BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2007/0293

IN THE MATTER OF AN INTENDED ARBITRATION

BETWEEN:

VICTOR INTERNATIONAL CORPORATION
VICTOR (BVI) LIMITED

Claimants

-and-

SPANISH TOWN DEVELOPMENT COMPANY LIMITED
CHARLENE O'NEAL HENDERSON
NORMAN O'NEAL HENDERSON

Defendants

Appearances:

Mr Gerard St. C. Farara QC and Ms Tana'ania Small-Davis of Farara Kerins for the Claimants
Dr Joseph S. Archibald QC and Ms Michelle Worrell of J.S. Archibald & Co for the Defendants.

2008: February 14, 18, 22, 26
2008: February 29, March 20

JUDGMENT

Introductory

[1] **HARIPRASHAD-CHARLES J:** The Claimants and the Defendants are embroiled in acrimonious litigation. Within the last two months, they have appeared in Court on no less than six occasions in an effort to resolve their disputes. On 14 February 2008, the Court delivered a written judgment dismissing the Defendants' claim that the Written Agreement made on 4 March 2007 ("the March 2007 Agreement") is a nullity. The Court ordered a continuation of the interlocutory injunction it initially granted on 20 December 2007 until further order.

The Claim

[2] The present claim, made by way of a Fixed Date Claim Form filed on 7 December 2007, is to enforce an arbitration agreement entered into by the Claimants and the Defendants to settle their disputes arising under the March 2007 Agreement. The arbitration agreement is contained in Clause 25 of the said Agreement. It reads:

> "Any dispute between the parties under this agreement that is not resolved through mediation will be finally settled by arbitration."

[3] The Claimants also seek an Order (i) appointing a suitable qualified person as arbitrator pursuant to Section 12 (1) (a) of the Arbitration Act, Cap. 6 of the Laws of the Virgin Islands ("the Arbitration Act"); (ii) appropriate directions for the conduct of the arbitration and (iii) injunctive relief to maintain the status quo pending the determination of the arbitration.

The written agreements

[4] The factual matrix to this dispute is already encapsulated in a judgment of this Court dated 14 February 2008. It is not necessary for purposes of this judgment to reproduce the said factual matrix but reference to the December 2006 Joint Venture Agreement and more particularly, the March 2007 Agreement is inexorable.

The December 2006 Joint Venture Agreement

[5] On 7 December 2006, the First Claimant and the Defendants executed a written agreement ("the December 2006 Joint Venture Agreement") which provided, inter alia, for the sale to the First Claimant or its nominee of 40 to 50 acres of the Oil Nut Bay property for the price of 1.15 million for use as a homestead; the splitting off to Spanish Town of an equivalent size parcel of land at the eastern tip of the property for use as a homestead; for the development of the remainder of the property (approximately 300 acres) as a joint venture between the First Claimant and the First Defendant; and for the payment by the First Claimant to the First Defendant of the sum of $2.85 million to reimburse development costs in exchange of the First Claimant receiving 50% interest in the joint venture. This agreement also provided for the First Claimant to provide funding to cover the costs of the

infrastructural improvements required by the development, the joint venture operating and construction costs, and to forego its standard development fees and to be reimbursed for such costs prior to any participation in proceeds by the joint ventures.

[6] In February 2007, the Defendants expressed concern over the 50/50 joint venture with representatives of the Claimants and indicated that they wanted a guaranteed buyout price for the land. Discussion ensued between the parties as to the new terms of the Agreement.

The March 2007 Agreement

[7] On 4 March 2007, the parties to the December 2006 Joint Venture Agreement entered into a new written agreement relating to the Oil Nut Bay property ("the March 2007 Agreement"). This agreement superseded the previous agreement and expressly declared the December 2006 Joint Venture Agreement null and void. It is common ground that no lawyer was present when the March 2007 Agreement was executed.

