SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2010/022

BETWEEN:

WHITE CONSTRUCTION COMPANY LIMITED

Appellant

and

DCG PROPERTIES LIMITED

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mde. Janice M. Pereira	Justice of Appeal

Appearances:

Mr. Dexter Theodore for the Appellant
Ms. Renee St. Rose for the Respondent

2011: July 25, 26;
September 26.

Contract – Claims under disputes and arbitration clauses – Dispute referred to arbitration – Jurisdiction of arbitrator unsuccessfully challenged on ground that claims were prescribed – Unsuccessful party sought declarations in court on similar grounds - Whether claims out of time and therefore prescribed – Whether arbitrator had jurisdiction.

The appellant, White Construction, and the respondent, DCG Properties, entered into an agreement under which DCG Properties employed White Construction to develop an 18-hole signature championship golf course and driving range. A dispute arose between the parties during the performance of the contract. Article 4.3.2 of the agreement provided that a Claim by either party must be initiated within 21 days after occurrence of the event giving rise to the Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. The Article also provides that Claims must be initiated by written notice to the Architect and the other party. Article 4.4.1 of the agreement states that a Claim shall be referred initially to the Architect for decision. It further states that an initial decision by the Architect shall be required as a condition precedent to arbitration of all Claims, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect.

White Construction referred a Claim to the Architect, and eventually referred the dispute to arbitration, pursuant to clause 4.6 of the agreement. The arbitrator assumed jurisdiction in the arbitration referral. DCG properties challenged the arbitrator's assumption of jurisdiction on the ground that White Construction did not refer the Claim to the Architect within the time stipulated in Article 4.3.2 of the agreement the time having been prescribed under the laws of Saint Lucia and could not be extended. The challenge failed before the arbitrator and DCG instituted proceedings in the court in Saint Lucia on essentially the same grounds which it raised before the arbitrator. The trial judge held that the Claim was time-barred under Article 4.3.2 and prescribed under Saint Lucian Law, and that, by extension, the referral of the dispute and the assumption of jurisdiction by the arbitrator were null and void. White Construction appealed.

Held: allowing the appeal and awarding costs to the appellant in the High Court and in the appeal:

The parties made Article 4.3.2 of the agreement a condition precedent to arbitration. The question whether the Claim was time-barred and prescribed raised an issue of procedural arbitrability, which rule 8(a) of the Construction Industry Arbitration Rules of the American Arbitration Association puts within the purview of the arbitrator. Since the respondent, DCG Properties, unsuccessfully challenged the arbitrator's assumption of jurisdiction in the dispute, and did not appeal the arbitrator's decision through the arbitral appeal process, the High Court should not have entertained a case which DCG Properties brought on the same issue. That litigation occasioned the court to make a conflicting decision to that of the arbitrator on the same grounds as DCG Properties had unsuccessfully challenged the arbitration. Saint Lucia has a strong public policy in favour of arbitration which the Arbitration Act exemplifies. The court, in support of that policy, should cause parties to act in accordance with the processes provided by that Act.

Karen Howsam v Dean Witter Reynolds Inc., 537 U.S. 79 (10 December 2002) Contec Corporation v Remote Solutions Co. Ltd., 398 F.3d 205 (2d Cir. 2005), adopted.

JUDGMENT

[1] RAWLINS, C.J.: The outcome of this appeal hinges on the interpretation of certain clauses contained in a contract between the parties in this appeal, which relate to claims and arbitration.

Contractual provisions

[2] The grounds of appeal, which will be set out later in this judgment, mirror some of the provisions that the agreement between the parties contain, which counsel for White Construction urged us to consider in the appeal. Other provisions were

referred to in the submissions by both counsel. I set out their contents at this juncture in order to put this appeal into the contractual context.

[3] The contractual provisions to which counsel referred us are Articles 4.3.1, 4.3.2, 4.4.1, 4.4.2, 4.4.3, 4.6.1, 4.6.2, 4.6.3, 13.1.1, 13.3.1, 13.4.2 and 13.7.1.

