



[2026] JMCC Comm 19

ORAL JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU 2024CD00407

**IN THE MATTER of the Judicature
(Supreme Court) Act**

AND

**IN THE MATTER of the Arbitration Act
of Jamaica**

BETWEEN	MAURICE A. SMITH	1ST APPLICANT
AND	KATHY A. SMITH	2ND APPLICANT
AND	C&D CONSTRUCTION & ENGINEERING LIMITED	RESPONDENT

Ms. Michala Gayle instructed by Smith Law, Attorneys-at-law for the Claimants.

Mr. Lorenzo Eccleston instructed by Temple Law Attorneys-at-law for the Defendant.

Civil Procedure – Whether matter should be referred to arbitration - Whether Final Certificate constitutes conclusive evidence that works were proper carried out - Whether there are any reasonable grounds for bringing the claim - Arbitration Act, S. 14 – The Civil Procedure Rules, 2002, Part 26.

VIA ZOOM

Heard on: 5th, 20th June, 23rd July, 2025

STEPHANE JACKSON-HAISLEY J.

BACKGROUND

- [1]** This matter commenced by way of Fixed Date Claim Form filed November 1, 2024 by Maurice A. Smith and Kathy A. Smith in which the Applicants sought an Order “That Notice of Arbitration between the parties having been served on 16th October 2024 and no agreement having been reached in respect of the appointment of arbitrator, that two arbitrators shall be appointed by this Court pursuant to section 14 of the Arbitration Act”.
- [2]** On February 12, 2025 the Respondent C & D Construction & Engineering Limited filed a Notice of Application on behalf of the Respondent seeking that the claim be dismissed and that the claim be struck out on the grounds that the claim is an abuse of the process of the court and that the Applicants have no reasonable grounds for bringing the claim. The Respondent also sought orders that the Court decline to exercise jurisdiction or determine whether the Applicants ought to be deemed to have abandoned the Claim by failing to notify the Respondent by written request to concur in the appointment of an Arbitrator before a Final Certificate was issued.
- [3]** The Applicants have asserted that pursuant to an Articles of Agreement entered into in or around June 2020, it was agreed that disputes would be settled by way of reference to a sole arbitrator to be agreed by both parties or by two (2) arbitrators where one (1) would be appointed by each party. Further that, the contractor failed to follow manufacturer’s specification or negligently carried out the construction which caused damage to the main structure of the property and goods of the Applicants. Despite serving a Notice of Arbitration on October 16, 2024, the Respondent failed to agree to or propose any candidate to be appointed as arbitrator.

- [4] The Respondent's Notice of Application is supported by evidence on affidavit of Clive Wint also filed February 12, 2025 in which it is expressed that pursuant to Clause 30.9 of the contract, the Applicants were obliged to notify the Respondent by written request to concur in the appointment of an arbitrator before the issuing of a Final Certificate for Payment by the Contractor. Having failed to do so, Final Certificate for Payment dated January 24, 2023 is conclusive evidence that the works were properly carried out and completed by the Respondent. Mr. Wint also asserted that prior to the issuing of the Final Certificate for Payment, the Applicants sent a list of defects that were remedied by the Respondent and none of the defects included any leaking of the roof.
- [5] On behalf of the Respondent, it was argued that the Applicants' failure to seek a referral by written request to concur in the appointment of an arbitrator prior to the issuing of the Final Certificate by the Contractor Administrator on January 24, 2023 in accordance with Clause 30.9 must be read as a time bar clause, thereby barring the Applicants from proceeding to arbitration at this late stage or to commence legal action. Several authorities were urged upon the Court to include **Sabal PH 1200 Limited v GM and Associates Limited** [2020] JMCA Civ 43, **Sydnia Matheson v Lelieth Watts** [2018] JMCA Civ 144, **Anthony Tharpe and Others v Alexis Robinson and others** [2022] JMCA Civ 66 to arrive at the conclusion that given the binding and/or conclusive nature of the Final Certificate, if the Applicants wanted the matter referred to arbitration, they were required to have made their request in writing prior to the issuance of the Final Certificate. Having failed to do so the claim should be struck out.
- [6] The Applicants' response was that summary judgment is not available to proceedings commenced by Fixed Date Claim Form therefore the Respondent's request for summary judgment should fail. It was submitted that for striking out, the Court should consider whether the Applicants' case can be regarded as a misuse of the Court's procedure or whether it is a genuine claim subject to litigation. It was argued that the Applicants have reasonable grounds for bringing

the claim and the Respondent is only seeking to have the claim struck out as a further means or attempt to avoid an examination of the substantive dispute in arbitration.

- [7] The Case of **Wayne Robinson v Basil Jarrett** [2025] JMCA Civ 18 was urged upon the Court. As it relates to the issue of exercising its jurisdiction, it was argued that the legislation provides that it is the arbitral tribunal itself that must decide on any preliminary question of jurisdiction to hear a dispute. The decision of **Douglas Wright T/A Douglas Wright Associates v Bank of Nova Scotia Jamaica Limited** (1994) 31 JLR 351 was referred to the Court for the principle that parties who have agreed to arbitrate should be held to their agreement.