[8] By the March 2007 Agreement, the Defendants agreed to sell to the Claimants 50 acres of land located on the western end of the Oil Nut Bay property at the agreed price of $2.0 million for development as a homestead; the splitting-off of a 50 acre parcel located at the eastern tip of the property to a new entity to be owned by the Defendants for the construction of a homestead; the formation of a 50/50 joint venture to develop, market and sell the remainder of the development; for the payment of $2.0 million to the Defendants at the Joint Venture closing for the costs incurred in respect of the development and as a result of the payment, the Claimant shall receive a 50% interest in the joint venture. The Agreement also provided for the Claimants to buy-out the Defendants' 50% interest in the joint venture for an additional guaranteed payment of $15.5 million over a maximum period of 10 years through phased payments made upon the release and sale of certain specified lots.

[9] A comparison of the two Agreements shows two discernible inclusions namely the buy-out provision and the inclusion of an agreement to submit all their disputes under the March 2007 Agreement to arbitration and more specifically spelt out in Clause 25.

[10] It appears to me that at the heart of this claim is the proper construction of Clause 25. The Court is not called upon to adjudicate upon the disputes which have arisen between the parties under the March 2007 Agreement, including any issue as to the binding nature or alleged invalidity of that agreement whether because of alleged undue influence or breach. Indeed, as Learned Queen's Counsel for the Claimants, Mr Farara correctly submitted, these are all matters to be determined by the arbitrator.

Statutory definition of arbitration agreement

[11] Section 2 of the Arbitration Act, Cap. 6 of the Laws of the Virgin Islands reads as follows:

> "An agreement in writing including an agreement contained in an exchange of letters or telegrams, to submit to arbitration present or future differences capable of settlement by arbitration."

[12] This is an all-encompassing provision. It incorporates situations both where there is an arbitration clause as part of the main contract, as in the present case and where there is a separate agreement to arbitrate not forming part of the main contract.

[13] An arbitration agreement is therefore a contractual undertaking by two or more parties to resolve disputes by the process of arbitration even if the disputes themselves are not based on contractual obligations.

Scope of arbitration agreement

[14] Where the parties have agreed an arbitration clause, they are presumed to have intended to resolve their disputes through arbitration, and not by means of several different forms of dispute resolution including both arbitration and the courts.[1] This presumption has been given forceful judicial expression in the case of **Fiona Trust & Holding Corporation v Yuri Privalov** [2] when it was described as a "powerful" reason for a liberal interpretation of arbitration clauses.

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[1] See Capital Trust Investments Ltd v Radio Design TJ AB [2002] 2 All ER 159 where the court emphasized that the parties would have wanted one tribunal to determine all claims which could fairly be said to arise out of the application for shares, including claims for fraudulent or negligent misrepresentation.

[2] [2007] 2 Lloyd's Rep. 267; [2007] UKHL 40.

[15] In **Fili Shipping Co Ltd and others v Premium Nafta Products Ltd and others**[3], Lord Hoffman at page 1726 had this to say:

> "In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked …'if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so'."

[16] The House of Lords held in **Fili Shipping** [supra] that assertions of the invalidity or rescission of the main contract or that an agent exceeded his authority in entering into the main contract or that there is no concluded agreement because, for example, terms of the main agreement remain to be agreed, or that the main contract is in uncommercial terms are all disputes or issues which are caught by the general arbitration clause to refer all disputes to arbitration.

[17] In the present case, Clause 25 reads "**any dispute between the parties**… **will be finally settled by arbitration**." It appears upon a fair construction of Clause 25 that the parties have agreed to refer **all of their disputes to arbitration**. In their lawyer's letter dated 25 July 2007 to the Minister of Natural Resources & Labour as well as in the Second Defendant's First Affidavit, the Defendants insisted that they entered into the March 2007 Agreement under undue influence, without legal advice, without good health of Mr and Mrs Henderson at the time, without any independent valuation of the Oil Nut Bay property, without the attachment of relevant exhibits; and without any satisfactory arrangement relating to price deposit either in manner or quantum and which was in a nutshell, in the nature of fraud on the Defendants.[4]

[18] Regardless of these allegations, Dr Archibald submitted that the only issue between the parties is price. This issue is plainly one which does not arise under the March 2007

[3] [2007] Bus. L.R. 1719.
[4] See paragraphs 32- 39 & 44 of First Affidavit of Charlene O'Neal Henderson

Agreement as the Agreement specifies the agreed price. However, the Defendants contend that when they agreed on the price, the Second Defendant was under the undue influence of Mr David Johnson and she was heavily sedated with medication rendering her unable to think clearly.