[4] Article 4.3 is under the rubric "CLAIMS AND DISPUTES". Article 4.3.1 is a definition provision. It states as follows:

> "A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the contract. The term "Claim" also includes other disputes and matters in question between the Owner and the Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim."

Article 4.3.2 is captioned "Time Limits on Claims". It states as follows:

> "Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party."

Article 4.4 is under the rubric "RESOLUTION OF CLAIMS AND DISPUTES".

Article 4.4.1 is captioned "Decision of Architect. It states as follows:

> "Claims, including those alleging an error or omission by the Architect but excluding those arising under Paragraphs 10.3 through 10.5, shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect. The Architect will not decide disputes between the Contractor and persons or entities other than the Owner."

Paragraphs 10.3 and 10.5 of the contract do not arise for consideration in the present case. That is because they make provisions for the manner in which hazardous materials and substances in the location of the performance of the contract works, which may result in bodily injury or death are to be dealt with. The

provisions also speak to liability for injury or death or for remedial work occasioned by such materials or substances.

Article 4.4.2 states as follows:

> "The Architect will review Claims and within ten days of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Architect is unable to resolve the Claim if the Architect lacks sufficient information to evaluate the merits of the Claim or if the Architect concludes that, in the Architect's sole discretion, it would be inappropriate for the Architect to resolve the Claim."

Article 4.4.3 states as follows:

> "In evaluating Claims, the Architect may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Architect in rendering a decision. The Architect may request the Owner to authorize retention of such persons at the Owner's expense."

[5] Article 4.6 is under the rubric "ARBITRATION". Article 4.6.1 states as follows:

> "Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavour to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5."

Article 4.6.2 states as follows:

> "Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect."

Article 4.6.3 states as follows:

> "A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings

based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7."

[6] Article 13.1.1 is captioned "GOVERNING LAW" and states as follows:

> "The Contract shall be governed by the law of the place where the Project is located."

[7] Article 13.3.1 is captioned "WRITTEN NOTICE" and states as follows:

> "Written notice shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered at or sent by registered or certified mail to the last business address known to the party giving notice."

[8] Article 13.4 is captioned "RIGHTS AND REMEDIES" Article 13.4.2 states as follows:

> "No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitutes approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing."

[9] Article 13.7 is under the rubric "COMMENCEMENT OF STATUTORY LIMITATION PERIOD". Article 13.7.1 states as follows:

> "As between the Owner and Contractor: (1) Before Substantial Completion. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion…"

Brief Background

[10] The parties entered into a contract on 1st September 2006. By that contract, the respondent, DCG Properties, employed the appellant, White Construction, to develop an 18-hole signature championship golf course and driving range in Saint Lucia. This was to be a part of the Le Paradis Golf Course Project, which was designed by Greg Norman Golf Course Designs. DCG is a property developer engaged in the development of golf courses. The contract price was

US$9,877,753.00. The commencement date was 1st September 2007. By a modification agreement dated 12th June 2007, the parties agreed that the completion date was to be 30th September 2008.

[11] A dispute arose between the parties during the performance of the contract. DCG Properties gave notice to White Construction of its (DCG's) intention to terminate the employment of White Construction. In turn, White Construction purported to terminate the contract. DCG Properties refused that purported termination on the ground that it was not done in accordance with the contractual provisions. White Construction eventually referred the dispute to arbitration, pursuant to clause 4.6 of the agreement. DCG Properties unsuccessfully challenged the arbitrator's jurisdiction. Having failed in this challenge before the arbitrator, DCG instituted proceedings in the court in Saint Lucia on essentially the same grounds on which it had challenged the arbitrator's jurisdiction.

DCG's claim in these court proceedings

[12] In its fixed date claim before the court, DCG sought the following declarations:

(1) A declaration that White Construction's claim against it (DCG Properties) dated 26th October 2007 was not served within the time prescribed in the contract of 1st September 2006.

