EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTPOHER & NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2013/0204

MOORJANI CARIBBEAN LIMITED

Claimant

and

ROSS UNIVERSITY SCHOOL OF MEDICINE
SCHOOL OF VETERINARY MEDICINE
(ST.KITTS) LIMITED

Defendant

Before:
Ms. Agnes Actie — Master [Ag.]

Appearances:
Mr. Anthony Gonsalves with Mr. Arudranauth Gossai of counsel for the Claimant
Mr. Emile Ferdinand Q.C with Mr. Garth Wilkin of counsel for the Defendant

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2014: June 17,
October 20

JUDGMENT

[1] **ACTIE, M. [AG.]**: This is an application for a determination of preliminary issues prior to trial.

[2] The claimant by notice of application applies to the court for a determination of the following preliminary issues, namely:

I. Whether the Respondent/Defendant, Ross University School of Veterinary Medicine (St. Kitts) Limited was the contracting party to the Construction Agreement entered into with the Applicant/Claimant for the

construction of on-campus housing (The Housing Contract/Project) at the Respondent's/Defendant's property at West Farm, St. Kitts, or whether the contracting party was Dominica Management Inc.

2. If the Respondent/Defendant Ross University School of Veterinary Medicine (St. Kitts) Limited is the proper Contracting Party, whether the Final Payment Certificate issued by the Architect on 19 April, 2010 was final, binding and conclusive as to the Applicant/ Claimant having completed its obligations and with no claims having been made within twelve months thereafter pursuant to clause 12.2.2 of the AIA 201; or whether despite the Final Payment Certificate the Respondent/Defendant can rely on the Sutton Kennerly & Associates (SKA) Report and the Thomasetti Report and/ or whether it was bound by the terms of the AIA 101 and AIA 201 contracts (as defined below), precluded from relying on the said Reports and bound by the Final Certificate of Payment issued by the Architect on 19 April, 2010.

3. Such further and/ or other relief that the Court deems just and proper in the circumstances.

Background

[3] I first set out the background facts as they are found in the claimant's pleadings and in the notice of application as follows:

(i) On or around 7th February, 2005, a Letter of Intent (LOI) was executed by the claimant (Moorjani), represented by Achal Moorjani, one of its

Directors and the Defendant (Ross), represented by Thomas Shepherd, its President.

(ii) The LOI confirmed Ross' intent to enter into an Agreement with Moorjani for the approximate contract sum of US$6,000,000.00 (Six Million Dollars United States Currency) for the construction by Moorjani of on-campus student housing on the Ross' St. Kitts campus ("the Housing Project"). The LOI further confirmed that the form of Agreement was to be AIA [American Institute of Architects] Document A101 – 1997, Standard Form of Agreement Between Owner and Contractor where the basis of payment is a STIPULATED SUM, as modified by Ross, (hereafter referred to as "A 101") and AIA Document A 201-1997, General Conditions of the Contract for Construction, as modified by Ross (hereinafter referred to as "A 201").

(iii) The LOI stated that Ross, having already issued verbal authorisation to Moorjani to proceed to commence performance of site clearance work on November 16, 2004 extended the said conditional authorisation to allow Moorjani to commence the foundation stage of the Construction Phase of the Housing Project on February 7, 2005.

(iv) Moorjani and Ross agreed that the LOI shall be governed by the laws of St. Kitts and Nevis.

(v) At the time when the LOI was executed, Moorjani was still in the process of reviewing the final modifications made by Ross to the A 201. While this review was being undertaken by Moorjani and prior to the execution of the said A 201, construction of the Housing Project continued and the construction of the Housing Project was completed without the Agreement being executed.

(vi) Ross also sent to Moorjani a draft A 101 which like the A 201, was unexecuted.

(vii) By the submission by Ross to Moorjani of the A 101 and A 201 and by their course of conduct, the parties, Moorjani and Ross, adopted the terms of the A 101 and A 201, as modified, as constituting the agreement between them for the construction of the Housing Project.