[19] These are all factual assertions which go towards the issue of whether the March 2007 Agreement is binding and in my opinion, they are all matters which fall within the ambit of Clause 25.

[20] To come to the point, all of the issues raised by the Defendants in their correspondence, in affidavit evidence and submissions before this Court concerning the March 2007 Agreement fall within Clause 25 of the arbitration agreement and are directly within the scope and jurisdiction of the arbitrator.

Submissions of the parties

[21] The Defendants have acknowledged that despite their contention that the March 2007 Agreement is unenforceable, Clause 25 is alive in its entirety based on the legal principles of the autonomy and survivability of the arbitration clause. Their primary contention is that Clause 25 invokes two separate methods of Alternative Dispute Resolution ("ADR"), that is to say, mediation as a first step and arbitration thereafter if mediation fails to resolve the dispute. They say that the Court also has jurisdiction to make Orders as to the framework of the mediation procedure arises from the statutory regime set out under CPR 25.1 and Practice Direction No. 1 of 2003 –The Mediation Rules ("the Practice Directions").

[22] Dr Archibald QC for the Defendants insisted that the Practice Directions is a statutory regime for mediation which by analogy is similar to the Articles of Association of a Company being a statutory regime which cannot be rectified by the Court. According to him, the Civil Procedure Rules 2000 ("the CPR") and the Practice Directions have the force and effect of legislation pursuant to section 11 of the West Indies Associated States Supreme Court (Virgin Islands) Act, Cap. 80 of the Laws of the Virgin Islands which provides:

> "The jurisdiction vested in the High Court in civil proceedings, and in probate, divorce, and matrimonial causes, shall be exercised in accordance with the provisions of this Ordinance and any other law in operation in the Territory and rules of Court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England."

[23] Dr Archibald asserted that the Claimants' argument that the Court has no jurisdiction to order mediation is wholly misconceived as the Court has the power to order parties before it to conduct mediation pursuant to CPR 25.1. He assuredly submitted that since mediation has not taken place or even been attempted, a direct resort to arbitration would be premature and unlawful. He relied on a plethora of legal authorities to support his contention that Clause 25 is a two-stage "Med-Arb" dispute resolution clause. He next submitted that section 12 (1) (a) of the Arbitration Act does not apply at this stage as contended by the Claimants where mediation as a pre-requisite first step has not yet been undertaken.

[24] Unquestionably, the Defendants have advanced some forceful arguments concerning jurisdiction. But the Claimants argued that the Defendants have plainly misconstrued Clause 25 which does not mandate or compel the mediation of the dispute between the parties and when properly interpreted, mediation is not mandatory and consequently, it is not a condition precedent to arbitration. Mr Farara asserted that certainly, this was not the intention of the parties when they entered into the arbitration agreement. He submitted that it is simply an arbitration clause and any reference to mediation is purely a voluntary private mediation should the parties mutually agree to solicit the aid of a mediator to assist them in resolving their disputes. Mr Farara QC persuasively submitted that this Court has no jurisdiction either under the arbitration clause or under the Laws of the British Virgin Islands ("the BVI") to order mediation in this action and any reference to court-connected mediation is a misleading notion as court-connected mediation can only arise as part of the court's case management powers under CPR 25.1 and the Practice Directions.

[25] Two principal matters arise out of these submissions namely: (i) whether the Court has jurisdiction to order court-connected mediation when it is not seized of the action and (ii) is mediation a condition precedent to arbitration in Clause 25?

Jurisdiction to order mediation

[26] When does a Court refer a case to court-connected mediation? The simple answer is firstly, there must be a claim filed in the Court Office and secondly, it ought to be fit for mediation. In the present claim filed in this Court, the only matter in issue is whether the Court ought to appoint an arbitrator and if so, who should be appointed? Logically flowing from this is another question: should the present claim be referred to court-connected mediation? In my opinion, the present claim to enforce an arbitration agreement is a simple run-of-the-mill matter which can be decided expediently and expeditiously by the Court. In the exercise of his case management powers, the Judge or Master decides what matters are fit to be mediated upon because not all matters are referred to court-connected mediation. Looking at the issues which are raised in the claim before me, no useful purpose would be served by referring this uncomplicated claim to mediation.