(2) A declaration that White Construction's said claim was not served within the time prescribed in the contract and is therefore prescribed by law.

(3) A declaration that the demand for arbitration and arbitration proceedings between the parties is null and void and the arbitration agreement or reference ceases to have effect with respect to the dispute referred.

(4) A declaration that the arbitrator erred in his decision not to dismiss White Construction's claim, it having been prescribed under the laws of Saint Lucia and under the contract.

(5) In the alternative, a declaration that the demand for arbitration and arbitration proceedings is null and void and that the arbitration agreement or reference ceases to have effect inasmuch as the time for serving the notice of the claim was not extended.

The High Court judgment

[13] The judgment was delivered on 2nd July 2010. In that judgment, the trial judge noted that the article 4.3.2 contract between the parties set a time limit within which claims under the contract were to be made. He stated that this was to be done within 21 days of the event that occasioned the claim. He also noted that such claims were to be made by written notice to the Architect and to the other party.[1] The judge found that White Construction had failed to give timely written notice of its claim, and, that accordingly, the claim was time barred under the contract and therefore prescribed under the laws of Saint Lucia.[2] The judge further found that inasmuch as time was not extended for the submission of the claim and the arbitrator had no jurisdiction to extend the time limit within which the claim was to have been submitted, the arbitrator had no jurisdiction to entertain the claim because it was prescribed. The judge accordingly found that the arbitration proceedings were null and void and that the arbitration agreement and references made under it ceased to have effect in relation to the dispute with DCG Properties, which White Construction referred to arbitration.

[14] It was in the foregoing premises that the judge held that the arbitrator erred when he did not dismiss White Construction's claim, it having been prescribed under the contract and under the laws of Saint Lucia.[3] DCG Properties' pleaded case was that the arbitrator had no jurisdiction to extend the time limit on the claim which was prescribed under Saint Lucian Law.[4] The judge granted the declarations which DCG Properties sought and awarded costs to DCG Properties to be

[1] See paragraphs 29 and 31 of the judgment.
[2] See paragraph 30 of the judgment.
[3] See paragraphs 32 and 33 of the judgment.
[4] See paragraph 7(x) of the statement of claim, which is at page 20 of the Record of Appeal.

assessed if not agreed. White Construction appealed against these decisions and the findings on which the judge based those decisions.

[15] I think that it suffices to state, at this juncture, that within the jurisdiction of this Court, prescription is a statutory device which is peculiar to the law of Saint Lucia. It is a feature of the Civil Code of Saint Lucia[5] and finds expression in Articles 2047, 2054, 2055 and 2085 of that Code. Essentially, these Articles provide that as long as the evidence discloses that a specified limitation period has expired, and whether imposed contractually, no steps may be taken to have proceedings instituted out of time because obligations and rights are extinguished once the expressed time limitation has passed.[6] Article 2085 of the Civil Code provides that prescription may only be interrupted by the service of a judicial demand upon the person whose prescription another person seeks to hinder. In David Sweetnam and another v The Government of St. Lucia and another,[7] Gordon JA reiterated that prescription in Saint Lucia is only interrupted civilly by the commencement of a suit before a court of competent jurisdiction and by the service of the suit on the party whose prescription it is sought to interrupt. Ms. St. Rose, learned counsel for DCG argued, and the judge agreed, that this law is applicable in the present case so that the 21 days limited in Article 4.3.2 of the contract for White Construction to initiate the Claim could only have been interrupted by submitting the Claim to the Architect and serving it on DCG within that 21 day period. Counsel argued that inasmuch as that was not done, neither the Architect, the arbitrator nor the court had jurisdiction to entertain a Claim or to extend the time limit within which it should have been initiated.

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[5] Chapter 4:01 of the Revised Laws of Saint Lucia, 2001, Book Nineteenth, Chapter First – General Provisions: Prescription.

