



[2018] JMCC Comm. 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017 CD 00469

BETWEEN	GM AND ASSOCIATES LIMITED	CLAIMANT
AND	SABAL PH 1200 LIMITED	DEFENDANT

Application for Stay pending Arbitration-Whether request for arbitration – Whether words “Notice is imminent” negates request - Whether filing legal action amounts to election not to arbitrate.

Duane O. Thomas for the Claimant.

Denise Kitson Q.C. and Anna-Kay E. Brown instructed by Grant Stewart Phillips & Co. for the Defendant.

IN CHAMBERS

HEARD: 17th April 2018.

COR: BATTIS, J.

[1] On the 17th day of April 2018 I made the following Orders:

- (a) The claim is withdrawn with costs to the Defendant to be agreed or taxed and paid.
- (b) The Defendant’s Counterclaim is stayed pending arbitration, on the condition that on or before the 1st June 2018 the Claimant provides security sufficient and satisfactory to the Defendant in the amount of

US\$82,025.00 and JM\$616,635.61 at a rate of 1.5% per month from the 3rd August 2016 to the date hereof.

(c) In the event of a failure to agree on adequate security as aforesaid the Claimant shall be at liberty to satisfy the condition in paragraph 1 by paying into a joint interest bearing account in the names of the parties the said amounts of US\$82,025.00 and J\$616,635.61 plus interest aforesaid or by payment of the said amount into court on or before the 29th June 2018.

(d) Unless the Claimant takes the necessary steps to pursue arbitration on or before the 31st May 2018 the Stay of Execution shall be set aside and Reply and Defence to Counterclaim struck out and judgment be entered on the Defendant's Counterclaim accordingly.

(e) Liberty to Apply

(f) Leave to Appeal granted to the Defendant.

On the 12th day of June 2018 a letter, dated 3rd May 2018 from the Registrar of the Court of Appeal, was received. The letter indicated that a Notice of Appeal has been filed. In consequence I have this day reduced to writing the reasons for my decision and Orders.

[2] On the morning of hearing, counsel for the Claimant indicated that he wished to withdraw his claim. He now wished to proceed instead to arbitration. Mrs. Kitson Queen's Counsel, for the Defendant, opposed the application to proceed to arbitration and applied for judgment on her client's counterclaim. This unusual turn of events I now explain.

[3] The parties entered into, and endeavoured to perform, a construction agreement dated the 25th February 2014. A dispute arose between the parties. It was, in accordance with the terms of the agreement, referred to adjudication. The adjudicator was Mr. Dean H. Burrowes. After a hearing the adjudicator gave his

written decision on the 29th June 2017. The Claimant and Defendant were each of the view that the decision was in their favour. The Claimant commenced this action seeking to enforce the award against the Defendant. The Defendant counterclaimed seeking judgment in its favour in reliance on the same adjudicator's award.

- [4] The Defendant filed an application for summary judgment on the 3rd January 2018. The Claimant filed an application on the 7th March 2018 seeking an order, among other things, that the dispute between the parties be referred to arbitration pursuant to Clause 8.1(2) of the Construction Agreement. The Claimant also seeks a stay of execution of the adjudicator's decision, dated 29th June 2017, until completion of the arbitration.
- [5] On the 8th March 2018 the parties, prompted by the court, agreed to seek clarification from the adjudicator as to the correct interpretation of his award. That clarification came by letter dated the 11th April 2018. In it the adjudicator stated that his decision was in favour of the Defendant to this action (who were the Claimants to the adjudication before him).
- [6] It is in the face of that clarification that the Claimants, on the 17th day of April 2018, withdrew their claim in this action and the Defendants applied for judgment on their counterclaim. Having heard oral submissions, and considered the written submissions and/or speaking notes of the respective counsel, I decided to allow the matter to proceed to arbitration. I did so on condition that the Claimant provides security, to the Defendant, in the amount of the adjudicator's award.
- [7] My reasons for doing so can be shortly stated. The construction agreement provides for both adjudication and arbitration. By Clause 8.1(2) and 8.2 either party may refer a matter to arbitration within 14 days of an adjudication. The relevant sections of the Construction Agreement read as follows:

“8. SETTLEMENT OF DISPUTES

8.1 Adjudication

- 1. If any dispute of any kind whatsoever shall arise between the Employer and the Contractor, at any time after execution of this contract, arising out of or in connection with this Agreement or the construction of the works, then such dispute or difference shall be referred in writing by either party to and be settled by the Adjudicator. The adjudicator shall be a person agreed by both Employer and Contractor and failing to agree by a person appointed by the President of the Jamaican Institute of Architects. The Adjudicator shall within a period of fourteen (14) days after being requested to settle any dispute or difference, by either party, give written notice of his decision to the contractor and the Employer and the decision shall be accepted by both parties.**