[4] The claimant sates that the defendant, Ross, in its defence and counterclaim accepts the fact that the terms of A 101 and A 201 governed the construction of the Housing Project but denies that it (Ross) was a contracting party, alleging instead that it was Dominica Management Inc (DMI") which was the contracting party with the claimant.

[5] Ross in its amended defence admits that Thomas Shepherd and Achal Moorjani executed a LOI, dated 7th February 2005 but denies that the LOI or any resulting business and contractual relationship was, or was intended to be, between the Defendant, a St. Kitts company, and the claimant. Ross further states that in 2005 Thomas Shepherd was President of DMI, now known as "DeVry Medical International, Inc", a New York corporation with its principal place of business in Edison, New Jersey, USA which operated under several names, including "Ross University" and "Ross University School of Veterinary Medicine", is the party to the LOI.

[6] Ross states that the claimant knew that the party it was contracting with was DMI in respect of the on-campus housing project. Ross states that Certificates for Payments to the claimant were issued to DMI under the name "Ross University" at DMI's offices in New Jersey, USA, and that payments made to the claimant in relation to the on-campus housing project were made to the claimant by DMI from the United States under the name "Ross University School of Veterinary Medicine" from an account at a U.S. bank with an address at DMI in New Jersey, USA.

[7] Ross although denying that it was a party to the contract has by way of set off [1] in its amended defence counterclaim stated that "*in the event that this Honourable*

[1] Paragraph 69 of amended defence

Court holds that the Defendant had in fact and in law contracted with the Claimant in relation to the on-campus housing project, the Defendant is entitled to set-off ofthe sum of US$2,542,008 against the amounts claimed in the Statement of Claim" (My Emphasis). Ross states that it was an implied term in building the on-campus housing project that the claimant would exercise all reasonable care and skill as a contractor, to construct buildings and infrastructure in accordance with all applicable drawings and specifications. Ross states that the buildings within the completed housing project, contained significant and numerous construction defects due to the claimant's actions or inactions during the construction which represents a breach of the claimant's legal and contractual obligations under the agreement. Ross claims damages for breach of contract and /or negligence if the court finds, in fact and in law, that it was Ross and not DMI who had contracted with the claimant. Ross further seeks to set off the amounts paid to remedy the construction defects or to counterclaim damages in diminution or extinction of the claim.

The objection to the claimant's application

[8] Ross is vehemently opposing the application to determine the Preliminary Issues stating that it would be a waste of judicial time and resources to conduct two substantive trials to resolve the said issues. Ross states that granting the orders requested would contradict Section 22 of the **Eastern Caribbean Supreme Court (St. Kitts and Nevis) Act**[2] which states:

> " The High Court and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Act shall in every cause or matter pending before the Court grant either absolutely or on such terms and conditions as the Court may think just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim or matter so that, as far as possible, **all matters in controversy between the parties may be completely and**

[2] Cap 3.11

finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided(emphasis added) ".

[9] Ross submits that a mere glance of the of the so-called "Preliminary" Issues shows that in order to adjudicate those issues this court (in a *voir dire* of sorts) would be called upon to resolve numerous and significant factual and legal issues before the actual trial of the captioned claim and counterclaim. Ross states that each of the aforesaid so-called "Preliminary" Issues would require disclosure, witness statements, cross-examination of witnesses (many of whom reside out of this Federation), written submissions and all the other elements of a full trial.

The Law on the determination of Preliminary Issues

[10] The court in seeking to give effect to the overriding objective of the CPR 2000 has the duty to decide promptly which issues need full investigation by directing a separate trial of any issue pursuant to CPR 25.1 (e). The court may also pursuant to CPR 26.1 (d) and (e) decide the order in which issues are to be tried and/or direct a separate trial of any issue.

[11] The claimant urges the court that it is crucial to determine as a Preliminary Issue, the proper contracting parties as this will significantly assist in the proper management of this case and control of the costs of the matter.