[6] See, for example, per Peterkin JA, in Norman Walcott v Moses Serieux, St. Lucia Civil Appeal No. 2 of 1975, (20th October 1975).

[7] St. Lucia Civil Appeal No. 42 of 2005 (28th October 2005), at paragraph 11 of the judgment.

The appeal

[16] Grounds 1, 2 and 3 of the appeal essentially raise questions relating to the interpretation of Article 4.3.2 of the contract between the parties.

[17] It was seen[8] that the learned judge found that White Construction failed to give timely written notice of its claim, as Article 4.3.2 of the contract requires, with the result that the claim was time barred under the contract and therefore prescribed under the laws of Saint Lucia.[9] We saw that the judge further found that inasmuch as time was not extended for the submission of the claim and the arbitrator had no jurisdiction to extend the time limit within which the claim was to have been submitted, the arbitrator had no jurisdiction to entertain the claim because it was prescribed. The judge therefore held that the arbitration proceedings were null and void. The judge further held that the arbitrator erred when he did not dismiss White Construction's claim it having been prescribed under the contract and under the laws of Saint Lucia.[10]

[18] White Construction's appeal from these decisions, which are contained in grounds 1, 2, and 3 of the appeal, state as follows:

> 1. The trial judge erred in that he failed to appreciate the following:
>
> (i) that article 4.3.2 of the contract between the parties merely requires the furnishing of a written notice of claim within a given time, and does not purport to abridge any relevant period of limitation or prescription;
>
> (ii) that article 4.3.2 of the contract does not stipulate that claims are barred unless initiated within 21 days and in accordance with the general rule that time bar clauses should be construed strictly, cannot be construed as abridging the six year period of prescription in the absence of express words to that effect;

[8] In paragraphs 13 and 14 of this judgment.
[9] See paragraph 30 of the judgment.
[10] See paragraphs 32 and 33 of the judgment.

(iii) that the 21-day time limit for the initiation of claims under article 4.3.2 of the contract specifies no particular form of claims under that article, the intent being that any form which fairly brings to the other party's attention the nature of the claim shall suffice.

2. The judge misdirected himself by construing article 4.3.2, without reference to articles 13.4.2, 13.7.1, 4.6.1 and 4.6.3 of the contract, and, in so doing, failed to construe the contract as a whole.

3. The judge erred in law by failing to appreciate that in St. Lucia it is not possible by contract to abridge any period required for prescription.

[19] During the appeal hearing, however, I indicated that my main concern was with the nature of the proceedings which brought us to the present juncture. That concern brought grounds 4, 5 and 6 of the appeal into focus. In my view, the resolution of these grounds will determine whether the High Court was required to embark upon its own interpretation of Article 4.3.2 of the contract in the first place. A fortiori, this would also determine whether this Court should also embark upon an interpretation of the article which would be inevitable if grounds 1, 2 and 3 of the appeal are considered. I would therefore consider grounds 4, 5 and 6 first.

Grounds 4, 5 and 6

[20] Grounds 4, 5 and 6 of the appeal state as follows:

> "4. The judge failed to consider the effect of article 4.6.2 of the contract which specifies that claims not resolved by mediation shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, rule 8(a) of which provides that it is for the arbitrator to rule on procedural arbitrability issues including waiver, or satisfaction of conditions precedent to arbitration.
> 5. The judge failed to appreciate that DCG Properties waived its right to seek the intervention of the court by failing to seek injunctive relief or a direction as a statement of a special case before tendering the issue to the arbitrator for his consideration.
> 6. The judge failed to appreciate that DCG Properties having unsuccessfully objected to the arbitrator's jurisdiction and having not appealed that decision, was estopped from raising the issue again before the High Court seven months later."

[21] The parties voluntarily entered into an arbitration agreement for the resolution of their disputes. Saint Lucia has a strong public policy in favour of arbitration. This is exemplified in the provisions of the Arbitration Act,[11] which provides extensive procedures to govern the conduct of arbitration. It also sets out the supervisory purview which the court is given in arbitration matters.