- 2. In giving a decision, the Adjudicator shall be deemed to be acting as an expert and his decision shall be final and binding upon the parties unless either party shall within fourteen (14) days of the Adjudicator's decision notify the other of dissatisfaction with the decision and require the matter to be settled by Arbitration, in which case, the decision be binding until practical completion of the works or termination of the employment of the Contractor."**

This is the clause as it appears in Exhibit CM 1 to the affidavit of Carlton Augustus Master's dated the 28th December 2017 and filed on the 3rd January 2018.

[8] Mrs. Kitson QC has strongly urged that, by filing a claim to enforce the adjudicator's award, the Claimant has unequivocally elected to uphold the adjudicator's decision. The failure to implement arbitration within 14 days is

therefore fatal. She relied on the authority of **P&M Kaye Ltd. V Hosier & Dickinson Ltd. [1972] 1 W.I.R 1146 at 152, F.** The legal principle relied upon is correct. The law supports finality in litigation. The Claimant and Defendant are commercial persons who freely entered into the agreement. They agreed to be bound by an adjudicator's decision unless within 14 days either party notified the other of its dissatisfaction with the decision and required arbitration. If the Claimant failed to do so and knowingly elected to proceed to litigation it ought to preclude a subsequent resort to arbitration.

[9] The question before me therefore was, whether there had been a sufficient notification and request for arbitration within 14 days and/or whether the Claimant had knowingly elected not to pursue arbitration. I came to the conclusion that there had been no valid election and that, the Defendant had been notified of the Claimant's dissatisfaction and request for arbitration. This is because, by letter dated the 7th July 2017, the Claimant's attorneys wrote the following to the Defendant's attorneys:

“Dear Madam,

Re: Dispute between Sabal PH 2000 Limited and GM and Associates Limited – Construction of Dwelling House and Associated Works at No. 1 Montrose Road, Kingston 6 in the parish of St. Andrew.

The captioned refers.

We hereby give formal notice pursuant to Clause 8.1(2) of the Articles of Agreement that GM Associates Limited is dissatisfied with the decision of the Adjudicator and requires that the matter be settled by Arbitration.

G.M and Associates Limited's notice of arbitration pursuant to Clause 8.2(1) of the aforementioned Articles is imminent.”

(See Exhibit MDG6 to the affidavit of Markland Gordon dated 13th February 2018).

- [10]** I hold that that letter was a sufficient reference as it clearly requests arbitration. The subsequent letters of the 20th July 2017 and 10th July 2017, written on the Claimant's behalf, do not withdraw the request for arbitration. Rather they put forward a construction of the Adjudicator's award which is in the Claimant's favour. The adjudicator did not at that time clarify his award. The Claimant therefore applied to this court for relief. It was after the adjudicator clarified his position that the Claimant withdrew its claim and sought to pursue the arbitration. It is noteworthy that the agreement has no Clause 8.2(1) as referenced in the letter dated 7th July 2017.
- [11]** I do not think the door to arbitration should be closed because the Claimant adopted an erroneous, and perhaps ill-advised, construction of the adjudicator's decision. The Claimant had taken the prudent course of requesting arbitration within 14 days of the adjudicator's award. I do not think the words at the end of the letter "Notice of arbitration is imminent" detract from my conclusion. This is because the request for referral was contained in the preceding paragraph of that same letter and was described as "formal". The letter is a sufficient notice as no document entitled "Notice" is required. The contract says one party is to "notify" the other. A letter will I think suffice. The further actions of the Claimant do not constitute a withdrawal of the request. In any event those actions were based on an error of fact, that is, as to the result of the adjudication. It cannot therefore have been a genuine election. I test my conclusion by asking whether, had the Claimant proposed a named arbitrator instead of commencing legal action, the Defendant could reasonably have said "we have not received notice of arbitration you are out of time". I think not.
- [12]** In these circumstances I considered it fair and just to allow the Claimant to pursue arbitration. The Defendant is protected by a condition that the amount of the award is to be put forward as security. This will ensure that the Claimant is

not merely utilising the process because it is unable to pay a lawful debt. It also protects against dissipation of assets in the event the arbitration ultimately ends in the Claimant's favour. The delay in consequence of the Claimant's error is not so great as to cause me to exercise my discretion in any other way.

David Batts
Puisne Judge
29th June 2018.