has got to the point where the Respondent's Counsel apparently was unclear as to his instructions at the time of the hearing. This is not surprising.
- [4] Counsel for the Applicant who wishes to abandon the arbitration and revert to the ordinary High Court proceedings has argued his case to suggest that the Respondent has repudiated the arbitration agreement by failing to participate in the exercise to select a new Arbitrator and move the matter forward in spite of their agreement to seek the services of a new Arbitrator.
- [5] The Respondent in turn has argued that the company is not solely responsible for delay in this matter. However, the Respondent did not deny that it has not taken steps to name an alternative Arbitrator. Counsel for the Respondent attempted to refer to facts in support of his assertion, that the Company is not solely responsible for delay, but was stopped by the objection of Counsel for the Applicant, who argued that the Respondent's failure to file an Affidavit in Response to the application means that the Court cannot take into account any facts which the Respondent may wish to adduce from the Bar Table.

- [6] Clearly, Counsel for the Applicant is correct and therefore the matters of fact raised by the Respondent cannot be taken into account. However, certain important facts arise from the Applicant's evidence and by implication based on the state of affairs.
- [7] The parties no doubt agree that there is an Arbitrator, Mr. Anthony Ross. But it must be implied from the state of affairs that there has been no application coming on for hearing to the Court to have the existing Arbitrator, Mr. Ross removed although both parties appear to be dissatisfied with him.
- [8] I am of the view that the Arbitrator must have some interest in his own removal unless he has chosen to resign. But he is not made a party to these proceedings.
- [9] It would seem that regardless of the state of case law with regard to the failure of one party to show interest in pursuing the arbitration, that if an Arbitrator exists, then he should be permitted to conduct the arbitration, or be removed before the Court orders that the matter be returned to the High Court for Adjudication.
- [10] I think that JADA Construction Caribbean Limited would have been in a much better position if it had made an application to remove the Arbitrator, and in that application named a replacement Arbitrator, while citing any other issues required to be dealt with at the time of the Arbitrator's removal.
- [11] While it appears that the Respondent is somewhat reticent, I am satisfied that this does not mean that it has no further interest in the arbitration. There may be other considerations which have not been spelt out because the Respondent failed to file an Affidavit in Response to the Applicant's application.
- [12] The Court does not have to accept an implied cause of the Respondent's reticence as having been proven. The fact is that the process of appointing an Arbitrator and proceeding with the arbitration had got on the way. The Applicant says the Arbitrator did things which could be considered acts of misconduct.
- [13] Mr. Tempro who swore to an Affidavit on the behalf of the Applicant stated:

*"On 3<sup>d</sup> March, 2010, the Applicant wrote to the Arbitrator to advise among other things that he had acted to our prejudice only and the continuous variations of the trial date and delay in the proceedings was unacceptable and amounted to misconduct. The matter being delayed despite the Applicant at all times remaining ready and willing to act in these proceedings.*

*Since the letter dated 3<sup>d</sup> March, 2010, the parties have been in discussion with a view to obtaining an alternative Arbitrator. To date the parties have been unable to agree to an arbitrator and or to instruct an alternative.*

*The Applicant has requested that the Respondent advise on its position regarding two (2) Arbitrators, but the Respondent has advised that it is unable to do so at present."*

- [14] In my view, the Applicant in the circumstances, should take the bull by the horns and apply to have the Arbitrator removed. The Arbitrator cannot be removed by an order to revert to High Court Proceedings. That would procure a breach of the Arbitrator's contract to arbitrate the matter. I am certain that no case cited has set a precedent for such a result.
- [15] I do not accept that **Bremer Vilkan Schiffbau Und Maschinenfabrik v South India Shipping Corporation Ltd** [1981] 2 W.L.R, 141 and **Paul Wilson & Co. v Partenreederie Hannah Blumwntal** [1983] Q.B.D 854 provided any support for the application. In the circumstances, I dismiss the application to have the matter returned to the High Court for determination.
- [16] However, in closing I would say that it would be in the best interest of all concerned for the Arbitrator, Mr. Ross to tender his resignation since, on the facts, he seems to be the major reason for the arbitration's lack of progress and neither party wants him to be the Arbitrator any longer.
- [17] Application is dismissed.
- [18] Consequently I order the Applicant is to pay the Respondent's cost of the application pursuant to Part 65 of the CPR 2000.

Francis H V Belle  
High Court Judge