IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2021CD00241

BETWEEN	**NEVILLE L. DALEY &COMPANY**	**CLAIMANT**
AND	**H & H VENTURES LIMITED**	**DEFENDANT**

Application to strike out claim- Building contract- Arbitration agreement-Neither party now seeks arbitration-Whether reference to arbitration time barred-Whether court has jurisdiction to try the issue – Earlier claim filed but not served and now expired-Whether an abuse of process to bring another action - Observations on attaching documents as a schedule to affidavits.

Canute Brown instructed by Brown, Godfrey & Morgan for Claimant.

Nigel Jones and D'Angelo Foster instructed by Nigel Jones & Company for the Defendant.

Heard: 4th March, 11th March and, 29th April, 2022.

In Chambers (By zoom)

COR: BATTS, J

[1] At the commencement, of this application to strike out the claim, I suggested to the parties that a stay of proceedings pending arbitration might be an appropriate order. Whereas the Claimant was receptive counsel for the Defendant was not. He rejected the suggestion on the basis that, when the words of the arbitration clause are properly construed, the court has no jurisdiction to do so.

[2] The affidavits, filed in support of the application, were that of Chantelle Biersay filed on the 1st October 2021 and 26th January 2022.The Claimant, in opposition,

relied on the affidavit of Lloyd Daly filed on 21st January,2022, and, by notice, on another filed on the 23rd January 2020. Each party filed written submissions supported by several authorities. The facts where not in issue. I will not repeat all the allegations or discuss all the authorities. The resolution of the question in issue turns largely on an interpretation of the contract and, hence, can be shortly stated.

[3] The Claimant had been retained by the Defendant to do certain works of construction. The relevant Articles of Agreement are dated the 2nd March 2018. The conditions attached thereto were expressly incorporated into the agreement. The agreement is found in several affidavits but a complete copy is attached as exhibit D W 1 to an affidavit of Dwight G. R Williams, sworn to on the 3rd February 2020 and, which is attached as exhibit CB 2 to the affidavit of Chantelle Biersay filed on the 26th January 2022.

[4] I pause to indicate that once again parties to litigation have chosen to attach exhibits to affidavits as schedules and without pagination. This makes it very difficult to locate and accurately identify documents. The profession is reminded that it is the best practice to have each exhibit separately tagged and certified. Pagination, when the affidavit is bulky, is also advisable.

[5] The clauses of the agreement, relevant to a decision on this application to strike out the claim, are numbers 37 and 38. One deals with adjudication the other with arbitration. The relevant portions read as follows:

> *"37. The parties to the contract may by agreement seek to resolve any dispute or difference through adjudication and the following shall apply:*
>
> *1) The Adjudicator named in the contract shall give a decision in writing within 28 days of receipt of a notification of a dispute.*
>
> *2) ……..*

3) *Should either party be dissatisfied with the decision of the Adjudicator, they may at the end of the contract refer the dispute to Arbitration.*

4) *……*

38. (1) Provided always that in case any dispute or difference shall arise between the Employer or the Architect/ Contract Administrator on behalf (sic) and the Contractor, either during the progress or after the completion or abandonment of the Works, as to the construction of this contract or as to any matter or things of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this Contract to the discretion of the Architect / Contract Administrator) or the withholding by the Architect/ Contract Administrator of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in clause 30(7) (b) of these Conditions or the rights and liabilities of the parties under clauses 25, 26, 31, 32 or 33 of these Conditions, the same shall not be allowed to interfere with or delay execution of the works but either party, shall forthwith give to the other notice in writing of such dispute or difference and such dispute or difference shall be settled by reference to a single arbitrator in the case where the parties agree upon one, otherwise by two arbitrators one to be appointed by each party and their umpire in a manner provided by the terms of the Arbitration Act.