[27] Next, the rhetorical question is whether the Court can refer a matter which is not before it to court-connected mediation. The short answer is no. The Claimants and the Defendants entered into a private contractual agreement with respect to the sale of lands by the Defendants to the Claimants. Clause 25 of that Agreement provides for any dispute between the parties **under this agreement** (emphasis added) that is not resolved through mediation will be finally settled by arbitration.

[28] The Defendants insisted that the reference to mediation in Clause 25 meant court-connected mediation. If I understood well, the Defendants are saying that parties could privately contract and dictate to the court, how their matter is to be resolved even when the Court is not seized of the matter.

[29] The starting point here is that the Court has no jurisdiction either under the arbitration clause or under the Laws of the British Virgin Islands ("the BVI") to order mediation in this

action and any reference to mediation is a misleading concept as court-connected mediation can only arise as part of the court's case management powers under CPR 25.1 and the Practice Directions when the Court is properly seized of a matter.

[30] The Court has no jurisdiction in this matter to order the parties under its case management powers to submit their private contractual disputes concerning the March 2007 Agreement to court-connected mediation, or any mediation for that matter. Those disputes are clearly not issues in this Claim and are not for determination by this Court as the Defendants themselves have conceded by accepting the validity, separability and survivability of the arbitration clause itself.

[31] Additionally, there is no statutory regime of mediation in the BVI. Mediation under the court's case management powers is not a statutory regime for mediation and has no applicability to the disputes between the parties to the March 2007 Agreement. There is also no statute law in the BVI providing for a system or process of mediation for the resolution of private contractual disputes, as there is in respect of arbitration. The court's case management powers under the CPR are not based on any statute.

[32] The Defendants seek to invoke Section 11 of the West Indies Associated States Supreme Court Act. That does not come to their aid. The reference therein to "rules of Court" does not confer jurisdiction on the Eastern Caribbean Supreme Court but speaks to the manner in which the Court will exercise its jurisdiction. The High Court has no jurisdiction to determine the disputes between the parties arising out of the March 2007 Agreement as they themselves have by Clause 25 expressly ousted the court's jurisdiction over such matters. By virtue of that Clause, they have vested such jurisdiction in an arbitrator to be exercised in accordance with the statutory scheme set up to deal with arbitrations under the Arbitration Act.

[33] The Defendants have also referred to Palmer's Company Law, 25th edition, para. 2.1125. It is of no assistance to them and can be easily distinguishable as correctly asserted by Mr Farara. **Scott v Frank Scott** suffers the same fatal blow.

[34] In a nutshell, the issues which are in dispute between the Claimants and the Defendants under the March 2007 Agreement are not matters in issue in the present claim. Accordingly, the Court has no jurisdiction to refer them to court-connected mediation under its case management powers.

Is mediation a condition precedent to arbitration?

[35] Dr Archibald QC insisted that Clause 25 invokes two separate methods of ADR, that is to say, mediation as the first step and arbitration finally if mediation fails to settle the dispute. He contended that a direct resort to arbitration on the plain construction and meaning of Clause 25 would be untimely and unlawful.

[36] Mr Farara argued that Clause 25 is not a "Med-Arb" dispute resolution clause as asserted by the Defendants. He asserted that it is simply an arbitration clause and any reference to mediation is purely a voluntary private mediation should the parties mutually agree to beseech the aid of a mediator to assist them in settling their disputes.

[37] The question which arises here is merely one of construction of Clause 25. A perfunctory reading of Clause 25 supports the Defendants' contention of mediation as the first step and it that fails to settle the dispute, then the parties will resort to arbitration. However, in approaching the question of construction, it is necessary to inquire into the purpose of the arbitration clause.

[38] The learned authors of **Russell on Arbitration** [5] state:

> "Many contracts containing arbitration clauses also provide for the parties first to try to settle the matter by negotiation or discussion between senior executives and, if that fails, the dispute must be referred to mediation or some other ADR process. Only when these steps have failed is the matter referred to arbitration. This type of clause, which contemplates at least two different levels of dispute resolution procedure, is known as a multi-tier or multi-level clause. Depending on the form of words used, these clauses may or may not give rise to a binding obligation to submit to the different forms of dispute resolution before starting an arbitration, but an obligation simply to negotiate is not binding. Where such preliminary steps are

[5] 23rd edition , 2007 at para. 2-036.