DECISION

- [8] On July 23, 2025 I delivered an oral judgment in the matter. I have set out below the essence of the oral judgment delivered.
- [9] The Fixed Date Claim Form seeks one (1) Order which is for two (2) arbitrators to be appointed by the Court pursuant to section 14 of the Arbitration Act. This was in furtherance of the Notice of Arbitration pursuant to the Arbitration Act and to section 38(1) of the Articles of Agreement between the parties, which demanded that the dispute be referred to Arbitration.
- [10] The Court noted that this Notice was served on the Respondent on October 16, 2024, however the Final Certificate had been sent to the Applicants on January 24, 2023, almost two (2) years before that. The Dispute as set out in the Notice of Arbitration identified the 'contractor's failure to sufficiently remedy cracks and watermarks in the roof's soffit' which were first noticed and brought to the contractor's attention in March 2022'. A list of defects was submitted on October 20, 2022, but it did not include any leaking issue regarding the roof.

- [11] Clause 30.9 of the Agreement stipulated that unless a written request to concur in the appointment of an arbitrator shall have been given under Clause 38 by either party before the Final Certificate is issued or by the contractor within fourteen (14) days of such an issue, the said certificate shall be conclusive evidence that the works have been carried out or completed in accordance with the terms of the contract. This required the Applicants to issue a written request to concur in the appointment of an arbitrator before the Final Certificate was issued. Clause 30.9 is subject to Section 38 which provided that where a dispute or difference arose, either party shall **forthwith** (emphasis mine) give to the other notice in writing of such dispute or difference and it shall be settled by reference to a single arbitrator if the parties agree on one (1) but where there is no agreement, to two (2) arbitrators, appointed by each party.
- [12] On behalf of the Applicants, it was argued that the Respondent's request is misconceived as pursuant to section 19 of the Arbitration Act, it is the arbitral tribunal that must decide on any preliminary question of jurisdiction to hear a dispute. Further that the facts and merits of the dispute are properly for the arbitral tribunal to determine. Further, clause 30.9 does not provide a precondition to initiating arbitral proceedings under the Agreement.
- [13] I do not agree that the arbitral tribunal must be the one to determine jurisdiction and that the facts and merits are only for them as the Court has a role to play in the weeding out of unwarranted cases. There is also the preliminary issue as to whether Clause 30.9 of the Contract is a condition precedent to the bringing of the Claim. On a review of that clause, it deals with the Certificate and not with the appointment of arbitrator. It is more of an evidential provision and rather than a condition precedent.
- [14] The main issue to be determined is whether there is any useful purpose to the appointment of an arbitrator at this stage. If the Applicants' case is to be accepted

at face value, at the time the Final Certificate was issued the situation was as follows:

- The Applicants were aware of what they refer to as the negligent omission resulting in the cracks and watermarks in the roof
- They brought this to the Respondent's attention in March 2022
- The Respondent promised to remedy the defect
- The Respondent did not remedy the defect
- This defect resulted in damage to the main structure

[15] Knowing all of this, the Applicants made no request for the appointment of an arbitrator until almost two (2) years post the Final Certificate being issued and about two and a half (2 ½) years after becoming aware of this defect. The use of the word 'forthwith' when giving Notice, in the Agreement required the party requesting arbitration to do so at the earliest opportunity.

[16] Clause 30.9 stipulates the effect of failing to make a written request within the time permitted which is that "the said certificate shall be conclusive evidence in any proceedings arising out of this contract, that the works have been properly carried out and completed in accordance with the terms of the contract". The exceptions set out are where the sum mentioned in the certificate is erroneous by reason of fraud, dishonesty or fraudulent concealment relating to the works or any part thereof or to any matter dealt with in the said certificate.

[17] The interpretation of what is meant by 'conclusive evidence' has been the subject of several authorities. The Respondent relied on the discussion of the learned authors of Keating on Building Contracts, 15th Edition at pages 106 to 110 where it was expressed that 'where a certificate is given, which the contract shows was intended to be a final expression of the architect's satisfaction, the employer is not allowed subsequently to allege that there are any defects'. This position was reflected in cases like in **East Ham Borough Council v Bernard Sunley & Sons**

Ltd. [1965] 2 Lloyd's Report 425 where Viscount Dilhorne opined at page 626, *inter alia*, that the final certificate is a certificate of the total value of the work done by the contractor and was conclusive evidence of the sufficiency of the works and materials.

[18] In **Crown Estate Commissioner v John Mowlem & Co.** [1995] 70 BLR 1, the Court ruled that the failure to issue arbitration proceedings within the stipulated time meant that the final certificate was conclusive evidence of the employer's satisfaction as to the quality and standard of the final works.