[22] Section 3 of the Arbitration Act states that an Arbitration Agreement between parties is irrevocable and has the same effect in all respects as an order of the court. According to section 6 of the Act, an arbitration agreement cannot be discharged by the death of any party to the agreement. Section 7 provides that any party who may claim under an arbitration agreement may move the court to stay court proceedings concerning a dispute that arises under the arbitration agreement. Sections 8, 9 and 10 empowers the court to appoint arbitrators or umpires, who may, pursuant to section 11, be ordered by the court to proceed with due dispatch. Under section 12, the court is empowered to deal with an arbitrator who is partial and the court may take certain steps where the dispute involves fraud. Under section 13 of the Act, the court may remove an arbitrator and take other incidental steps in that regard.

[23] Powers of arbitrators and umpires are addressed in section 15 of the Act. The court may set aside an arbitration award pursuant to section 19 of the Act. It is trite law that an arbitration award may be enforced as a judgment or order of the court. This is given statutory authority and reinforced in section 20 of the Act. Section 23 of the Act provides that the statutes of limitation shall apply for the purpose of the commencement of arbitration as they apply to proceedings in court. The section also makes other important related provisions. Sections 24 and 25 empower the court to refer questions to a referee for inquiry or for trial. The court may, pursuant to sections 16 and 29 of the Act, compel the attendance of witnesses before an arbitrator or umpire. Under section 18 of the Act, the court may remit matters for reconsideration by an arbitrator or umpire. Section 31 of the Act permits an arbitrator or umpire to state a special case on any question of law

[11] Cap. 2.06 of the Revised Laws of St. Lucia, 2001.

for a decision thereon by the court. The section also empowers the court to direct either of them to state such a case, even on an award.

[24] It is not disputed that the present dispute between the parties is within the terms of their arbitration agreement and is a matter which may be resolved by arbitration if mediation by the Architect fails. DCG's contention is that White Construction did not properly trigger the arbitration proceedings because DCG did not initiate the claim within the time specified in Article 4.3.2 of their agreement and did not serve the Claim within the time specified therein on it [DCG].

[25] In his judgment, the trial judge noted[12] that DCG was advised by the American Arbitration Association, by a letter dated 18th April 2008, that White Construction had submitted to it a claim for arbitration. DCG objected to that claim on the ground that it was not submitted in accordance with the terms of the contract and was prescribed under Saint Lucian law. The judge noted that the arbitrator, Herbert Boxill, denied DCG's request without giving reasons. In my view, nothing now turns on this latter statement, given that DCG subsequently applied to the arbitrator challenging his jurisdiction on the same prescription ground.

[26] The judge further noted[13] the allegation by White Construction that DCG breached their agreement by failing to comply with Article 2.2.1 which required DCG to furnish it (White Construction) with reasonable evidence that financial arrangements were in place to fulfill DCG's obligations under the contract. He also noted that White Construction also alleged that it emailed a copy of its written Claim to White Construction's local counsel for forwarding to DCG's local counsel, but it was unclear whether they were delivered to DCG's counsel. The judge also noted[14] the assertion by counsel for White Construction, that by email dated 18th September 2008, counsel for DCG advised the Administrator of the American Arbitration Association of DCG's intention to appeal the arbitrator's ruling on the

[12] At paragraph 18.
[13] At paragraph 20 of the judgment.
[14] At paragraph 21 of the judgment.

jurisdiction issue, but that no appeal was filed and the parties continued to participate in the arbitration.

