

EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT

GRENADA

GDAHCV2013/0550

BETWEEN:

MICHAEL ALEXANDER

Claimant

and

JACKIE FREW
PATRICIA 'TRISH' FREW

Defendants

Before:

Kimberly Cenac-Phulgence

Master [Ag]

Appearances:

Ms. Karina Johnson for the Claimant

Ms. Kimber Guy-Renwick for the Defendants

Claimant present

2014: May 22;
June 12.

JUDGMENT

[1] **CENAC-PHULGENCE, M [AG.]**: On 30th January 2014, the defendants filed an application supported by affidavit of Jackie Frew for an order that all proceedings in this action be stayed pursuant to section 7 of the **Arbitration Act**¹, the claimant and defendants having by an agreement dated 17th November 2010 agreed to refer to arbitration the matters in respect of which the action is brought.

¹ Cap. 19 of the 2011 Continuous Revised Laws of Grenada.

- [2] The defendants state in the affidavit in support of the application that by virtue of article 4 of the Agreement dated 17th November 2014, the parties agreed to refer matters of dispute to arbitration. The matter in dispute in this action they say is whether the payment of the sum of \$81,752.14 is due and owing to the claimant under the Agreement. They say that these matters are within the scope of the Agreement to refer disputes and differences arising thereunder to arbitration. The defendants have acknowledged service but aver that they have taken no step in the action and that at the time the action was commenced, they were and remain ready and willing to do all things requisite to enable all the matters in dispute to be determined by arbitration in accordance with the provisions of the Agreement.
- [3] The claimant opposes the application and filed an affidavit in response on 20th February 2014. The claimant avers that this action does not concern the construction of the building agreement or any matter or thing of whatsoever nature arising thereunder or in connection of the construction of the building agreement. He also avers that the defendants had ample opportunity to request that the matter be referred to arbitration as since April 2011, the claimant has been complaining about the late payment. Yet the defendants did not request such referral.

Background

- [4] The claimant filed a claim on 13th November 2013 claiming inter alia, damages for breach of a construction contract between the parties and payment of the sum of \$81,752.14 due and owing under the construction contract. The short facts surrounding the claim are that the defendants contracted the claimant to perform certain construction works which were to commence in April 2010 and were to be managed by Tardi Alexis. The defendants sent the initial sum of monies in May 2010 as a result of which the construction was delayed by one month. It is the claimant's case that throughout the life of the project the defendants habitually made late payments resulting in him having to use his overdraft facility in order to try to continue the project and minimize delays. The claimant also states that at some points he was forced to stop works entirely due to late arrival of funds.

[5] The claimant claims that in January 2012, the said Tardi Alexis certified the value of the works as 99% complete and as at March 2012, the monies due and owing under that certificate had not been paid. The claimant says he performed remedial work as requested by the defendants and on or about October 2012, the defendants were advised by Tardi Alexis that the work had been completed that they should send the outstanding payments to the claimant. A final certificate certifying the amount of \$81,752.14 as due to the claimant was presented by the project manager in accordance with clause 4.3 of the Agreement. To date the defendants have failed to pay the sum due and owing.

[6] The defendants acknowledged service on 17th January 2014.

Analysis

[7] Section 7 of the **Arbitration Act** states:

“Where a party to an agreement or any person claiming through or under him or her, commences legal proceedings in the Court against another party to the agreement or any person claiming through or under him or her, in respect of any matter agreed to be referred then, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, any party to those proceedings may apply to the Court to stay the proceedings. The Court may make an order staying the proceedings if satisfied-

(a) that the applicant was at the time of the proceedings were commenced, and still is, ready and willing to do everything necessary to the proper conduct of the arbitration; and

(b) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement.”

[8] Article 4 of the Agreement dated 17th November 2010 provides:

“If any dispute or difference as to the construction of this Agreement or any matter or thing of whatsoever nature arising thereunder a connection therewith, shall arise between the Employers or the Project Manager/The Engineer on his behalf either during the progress or after the completion or abandonment of the Works or after determination of the Contractor it **shall** be referred to arbitration in accordance with clause 8 of the Conditions.”