> expressed in mandatory terms so as to constitute a condition precedent to the right to arbitrate they must be complied with. In many cases however they will not be mandatory and it is possible for the claimant to commence arbitration even without complying with them. When drafting a multi-tier clause it is important to set out time limits within which each stage of the process is to be completed, so that the parties can be certain about when they can proceed to the next level."

[39] In **Scott v Avery** [6] it was held that parties cannot by contract agree to oust the ordinary jurisdiction of the courts to deal with their rights under the contract, but a term of the contract which provides that, in the event of a dispute arising, it shall be referred to arbitrators whose award shall be a condition precedent to any right of action in respect of the matters agreed to be referred is valid.

[40] In **Halifax Financial Services Ltd v Intuitive Systems Ltd** [7], the parties entered into a written agreement for the supply by the Defendant to the Claimant of services in respect of software design for a system which the Claimant required for its own customers called a Point of Advice Service. Specific services were provided for in the contract. The Claimant says that the Defendant was unable or unwilling to provide those services within the required time frame, and subsequently, the Claimant wrote to the Defendant accepting what it said was the Defendant's repudiation. The repudiation did not come out of the blue but as a result of prior unsuccessful discussions. The agreement contained Clause 33 which provided a structured method in the event of any dispute arising between the parties. At page 3 of the judgment, McKinnon J had this to say:

> "There is no express provision making Clause 33 a condition precedent to legal proceedings. Before me, [Counsel for the Defendant/Appellant] expressly said that he is not submitting that a **Scott v Avery** Clause could not be implied into Clause 33. I do not see that, upon a proper construction of Clause 33 looked at as a whole, that the contractual procedure in Clause 33 had to be complied with before proceedings were issued. "

[41] In **Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others**[8], the contract provided that "any dispute between the parties should first be

[6] (1843-1860) All ER reprint 1; 5 H.L. Cas. 811.
[7] [1998] WL 1042283 (cited at footnote 162 in Russell on Arbitration.
[8] [1993] 1 All ER 664.

referred to a panel of experts for settlement and then finally settled by arbitration…." It was held that the court had power to grant a stay of an action brought before it in breach of an agreed method of resolving disputes by some other method". Section 67 dealing with settlements of disputes provided a mechanism by which the parties shall proceed in the event of any dispute arising.

[42] Indubitably, each arbitration clause must be interpreted or construed to determine whether there is a condition precedent to arbitration or not. It appears to me from the line of legal authorities that were cited by both Queens' Counsel that to be a condition precedent, the preliminary step must be expressed in clear mandatory terms. If not, it is not a condition precedent to resorting to arbitration.

[43] Clause 25 is utterly distinguishable from Clause 67 in the **Channel Tunnel case** and the dictum of Lord Mustill at page 678 letters d - f which Dr Archibald alluded to does not assist him at all.

[44] In my judgment, on a proper construction of Clause 25, it cannot be a "Med-Arb" dispute resolution clause. It does not set out any time limits within which each stage of the "Med-Arb" process is to be completed, so that the parties can be convinced about when they can proceed to the next level. It does not refer to the method by which a mediator is to be selected or agreed upon. All in all, the preliminary steps to be undertaken are not expressed in mandatory terms so as to constitute a condition precedent to the right to arbitrate.

[45] In those circumstances, I fully concur with Mr Farara QC that the reference of mediation in Clause 25 is purely a voluntary private arrangement should the parties mutually consent to solicit the aid of a mediator to assist them in settling their disputes. In addition, on a proper construction of Clause 25, I do not think that the parties intended a "Med-Arb" dispute resolution clause. I think that the reference to mediation simply records what is probably no more that a pious hope that there would be amicable discussions. These parties have long

past that stage. It is plain that there is a total lack of trust and good faith in one another.[9] Any request by one party for a dispute concerning the March 2007 Agreement to be referred to mediation, which the other party does not agree to have mediated, will be unenforceable. By contrast, under Clause 25, the reference to arbitration is enforceable as it mandates that any dispute arising under the agreement is to be "finally" resolved by arbitration.