2) Such reference, except on article (3) or article (4) of the Articles of Agreement, or on the question whether or not a certificate has been improperly withheld or is not in accordance with those conditions or on any dispute or difference under clauses 31,32 or 33 of these Conditions, shall not be opened until after Practical

Completion or alleged practical completion of the Works or termination or alleged termination of the contractors employment under this contract or abandonment of the works, unless with the written consent of the Employer or the Architect/ Contractor Administrator on his behalf and the Contractor

3)……..

4)……

5) (a)……..

(b)……...

(c)……

(d) ……...”

[6] The issue between the parties concerns alleged non-payment, by the Defendant to the Claimant, of amounts certified by the architect. It is therefore an alleged breach of clause 26 of the agreement. A claim was first filed in this court in the year 2019 being suit number 2019CD00421. A default judgment in that claim was set aside for non-service of the claim. By that time the Claim Form had expired and could not be served. The Claimant thereafter filed this suit. The Defendant having been properly served now seeks either, to have this claim struck out and/or, a declaration that the court has no jurisdiction to try the claim. The grounds of the application are:

a) Pursuant to section 5 of the Arbitration Act

b) The Arbitration Act has as its objective the facilitation of the use of arbitration agreements.

c) Rule 9.6 of the Civil Procedure Rules.

d) The parties agreed by clause 38 of the agreement to be bound by the terms of arbitration in the event of a dispute.

e) The claim in 2019CD00421 still subsists.

[7] The Particulars of Claim in this action assert that the Defendant failed, neglected and or refused to make payments pursuant to certain payment certificates issued by the architect. The non or short payment is attributable to errors in computation. The non or short payments also caused further loss and damage to the Claimant. It is alleged that by letter dated the 23rd day of July, 2019 and pursuant to clause 26(1) (a) of the agreement the Claimant gave notice in writing to the Defendant of its intention to determine the contract if payment was not made within 7 days. The payments not having been made a notice of termination was issued on the 2nd August, 2019. It is alleged that the Defendant issued letters of 8th April, 2019 and 2nd August 2019 purportedly determining the contract but that these letters contained *"unsubstantiated*" allegations.

[8] The Defendant's counsel has made it clear that he does not wish the action stayed pending arbitration. He submits that arbitration is no longer open to the parties as clause 38 required any such submission to be "*forthwith".* The Claimant, not having done so, is now barred by contractual limitation. Further, as the parties agreed that such disputes were to go to arbitration, this court has no jurisdiction to hear the claim. This argument is supported by reference to section 11 of the Arbitration Act. That section however only requires a court to refer parties to arbitration *"if a party so requests".* Neither party to this claim made such a request. Reference is made to several authorities however none of these involved a reference by the court where neither party requested it.

[9] The Defendant submitted further that, as the arbitration clause was mandatory and had not been implemented, the court had no jurisdiction to entertain the claim. The authorities relied on were ***Anzen Limited and others v Hermes One Limited [2016] UKPC1 PC Appeal No 41/2015 (on appeal from the British Virgin***

Islands) delivered on the 18th January, 2016 and, ***A. G. Clark Holdings Ltd. and Giebelhaus Developments Ltd. carrying on Business In Partnership As Clark Builders v Hoopp Realty Inc. 2013 ABQB402****,* a decision of the Court of Queen's Bench Alberta, Canada. In the latter case the court relied on a statutory limitation period applicable to arbitration and decided that, as arbitration was mandatory under the terms of the agreement and as the limitation period for reference to arbitration had passed, the claim ought to be struck out. The other decision, was by Her Majesty's Board but, does not assist the Defendant. The Judicial Committee, at paragraph 13 of the judgment, reaffirmed the principle that an agreement to deprive a party of a right to litigate is to be *"clearly*" worded. There is, the court said, an obvious difference between a provision which says disputes "*shall"* be submitted to arbitration and one that says "*any party may submit this dispute to binding arbitration*." The clause in that case stated that either party *"may"* submit a dispute to arbitration.