Whether Article 4 applies

- [9] Counsel for the claimant contended that Article 4 does not apply as there is no dispute as to construction of the Agreement or any matter arising thereunder. Counsel for the defendants on the other hand says that Article 4 does apply and that the Article refers to disputes or differences as to (a) the construction of the Agreement and (b) any matter or thing of whatsoever nature arising under the Agreement. Counsel for the defendants says that to interpret the clause any other way would not be giving the clause its proper construction. Counsel for the defendants further says that if there is a disagreement about the amount to be paid under the Act, that is a dispute which should be referred to arbitration. Counsel for the claimant interprets the clause to refer only to disputes as to construction of the Agreement or any matter or thing arising thereunder, the latter clause being linked to 'construction'.
- [10] I have considered both arguments and having reviewed the clause, I have to disagree with counsel for the claimant that the clause is limited to matters of construction. To do so would mean that the clause would read disputes or differences as to construction of the Agreement and disputes or differences as to construction of any matter or thing of whatsoever nature arising thereunder (meaning the Agreement). This interpretation would mean that both aspects of the clause would be referring to the same thing. I therefore consider that the purport of the article 4 is to refer to disputes or differences in relation to construction of the Agreement and matters of dispute in relation to any other matter or thing arising under the contract.
- [11] If that interpretation is correct, then the claim brought by the claimant would fall into the category of a difference or dispute not as to the construction of the Agreement but as to a matter or thing which arises under the Agreement. The Agreement makes provision for the issuance of final certificates and how they are to be paid and dealt with. The fact that the certificate was issued but no payment

was made in accordance with the provisions of the Agreement is in my opinion a dispute.

- [12] Whilst it may be said that Article 4 is not the most elegantly drafted clause, I believe its purport and intent are clear. Having established that Article 4 does apply, the question then is whether this is a case where a stay should be granted.

Whether stay should be granted

- [13] Section 7 of the Arbitration Act gives the court the discretion to stay proceedings in cases where legal proceedings have been commenced in relation to a matter which the parties agreed should be referred to arbitration. In the case of **DGT Steel and Cladding Ltd. v Cubitt Building and Interiors Ltd.**², Judge Peter Coulson said: "If the parties have agreed on a particular method by which their disputes are to be resolved, then the court has an inherent jurisdiction to stay proceedings brought in breach of that agreement. In **Cott UK Ltd. v FE Barber Ltd.**³, the judge in said that "where there is such a clause which is contractually binding, there is a burden on the person opposing the stay to show grounds for opposing it."

- [14] It is to be noted that in the **DGT Steel** case, the claim was that the defendant owed the claimant a sum of money and that was seen as a dispute which was to be referred to arbitration under the contract. In the case at bar, I cannot agree that there is no dispute arising. The claimant has not shown grounds for opposing the stay except to indicate that the defendants had not made any request for the matter to be referred to arbitration previously. In answer to this submission, counsel for defendants says that it is the claimant who has an issue so it is he who should have referred the matter to arbitration as a first step.

² [2007] EWHC 1584.

³ [1997] 3 All ER 540.

- [15] The claimant has shown no compelling reason as to why the matter should not be stayed. In the words of Judge Coulson in **DGT Steel**, "a stay would support the adjudication process in accordance with the general purpose of the 1996 Act; it would keep the parties to their bargain; and it would comply with CPR 1.4 and 3.1."
- [16] The fact that the defendants did not ask for the matter to be referred to arbitration does not say that they are unwilling to arbitrate. The facts show that the defendants applied for this stay once they were served with the claim and had acknowledged service.
- [17] In light of all the circumstances and in view of the interpretation of Article 4 of the Agreement, I would grant the application.

Order

- [18] The order is as follows:
- (1) Pursuant to section 7 of the **Arbitration Act**, all further proceedings in this action are stayed until further order of the court.
 - (2) The parties shall refer this matter to arbitration in accordance with the Agreement dated 17th November 2010.
 - (2) The claimant shall pay costs of \$500.00 to the defendants, being costs on this application.

Kimberly Cenac-Phulgence
Master [Ag.]