[27] The judge then referred[15] to the contention by White Construction, in its defence, that according to rule 8(a) of the Construction Industry Arbitration Rules of the American Arbitration Association, the question of jurisdiction in the matter falls under procedural arbitrability, which includes issues such as waiver or the satisfaction of conditions precedent to arbitration. It is clear in the present case that Article 4.3.2 of the agreement between the parties is a condition precedent to the submission of a claim to arbitration. The parties agreed that a Claim must first be submitted to mediation by the Architect, and to arbitration if mediation fails or where the mediator does not give a decision within 30 days. It was seen that the arbitrator dismissed DCG's application alleging that White Construction did not comply with the condition precedent set out in Article 4.3.2 of the agreement. He further noted[16] the submission by counsel for White Construction, that since DCG failed to appeal the arbitrator's decision, DCG was estopped from raising the issue again in the court of Saint Lucia some 7 months after the arbitrator's decision.

[28] The judge then noted the further submission, by counsel for White Construction, that having not appealed the arbitrator's decision on the jurisdiction issue, DCG waived its rights to seek the court's intervention because DCG neither sought injunctive relief from the court nor sought a direction from the court for the statement of a special case on the issue. The judge did not go on to discuss this issue, which could have determined whether the matter which arose before the arbitrator on DCG's application fell within the purview of the arbitrator. Instead, the judge returned to the prescription issue and the interpretation of Article 4.3.2 of the agreement and held that the Claim was prescribed and the arbitrator's decision on the issue, and, by extension, the arbitration was null and void.

[15] See paragraph 23 of the judgment.
[16] See paragraph 24 of the judgment.

Did the judge err?

[29] The Claim by White Construction was not resolved by mediation. Article 4.3.2 of the agreement between the parties provides that Claims are to be initiated within 21 days after occurrence of the event giving rise to a Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. It further states that Claims must be initiated by written notice to the Architect and the other party. This is a condition precedent to arbitration inasmuch as under Article 4.4.1 of the agreement, the parties specifically agreed that an initial decision by the Architect is required as a condition precedent to arbitration, except that the matter may be referred to an arbitrator where the Architect has not made a decision within 30 days of the referral to him or her. Critically, in the context of the present case, however, Article 4.6.2 of the agreement provides that such Claims are to be decided by arbitration, which shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect, unless the parties mutually agree otherwise. The parties did not otherwise agree. The question which then arises is whether by virtue of rule 8(a) of the Construction Industry Arbitration Rules of the American Arbitration Association, an issue arising from Article 4.3.2 of the agreement, concerning the satisfaction of conditions precedent to arbitration, is a matter of procedural arbitrability which is to be determined by the arbitrator.

[30] Similar provisions to rule 8(a) of the Construction Industry Arbitration Rules of the American Arbitration Association were considered in the subject of litigation. In Karen Howsam v Dean Witter Reynolds Inc.,[17] and in Contec Corporation v Remote Solutions Co. Ltd.,[18] the United States Supreme Court and the Second Circuit of the Federal Court of Appeal for New York decided, respectively, that where the parties incorporated the American Arbitration Association Construction Industry Arbitration Rules into their agreement, procedural issues that grow out of an

[17] 537 U.S. 79 (10 December 2002).
[18] 398 F.3d 205 (2d Cir. 2005).

arbitrable dispute is for the arbitrator to decide. This includes issues revolving around the interpretation and applicability of time-limit provisions.

[31] The arbitrator took jurisdiction of the dispute. DCG unsuccessfully challenged that assumption of jurisdiction. DCG then brought the same issues before the court in Saint Lucia for litigation, without any evidence that DCG attempted to access the arbitral appellate process with a view to securing a possible reversal of the arbitrator's decision.

[32] Article 4.3.2 of the agreement between the parties is a condition precedent to instituting arbitration proceedings. It is my view that the effect of rule 8(a) of the Construction Industry Arbitration Rules of the American Arbitration Association is that the determination of the issue whether White Construction initiated the claim in accordance with the time stipulations in Article 4.3.2 fell within the purview of the arbitrator. DCG appeared before the arbitrator to dispute his assumption of jurisdiction on the time-bar issue. DCG contended that the matter was prescribed under Saint Lucian law, and, in effect, there was nothing for the arbitrator to take jurisdiction of. Inasmuch, however, as the arbitrator dismissed DCG's application, and DCG did not pursue the arbitral appeal process, the High Court should have upheld the public policy of Saint Lucia in support of arbitration and declined to entertain DCG's court claim. In my view, the High Court should not have nullified the arbitrator's decision in those circumstances. On this reasoning I would allow ground 4 of the appeal.