[19] The essence of the dispute alleged by the Applicants was to determine the negligence of the contractor. They would have been aware of this alleged negligence which resulted in cracks in roof from March 2022 but did not seek to refer the matter to arbitration, forthwith, as required under the Agreement. Knowing all this, the Applicants did not make any request either before or after the Final Certificate, for any dispute to be referred to arbitration. Further, they have not raised any allegations of fraud, dishonesty, misrepresentation.

[20] It is important to examine the wording of clause 30.9. The words used are interpreted as meaning that the certificate shall be conclusive evidence in any proceedings arising out of the contract, whether by arbitration or otherwise that the works have been carried out in accordance with the term of the contract. Clause 30.9 suggests therefore that there is a contemplation that proceedings can still ensue even where a final certificate has been issued so there is no bar so to speak. However, if it is accepted that the certificate is conclusive evidence of the sufficiency of the work done, it begs the question, what then would be the value of arbitration if there is already conclusive evidence that the works have been carried out in accordance with the contract.

[21] On behalf of the Applicants, it was contended that the parties are bound by the contractual agreement and that the Court's powers to resolve matters of alternative

dispute resolution should be encouraged. The Arbitration Act provides for arbitration, and the Court is mandated to refer a matter to arbitration if there is a request. However, the parties are bound by the terms of their contractual agreement. Under these circumstances, where there is conclusive evidence in favour of the contractor that the works were carried out in accordance with terms of the contract, there would be no dispute and therefore no value to having an arbitrator appointed. The Applicants have not identified any exceptions to the provision such as mistake, dishonestly or fraud so therefore the conclusive evidence is irrebuttable.

- [22] If the Final Certificate determines this, what would arbitration be seeking to achieve? What would be the value of arbitration. The point of Arbitration is to determine dispute. To appoint an arbitrator to determine “the dispute” where it has already been determined by conclusive evidence that the works have been properly carried out would be an exercise in futility. It is in these circumstances, that I must consider whether the Applicants have reasonable grounds for bringing the claim?
- [23] On behalf of the Applicants, it was argued that this is not an appropriate case for the grant of Summary Judgment or for striking out. Further, that the Court is not empowered to grant summary judgment. Reliance was placed on the judgment of **Wayne Robinson v Basil Jarrett**. I agree that the grant of summary judgment is not an option for Fixed Date Claim Form. The issue for me is whether the claim ought to be struck out as being an abuse of process or that there are no reasonable grounds to bring the claim.
- [24] Part 26.3 (1) (b) and (c) of the Civil Procedure Rules (CPR) empowers the court to strike out a statement of case or part of a statement of case if it appears to the court that the statement of case is an abuse of the process or that the statement of case or part to be struck out discloses no reasonable ground for bringing the Claim.

- [25] The **Wayne Robinson v Basil Jarrett** case relied on by the Applicants provides useful guidance as to the factors I must consider in determining whether to strike out the case. At paragraph 26, the court prescribed that the court hearing the application for striking out must strike a balance between two (2) competing principles which is that it is preferable for cases to be determined on their merits rather than terminated for technicalities and trifles and the need to maximize the best use of judicial resources and weed out unwarranted claims. I must try to strike a balance between weak cases but should err on the side of allowing a claim to proceed to trial unless standing is non-existent. I must therefore balance the Claimants' right to be heard against the need for efficient proportionate litigation.
- [26] One question to be determined is whether the claim as pleaded satisfied the requirements for prosecution of the alleged cause of action. Assuming all the facts are true, the key test is whether the claim has a real legal basis or raises substantial factual issues that require ventilation.
- [27] The essential facts herein are not in dispute. It is not disputed that no request was made for arbitration until after the Final Certificate was issued. The Applicants' case is that the contract was not properly performed, however, as there was no written request to concur in the appointment of an arbitrator before the final certificate was issued, there remains no dispute and the certificate is conclusive evidence that the contract was performed in accordance with the contract. According to clause 30.9, in these circumstances there is no dispute requiring resolution. The Applicants have not asserted that there is any exception has been set out under the clause.
- [28] The purpose of a referral to arbitration would have been to resolve the dispute. If there is no genuine issue to arbitrate and nothing to decide, the role of an arbitrator in these circumstances would be wasted. Therefore, there would be no reasonable grounds for seeking to have the court appoint an arbitrator. The Court recognises

that striking out is a measure of last resort and is often referred to as a draconian measure, but in these circumstances, I find there to be no reasonable grounds for bringing the claim. I am prepared to order that the Applicants' case be struck out.

[29] My orders are:

1. Claimants'/Respondents' case is struck out against the Respondent on the basis that the Claimants/Respondents have no reasonable grounds for bringing the Claim.
2. Cost to the Respondent/Applicant to be agreed or taxed
3. Respondent's/Applicant's Attorneys-at-Law to prepare file and serve the order herein.

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Stephane Jackson-Haisley
Puisne Judge