[10] In the case at bar the arbitration clause is mandatory and is designed so that disputes or differences do not "*interfere with or delay*", the execution of the works. The issue in this case relates to non-payment of certificates. Neither party initiated arbitration after the Claimant wrote, pursuant to clause 26, complaining of the short or non-payment of certificates. This is understandable as there is correspondence suggesting that the amount was not disputed, see exhibit LD 1A to the affidavit of Lloyd Daley filed 23rd June 2020 (a notice of intention to rely on which was filed by the Claimant on 20th January 2022). It may be argued that there was no dispute or difference to be arbitrated see, ***Amec Civil Engineering Ltd v Secretary of State for Transport [2005] EWCA Civ 291*** **per Lord Justice May at paragraphs 29 and 31 and Lord Justice Rix at paragraph 65**. Both parties took a decision to terminate their contractual relationship. There is no clear contractual term which bars resort to litigation in court after the contract has been terminated. On the other hand, by affidavit of Haresh Daswani, filed on the 24th July 2020 and exhibited to the affidavit of Chantelle Biersay filed in these proceedings on the 26th January 2022, evidence is presented that full payment was not made due to poor finishing, workmanship and, delays on the project, see letters dated 8th and 10th April 2019

as well as the Defendant's further written submissions dated 3rd March 2022 which set out the basis of a dispute or difference.

[11] Whether or not there was such a dispute or difference it seems to me to be axiomatic that, if both parties to a contract resile from or fail to implement a contractual term, it is unenforceable by either. In this case neither party sought to arbitrate the issue. Even at this stage the Defendant has declined the offer of a stay pending a reference. The court cannot compel arbitration if neither party to the contract wants arbitration. The Defendant cited ***Sabal Ph 1200 Limited v GM and Associates Limited [2020] JMCA Civ. 43 (*****unreported Judgment delivered 25th September 2020).** That judgment of the Court of Appeal overturned a first instance decision of mine. It involved a construction contract and an adjudication process. A dispute arose and the employer activated the process. The appointed adjudicator made a ruling which the contractor erroneously interpreted to be in his favour. He therefore filed a claim before properly initiating the arbitration clause. The adjudicator, after the claim was filed, clarified his award in a manner which suited the employer. The contractor therefore elected to withdraw his claim and pursue arbitration. The Court of Appeal decided that the judge at first instance had no jurisdiction to refer the matter to arbitration because the contractor, who was requesting arbitration, had by filing the claim irrevocably elected not to pursue arbitration. Sadly, the court failed to also restore the claim by vacating his election to withdraw it. That election had obviously also been made on a false or erroneous premise because, the contractor would not have withdrawn his claim had he known that, the court had no jurisdiction to refer the parties to arbitration. The case as I understand it is of no assistance to the Defendant because there was neither adjudication nor arbitration in this matter and, although being aware of the dispute or difference, neither side seemed or seem interested in that process.

[12] On the matter of limitation of actions there is no term in the contract which speaks directly to that. The question whether there has been a "*forthwith*" reference, or whether letters written by the Claimant (see exhibits LD1,2,3,4 and 5 to the affidavit of Lloyd Daley filed on the 21st January 2022) would serve that purpose, are really

questions of fact. In any event a defence relying on a limitation period is not jurisdictional. It must be pleaded and proved in the proceedings whether in court or in arbitration. It is not a basis to strike out a claim particularly, as I have said, when the alleged limitation period is unclear. In this regard ***Lemard v Key Insurance Company Limited [2017] JMSC Civ. 208*** **(unreported judgment of Bertram-Linton J. dated 15th December 2017)**, relied on by the Defendant, is clearly distinguishable.

[13] As to the allegation that there was an abuse of process, by the bringing of this second claim, that too has no merit. The first claim can no longer be served as it has expired. It no longer is alive. It had not been considered on the merits and therefore there is no abuse of process in commencing another action.

[14] In the premises, the application to strike out the claim is refused and, the Defendant's application is therefore dismissed. Costs will go to the Claimant to be taxed or agreed.

David Batts
Puisne Judge