[12] In **Ronicles Limited v DCG Properties Ltd**[3] Master V. Georgis Taylor-Alexander stated:

> "The court can try certain issues preliminarily at the case management conference, if this will assist in illuminating what are the real issues in dispute between the parties".

[3] SLUHCV2011/0547 delivered on 4th February 2013 para. 1

[13] In **Craig Reeves v Platinum Trading Management Ltd** [4] Barrow JA in relation to an application to determine a preliminary issue stated :

" :…

That is a procedure that the court employs when costs and time can be saved if decisive issues can be tried before the main trial. **Blackstone's Civil Practice 2006** indicates there are three types of orders that can be made: (a) for the trial of a preliminary issue on a point of law; (b) for the separate trial of preliminary issues or questions of fact; and (c) for separate trials of liability and quantum."

[14] Barrow JA at paragraph 17 further stated:

> "Wasting rather than saving time, complicating rather than simplifying issues, and engaging in mini-trials with no true justification for doing so, are among the risks that require careful consideration before a court decides to order the trial of a preliminary issue".

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Barrow JA made reference to the dicta of Lord Roskill in **Allen v Gulf Oil Refining Ltd** [5] where he stated:

> "5… your Lordships' House has often protested against the procedure of inviting courts to determine points of law upon assumed facts. The preliminary point procedure can in certain classes of case be invoked to achieve the desirable aim both of economy and simplicity. But cases in which such invocation is desirable are few. Sometimes a single issue of law can be isolated from the other issues in a particular case whether of fact or of law, and its decision may be finally determinative of the case as a whole. Sometimes facts can be agreed and the sole issue is one of law.…"

[15] In deciding whether to try preliminary issues in advance of the substantive trial the court needs to be circumspect and must take several matters into consideration. In **Eamonn McCann v Denis Desmond**[6] the court stated:

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[4] SKBHCVAP 2008/004 delivered on
[5] [1981] AC 1001 at 1021-1022
[6]

" 7. Therefore, given that the default position is a full hearing, I believe that the questions which would naturally address themselves to the mind of a court in considering an application such as this for a modular hearing, would include:-

(1) Are the issues to be tried by way of a preliminary module, readily capable of determination in isolation from the other issues in dispute between the parties? A modular order should not be made if the case could be characterised as an organic whole, the taking out from which of a series of issues would tear the fabric of what the parties need to litigate so that the case of either of the plaintiff or the defendant would be damaged through being seen in the isolated context of a hearing on a number of limited issues.

(2) Has a clear saving in the time of the court and the costs that the parties might have to bear been identified? The court should not readily embark on a modular hearing, simply because of a contention that a saving in time and costs has been identified, but rather it should view that factor in the context of the need to administer justice in the entire circumstances of the case.

(3) Would a modular order result in any prejudice to the parties? If, for instance, the issue as to what damage was occasioned by reason of the wrong alleged by the plaintiff was so intricately woven in to the proofs that were necessary to the proof of liability for the wrong, so that the removal of the issue of damages would undermine the strength of the plaintiff's cases, or the response which a defendant might make to it, then the order should not be made.

(4) Is a motion a device to suit the moving party or does it genuinely assist the litigation by being of help to the resolution of the issues? I return to the idea that a judge should always be aware that tactical decisions are made, often out of an abundance of enthusiasm, by parties to litigation, who may seek to put the other party at a disadvantage through the obtaining of an order under the Rules of the Superior Courts or one capable of being made within the inherent jurisdiction of the court……

Decision

10. I am convinced that I should make the order sought on the notice of motion herein. *It is crucial to the determination of all the issues in this case as to who the parties were. It is virtually a daily occurrence in the courts that one or other parties to a contract will contend that they were not of the true contracting entity but that, instead, a corporate vehicle, of which they are a director or shareholder, entered into the agreement as an artificial person. As to how these issues can be decided, it seems to be me that reason plays a very heavy part. Since contract law is based upon the*

express agreement of parties, but since people are presumed, in the absence of express terms that suggest a contrary notion, to be both reasonable and to be desirous of acting reasonably, the situation as it appears in all the circumstances to the alleged parties to the agreement will tend to be the best guide as to whether human or artificial persons came together to form a contract. (My emphasis)