[33] In any event, inasmuch as the arbitrator took jurisdiction of the dispute, it is my view that any court proceedings concerning that dispute should have been informed by the provisions of the Arbitration Act. It is to this extent that I agree with the contention stated in ground 5 of the appeal that DCG may have, for example, sought to move the special case stated facility provided by section 31 of the Arbitration Act on the issue for resolution by the court. The court would then have had the benefit of the arbitrator's reasons for dismissing DCG's application to

the arbitrator, which challenged his assumption of jurisdiction. On this reasoning I would allow grounds 5 and 6 of the appeal.

[34] The main concern that would move me to allow the appeal on grounds 4, 5 and 6, however, is that commencing the proceedings in the High Court in the circumstances in which DCG did is inimical to the benefits which the legislature intended to result from the enactment of the Arbitration Act. The Act is intended to be an alternative disputes resolution mechanism, to permit tribunals constituted of persons with special expertise and experience in a particular area to lend their specialized experience to resolve disputes in those areas. It is for this facility that the Arbitration Act fairly demarcates and balances the relative purviews of the tribunal and the court in a manner that is intended to prevent conflicting concurrent decisions by the court and tribunal. Because the High Court entertained DCG's claim when there was no attempt to have the arbitrator state a special case, for example, for the court's determination and guidance, there are now conflicting decisions by the tribunal and by the court on the same issue.

[35] In allowing the appeal on grounds 4, 5 and 6, it follows that the trial judge erred when he embarked upon his own interpretation of Article 4.3.2 of the agreement and purported to nullify the arbitrator's decision and the arbitration. I would not therefore embark upon a determination of grounds 1, 2 and 3 of the appeal, which would lead to a consideration of the merits of the judge's interpretation of Article 4.3.2 of the agreement.

Costs

[36] The appellant appealed against the costs order of the trial judge. Although the judge awarded costs to be assessed, it is accepted that the correct order in the matter, which was completed, should have been prescribed costs. There is nothing in the circumstances of this appeal that invites a departure from the general rule that costs shall follow the event. I would therefore award prescribed costs to the appellant, both in the High Court and in this Court pursuant to rule 65.13 of CPR 2000. The parties may otherwise agree costs.

Summary and order

[37] I would allow the appeal on grounds 4, 5 and 6. The learned judge erred when he did not decide whether the issue concerning the interpretation of Article 4.3.2 of the agreement fell within the purview of the arbitrator. The issue was in fact one of procedural arbitrability as it was concerned with a condition precedent to arbitration. As such, it was to be decided by the arbitrator. The trial judge erred when he decided the question and held that the Claim was time-barred and prescribed, when the arbitrator had made a prior decision that it was not on an application that DCG made to the arbitrator. On this finding, I would not seek to determine grounds of appeal 1, 2 and 3, which invites this Court to decide whether the judge correctly held that the said Claim by White Construction was time-barred and prescribed under Saint Lucian Law. In the premises, I would set aside the judgment and the order of the trial judge. I would award prescribed costs to be paid by DCG Properties Limited to White Construction Company Limited in the High Court and in these appeal proceedings in accordance with rule 65.13 of CPR 2000.

[38] The order that I would make then is as follows:

> 1. The appeal is allowed and the judgment and order of the trial judge are set aside.
> 2. Unless the parties otherwise agree, DCG Properties Limited shall pay to White Construction Company Limited prescribed costs in the High Court and two-thirds of those costs in these appeal proceedings in accordance with rule 65.13 of CPR 2000.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice M. Pereira
Justice of Appeal