[46] It is important to remind ourselves that these parties are now entangled in hostile litigation. Even if the Court had jurisdiction to refer this matter to court-connected mediation (which I have found, it does not have), it would be very diffident to do so. In referring a case to court-connected mediation, a Master or Judge is called upon to exercise an extrasensory judgment. After seeing and hearing the parties and their Counsel, he then prognosticates the chance of success. If it appears good, then the matter is referred to court-connected mediation. It goes without saying that not all cases are referred to court-connected mediation.

[47] It is a fact that these parties have attempted fruitlessly in about 5 meetings to resolve their disputes. There have also been meetings between the Defendants' Counsel and Mr Derek Dunlop of Smiths Gore. Those meetings were attempts in vain. Therefore, any reference to mediation, which is not mandatory and involves a defined procedure which should have been spelt out in Clause 25 would be meaningless and a futile exercise.

[48] It is also to be observed that at no time during the entire dispute up to the time when the First Affidavit of Mrs Henderson was filed, did the Defendants assert that Clause 25 required the parties to first resort to court-connected mediation. When the Defendants suggested the Rt. Hon. Sir Vincent Floissac as the mediator, they could not have contemplated court-connected mediation as Sir Vincent is not listed as a mediator on the Roster of Mediators in the BVI.

[9] See paras 50 and 64 of the First Affidavit of the Second Defendant and letter from Defendant's lawyer dated 27 July 2007 at Tab 30 – First Affidavit of David V. Johnson.

[49] Finally, I am quite clear in my mind that Clause 25 does not impose a condition precedent at all. At any event, I also hold that it is plain from the correspondence that the parties were unable to reach an amicable settlement, the reason being that the Defendants are demanding more money for the property than is contained in the March 2007 Agreement. They alleged that the said agreement is not binding or enforceable because they entered into them as a result of undue influence. These are disputes which require adjudication in the manner and through the process that they agreed to. In those circumstances, it seems to me clear that the Claimants are entitled to refer the matter to arbitration straightaway so as to prevent any further delay.

Reference to arbitration and applicable law

[50] Section 8 of the Arbitration Act provides:

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

[51] Accordingly, since Clause 25 of the March 2007 Agreement does not specify otherwise, the reference therein is deemed to be to a single arbitrator.

[52] As regards the applicable law, Clause 24 of the March 2007 Agreement expressly states that "this agreement is subject to BVI law."

[53] There has been no challenge by the Defendants to this aspect of the case.

Arbitration Notice

[54] On 11 October 2007, the Claimants served on the Defendants a written notice to appoint an arbitrator pursuant to section 12 (1) of the Arbitration Act. Service was accepted by their lawyers on their behalf. There had been no response from the Defendants or their lawyers to agree to the appointment of an arbitrator. Consequently, on 7 December 2007, the Claimants instituted the present claim for the Court to appoint a suitably qualified person as the sole arbitrator to adjudicate the disputes which have arisen pursuant to the March 2007 Agreement.

Confidentiality of Negotiations

[55] The Defendants raised this issue. The Defendants themselves have not been confidential. They have breached the privileged nature of the negotiations by their unilateral actions. They have issued to the Premier and the Regional Manager of Banco Popular de Puerto Rico a Memorandum headed "Memorandum of J.S. Archibald & Co – 4 October 2007" summarizing without prejudice negotiations conducted over several meetings between the parties and their respective Counsel. In doing so, I am of the opinion, that the Defendants breached their privileges regarding confidential negotiations.

Challenge to arbitrators proposed by the Claimant

[56] The Claimants have proposed four persons to arbitrate the various disputes or differences that have arisen or been asserted by or between the parties under the March 2007 Agreement including issues as to the alleged invalidity of the said agreement whether through purported undue influence or otherwise. The Defendants say, perhaps unwittingly, that the only issue between the parties relate to the price. This is not so. The Claimants, to my mind, have correctly identified the main issues which, at any rate, are properly for the determination of the arbitrator, not this Court.

[57] Of the persons identified by the Claimants, only the Rt. Hon. Lord Millett, P.C. and Mr Alan Steinfeld QC have consented to accept appointment of the court as arbitrator. The Claimants contend that both Lord Millett and Mr Steinfeld are eminently qualified and the Court ought to appoint one of them as sole arbitrator.