Analysis

[16] The court must always take into consideration the overriding objective of the CPR 2000 to save time and costs before making any particular decision. In the instant case both parties to the claim concede that the two draft Standard Form Agreements governing the general conditions of the contract for the construction of the housing project were unexecuted. It is noted that Ross in its defence states that DMI was the contracting party yet as an alternative pleading is seeking to set off against the claimant, if the court determines that Ross and not DMI is the other party to the contract. This denial and subsequent alternative pleading/admission by the defendant further bolster the need to have a preliminary determination of the identity of the proper contracting parties in an effort to move this matter forward in an efficient and structured manner in determining the reliefs sought by the parties in the claim. This exercise will be a cost effective and an efficient way of narrowing the issues between the parties in advance of the trial. To allow the matter to proceed to trial without first determining the proper parties to the claim will protract the proceedings as the reliefs claimed by the claimant and in the counterclaim of the defendant can only be properly distilled if the proper parties are before the court. Upon reviewing the facts and reading the authorities in support I am convinced that a preliminary determination of the issue as to the proper parties to the extant claim is necessary.

[17] Secondly, the claimant requests that if the court finds that the defendant "Ross University Medicine School of Veterinary Medicine (St. Kitts) Limited" is the proper contracting party, whether the "Final Payment Certificate" issued by the architect on 19 April, 2010 was final, binding and conclusive as to the claimant

having completed its obligations and with no claims having been made within twelve months thereafter pursuant to clause 12.2.2 of the AIA 201; or whether despite the "Final Payment Certificate" the defendant can rely on the Sutton Kennerly & Associates (SKA) Report and the Thomasetti Report and/ or whether it was bound by the terms of the AIA 101 and AIA 201 contracts, precluded from relying on the said Reports and bound by the Final Certificate of Payment issued by the architect on 19 April, 2010.

[18] The claimant submits that issuance of the "Final Payment Certificate" issued by the architect was final and conclusive as to Moorjani's entitlement to payment. The claimant relies on the dicta of Lord Pearson in the House of Lords case of **P & M Kaye Ltd** v **Hosier & Dickinson** [7]where he stated :

> "…that the words 'conclusive evidence in any proceedings arising out of this contract' were not limited to proceedings commenced after the date of the final certificate but also covered proceedings previously begun. Accordingly the final certificate was in both actions 'conclusive evidence' that the work had been properly carried out and was effective to bar the employers from relying on allegations of defective work by way of defence and counterclaim in both actions." [Emphasis supplied]
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> At page 162 Letters *E-F the court said*
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> "If in a contract such as this the parties agree that the architect's final certificate shall be conclusive evidence of certain matters, I do not think there is any invasion of the court's jurisdiction or any affront to its dignity. The court's function in a civil case is to adjudicate between the parties, and if they have agreed that a certain certificate shall be conclusive evidence the court can admit the evidence and treat it as conclusive…"

[19] In **Beaufort Developments (NI) Ltd v. Gilbert-Ash NI Ltd and Others**[8] Lord Hope of Craighead states:

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[7] [1972] 1 WLR 146

[8] [1999] AC 266; [1998] 2 All ER 778; [1998] 2 WLR 860 (20th May, 1998)

> "It seems to me that the discussion in the ***Hosier & Dickinson*** case put the matter on the correct basis. On the one hand there is the principle which was expressed by Lord Diplock in *Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd.* [1974] A.C. 689, by which clear unequivocal words must be used to deprive a party to a contract of recourse to the court for the ordinary exercise of its powers and the granting of the ordinary remedies. On the other there is the principle that the court must give effect to the contract which the parties have made for themselves. If the contract provides that the sole means of establishing the facts is the expression of opinion in an architect's certificate, that provision must be given effect to by the court. ***But in all other respects, where a party comes to the court in the search of an ordinary remedy under the contract or for a remedy in respect of an alleged breach of it, the court is entitled to examine the facts and to form its own opinion upon them in the light of the evidence. The fact that the architect has formed an opinion on the matter will be part of the evidence. But, as it will not be conclusive evidence, the court can disregard his opinion if it does not agree with it***". (My emphasis).

[20] As can be gleaned from the decisions if the contract provides that the sole means of establishing the facts is the expression of opinion in an architect's certificate, that provision must be given effect to by the court. However in other respects the architect's certificate will be considered as evidence to prove the facts necessary to establish liability. In the case at bar it is admitted by both parties that the draft A 101 and A 201 which outlines the terms constituting the agreement between the parties were unexecuted. The claimant submits that the parties by their course of conduct adopted the terms of the A 101 and A201 as modified.

[21] I am not convinced that conclusiveness of the " Final Payment Certificate" issued by the architect should be considered as a Preliminary Issue for the simple reason that document which the claimant relies on for enforcement was unexecuted by

the parties. The court will have to examine the facts and to form its own opinion on the basis of evidence adduced. The fact that the architect has formed an opinion on the matter may be part of the evidence. Ross in its defence of set off/counterclaim alleges that there are significant structural deficiencies which represents a breach of the claimant's legal and contractual duties. The interest of justice would be better served if the matter proceeds to trial to allow the parties to lead evidence to ventilate their issues if it is determined that Ross is a proper party to the claim. The court will then determine what sums, if any, are due to be paid by one party to the other, whether by way of set off or in addition to those sums which have been certified by the architect. In the circumstances the claimant's second limb of the application to determine the conclusiveness of the architect's "Final Payment Certificate" as a Preliminary Issue if the court determines that Ross is a proper party to the claim, is refused. .

Stay of Proceedings

[22] Ross by application filed on 4th April 2014 seeks an order for a stay of these proceedings until the final disposal of the pending arbitration proceedings before the International Centre for Dispute Resolution, between the claimant and DeVry Medical International Inc. (formerly known as Dominica Management Inc). Ross submits that the issue as to whether the housing project dispute will be part of that arbitration, as the matters therein, relate to the same matters in dispute in the extant claim. Ross submits that the arbitration proceedings may fully determine the disputes arising in the claim before this court. Ross further states that given the amount, importance and complexity of the issues involved therein, it would be a waste of the court's and the parties resources and contrary to the overriding objective of the CPR 2000 to conduct simultaneous and analogous proceedings to those currently being conducted before the International Centre for Dispute Resolution.

[23] The claimant in response states that Ross is not engaged in any arbitration proceedings in relation to the construction project which is before this court.

The claimant contends that the project in dispute before this court is the construction of the "Housing Project". The arbitration proceedings which Ross refers are in relation to the construction of the "Classroom Project" and are two separate projects with different parties and governed by separate and distinct contracts. The claimant further avers that the parties to the Housing Project are the claimant and the defendant herein while the parties to the Classroom Project are the claimant and Dominica Management Inc (DMI). The claimant further states that DMI is not a party in the proceedings currently before this court and therefore has no standing to seek a stay of these proceedings to await the outcome of the arbitration proceedings to which it is not a party.

Analysis

[24] The issue to be determined here is whether the court should grant a stay of proceedings until the final outcome of the arbitration proceedings.

[25] The court in addition to the provisions of the **Arbitration Act** and CPR 26.1(q) also has an inherent jurisdiction to grant a stay in whole or part of any proceedings. This discretionary power can be exercised in favor of arbitration proceedings. Parties are usually held to their contractual agreement where they have agreed that any dispute shall be referred to arbitration and have taken steps to give effect to their agreement.