[58] Dr Archibald forcefully challenged the Claimants' proposed nominees. Dr Archibald says that Lord Millett should not be appointed because he has written extensively on the subject of arbitration and therefore, he should not be selected. The objection to Mr Steinfeld QC is not as passionate as that of Lord Millett.

[59] On the other hand, the Defendants suggested the Rt. Hon. Sir Vincent Floissac, QC, CMG and former Chief Justice of our Court. Regrettably, Sir Vincent is no longer available. In the interim, they have sought and obtained confirmation from the Honourable Justice Stanley

Moore, well-known to the Court having been a High Court Judge in this very territory for many years. He is presently a Justice of Appeal in the Republic of Botswana. Like Lord Millett and Mr Steinfeld, Justice Moore is also highly qualified.

An ideal arbitrator

[60] Probably the best definition of the "ideal arbitrator" was given by His Honour Peter Mason, QC, FCI Arb,[10] when he said, "like a judge, every arbitrator is in a sense of his own man." He continued:

> "The law prescribes the parameters within which he operates, but subject to that, his style and his techniques are his own. There are, however, as it seems to me, certain qualities which the really good arbitrator will aim to develop in order to assist him dispose of the dispute in a manner satisfactory to all the parties concerned and by chance, all begin with the same letter of the alphabet.
>
> First is fairness. This is so obvious that it almost goes without saying. An arbitrator is by definition unbiased….
>
> The second quality required of an arbitrator is firmness….It involves a reluctance to speak, and a readiness to think. It also involves a great deal of hesitation before making a decision, but an absence of vacillation thereafter.
>
> Linked with firmness is formality. It should never be forgotten that an arbitrator is dealing with serious matters which are of consequence to the parties and maybe to others too. An arbitration is not a coffee party and the parties must not be encouraged to think it is.
>
> It is, in a sense, a paradox to say that the next quality is friendliness, in which I include courtesy, at all times and to all parties –parties, witnesses and advocates. It is very easy for those clothed in brief authority to become pompous and self-opinionated.
>
> The fifth quality is flexibility….
>
> Finally, the arbitrator must be *fast* but speed is not only, it is a matter of law, it is a matter of common sense. What the parties require in nine out of ten cases is a speedy resolution of their disputes….it can be said that a sure antidote to delay is an active arbitrator who keeps up, so far as is possible, a relentless pressure, in order to achieve finality."

[10] Arbitration (August 1986): 147.

[61] There is no doubt that all three nominees fall within the best definition of the "ideal arbitrator." They have all consented to accept appointment as arbitrator. Lord Millett is the first choice of the Claimants. In my considered opinion, the opposition to his appointment is unfounded and tenuous. As I reiterated, the objection is based on the fact that Lord Millett has written extensively on the subject of arbitration. That, to my mind, should earn him the repute of the most learned in that field.

[62] The Court will appoint Lord Millett to be the arbitrator. In the event that he is unable to take up appointment forthwith, Mr Alan Steinfeld QC will be the substitute arbitrator. If neither is available, then Justice Moore will be appointed in their place.

Order

[63] In the premises, the Court makes the following Orders:

a) The dispute arising between the Claimants and the Defendants arising under the written agreement made on 4 March 2007 between the Claimants and the Defendants headed "Oil Nut Bay Agreement" is referred to arbitration.

b) The Rt. Hon. Lord Millett PC of Essex Court Chambers, Lincoln's Inn Fields, London, England is forthwith appointed Arbitrator pursuant to Section 12 (1) (a) of the Arbitration Act, Cap. 6 of the Laws of the Virgin Islands.

c) If the event that Lord Millett is unable to take up the appointment, Mr Alan Steinfeld QC of XXIV Old Buildings, Lincoln Inn, London, England will be the substitute arbitrator. If either is unable to act, then Justice Moore will be appointed in their place.

d) The injunction initially granted on 20 December 2007 is to continue pending the final determination of all disputes by arbitration.

e) The costs associated with the arbitration are to be borne equally by the Claimants and the Defendants.

f) Costs of the claim to be paid by the Defendants to the Claimants; such costs to be assessed if not agreed.

g) This matter is to be dealt with expeditiously.

Indra Hariprashad-Charles
High Court Judge