[26] Counsel for the claimant states that the applicant has not furnished the court with any authority in support of its application for the stay of proceedings. The claimant referred to the decision of **Etri Fans Ltd v NMB(UK) Ltd**[9] where the court of appeal held:

> "…. Although the court had very wide powers to stay proceedings under its inherent jurisdiction in order to protect it, in particular, from abuse of process, that justification would very rarely be exercised where the subject

[9] [1987] 2 All ER 763

matter concerned was covered by statute, since in such circumstances the court's inherent jurisdiction was residual and principally confined to those matters which were not contemplated by the statutory provisions".

[27] The claimant has maintained that there is an arbitration agreement arising in the classroom contract but not in the housing contract which is before this court. The claimant submits that the arbitration in relation to the classroom contract matter is one contemplated by the statutory provisions as it is in writing. The principle is that on an application for a stay the court must determine whether a written arbitration clause does exist in which case the **Arbitration Act,** Cap. 3.01 of the Laws of St. Kitts and Nevis apply or not, in which case the inherent jurisdiction applies. The claimant alleges that Ross can only apply for a stay if there is a written agreement to arbitrate. The claimant states that Ross has not stated that a written obligation to arbitrate exists under which the court can exercise any jurisdiction to grant a stay.

[28] It is conceded that the optional nature of arbitration clause is not an issue in the extant case as there is no binding arbitration agreement between the parties. I accept the claimant's submission that in order for the court to exercise its discretion to grant a stay there must be a concluded agreement to arbitrate and the legal proceedings which is sought to be stayed must have commenced against another party to agreement. The applicant must be both a party to the legal proceedings and party to the arbitration agreement, or a person claiming through or under such a party to the arbitration agreement. As it stands there is a dispute as to the proper contracting parties in the extant claim before this court for which the claimant has made application to determine as a preliminary issue. The parties to the claim are still in issue. The court will not grant a stay of proceedings on mere conjecture.

[29] In this application for stay the applicant has raised nothing more other than to say that it would be a waste of judicial time and resources to proceed with this current matter in light of the analogous and simultaneous arbitration proceedings currently

before the International Centre for Dispute Resolution. The avoidance of multiplicity of proceedings is certainly an important and may in some cases be a decisive factor against a stay[10]. However the mere fact of multiplicity of proceedings is not a sufficient reason to grant a stay.

[30] The grant of a stay pending arbitration is discretionary. In order for the court to exercise its discretion to grant the stay (1) there must have been a concluded agreement to arbitrate; (2) the legal proceedings which are sought to be stayed must have commenced by a party to the arbitration agreement and (3) legal proceeding must have commenced against another party to the arbitration agreement. In the circumstances I see no reason why a stay should be granted there being no agreement to arbitrate coupled with fact that the defendant is not a party to the arbitration proceedings and having also disputed its standing in the extant case. Accordingly upon reviewing the evidence and authorities the application for stay of execution pending arbitration is refused.

Order

[31] In summary I make the following Orders:

(1) The Application for a stay of proceedings is refused with costs in the sum of $750.00 to the claimant.

(2) The application to determine as a Preliminary Issue as to whether the defendant Ross University School of Medicine School of Veterinary Medicine (St. Kitts) Limited or Dominica Management Inc. was the contracting party to the Construction Agreement entered into with the claimant for the construction of on-campus housing (The Housing Contract/Project) at the Defendant's property at West Farm, St. Kitts, is granted.

[10] The Escherisheim 3 ALL ER pg.322

(3) The claimant shall file and serve submissions with supporting documents to resolve the issue as to whether the defendant, Ross or Dominica Management Inc. is the proper defendant to the claim within 14 days of today's date.

(4) The defendant "Ross" shall file and serve submissions with supporting documents in reply within 14 days of service by the claimant.

(5) The claimant shall file and serve submissions in response, if any, within 7 days of service by the defendant.

(6) Thereafter the matter shall be listed for the determination of the Preliminary issue.

[34] I wish to express my gratitude to counsel for the parties for their very insightful submissions and authorities.

Agnes Actie
Master [Ag.]