

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No.755 OF 2023

BETWEEN:

MEDINA CONSTRUCTION LIMITED Claimant

and

PLEXAR CAPITAL Defendant

Appearances:

Mr. Jose Alpuche for the Claimant

Mr. Allister T. Jenkins for the Defendant

2024: May 2

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DECISION

Jurisdiction – Arbitration clause – Strike out – Whether claim based on separate agreement – Novation – Section 5, Arbitration Act (Cap 125) - Rules 9.7 (1) & (6) and 10.3 (3) of the Civil Procedure Rules (CPR) 2005

- [1] This is an application by the defendant to strike out the claim for lack of jurisdiction or, in the alternative, for an order staying proceedings.

Background

- [2] The defendant contracted the claimant to construct several buildings for Itzana Resorts in Placencia in the Stan Creek district of Belize. After the claimant completed construction of the buildings, the claimant states, the defendant owed the claimant a sum off Belize dollars 1,633,799.29. The claimant instituted action seeking to recover the alleged outstanding sum of 833,854.29 together with costs.

- [3] The claimant pleads that it entered into an agreement (“payment agreement”) with the defendant around June 2017 following which the defendant agreed to pay the amount owed to the claimant in monthly installments of \$100,000.00. The claimant states that pursuant to the payment agreement the defendant made payments of \$100,000.00 each in July, October and November 2017, and in January, February, March and June 2018. The claimant states that the defendant’s last payment was made on 29 June 2018.
- [4] The defendant did not file a defence. Instead, an application was filed under rules 9.7 and 10.3 (3) of the Civil Procedure Rules (CPR) 2005. Under rule 9.7 (1), a defendant who disputes the court’s jurisdiction to try the claim may apply for a declaration to that effect. Rule 9.7 (6) provides that an order under the rule may also strike out any statement of claim. Rule 10.3 (3) provides that where the defendant makes an application within the stipulated period under any relevant legislation relating to arbitration to stay the claim on the grounds that there is a binding agreement to arbitrate, the period for filing the defence is extended to 14 days after the determination of that application. The defendant also applies under section 5 of the Arbitration Act (Cap 125) to stay proceedings¹.
- [5] The defendant states that the agreement dated 2 January 2016 exhibited to the statement of claim is a construction agreement, and that the cause of action relates to the alleged breach of that agreement. The defendant relies upon clauses 27.1 and 27.3 of the construction agreement in support of its application to strike out the claim and denies having entered into a separate payment agreement.

Dispute resolution

- [6] The defendant states that in terms of the construction agreement, the claimant is obliged to raise a dispute, controversy or claim within seven (7) days of it arising and that failure to do so would result in a waiver of claim. The defendant contends that the claimant, having failed to raise a dispute within seven days in terms of the construction agreement, has waived its right to make a claim. The defendant states that in any event the court has no jurisdiction to hear the claim as any dispute must necessarily be referred for arbitration and not be brought before the court.
- [7] Clause 27 of the construction agreement deals with dispute resolution. The agreement describes the claimant as “Package Contractor” and the defendant as “Owner”. Clause 27.1 states:

“Package Contractor shall submit any dispute, controversy or claim arising out of or relating to this Agreement or performance or breach thereof, including any demand or assertion by Package Contractor, seeking as a matter of right, adjustment or interpretation of terms of this Agreement, payment of money, extension of time or other relief (“Package Contractor’s Claim”), to the Owner, in

¹ Revised edition 2000

writing, within seven (7) days after the event giving rise to any such Package Contractor's Claim or dispute occurs or commences (unless an earlier timeframe is expressly set required elsewhere in the Agreement). The Package Contractor's failure to submit any Package Contractor's Claim or other matter to Owner in accordance with this Paragraph shall result in a waiver of such Package Contractor's Claim".

Clause 27.3 of the construction agreement – carrying the heading jurisdiction, the venue and governing law – states:

27.3.1 "With regard to any controversy in any way arising out of or relating to the execution or performance of this Agreement (a "Dispute"), the Package Contractor hereby irrevocably agrees to resolve all Disputes by binding arbitration in accordance with the Arbitration Act save that the curial law governing arbitration procedures being the Construction Industry Rules of the American Arbitration Association and the hearing shall be located in Belize".

27.3.2 "The Parties agree that any arbitration award shall be final and binding, and judgment upon the award may be entered in any court having jurisdiction thereof. The Owner shall have the right to join the Package Contractor into any proceeding in which a dispute regarding the Project is pending and the Package Contractor agrees to waive any objection to being joined in that proceeding".

27.3.3

27.3.4 "Any order, decision, determination or award rendered by a court of competent jurisdiction or arbitrator shall be final and binding upon the parties and their successors, and shall be the sole and exclusive remedy between the parties regarding any claims, counterclaims or issues presented to the court or arbitration in accordance with applicable laws. Judgment upon any award may be entered and enforced in any court having jurisdiction over a party or any of its assets. For the purpose of the enforcement of an award, the parties irrevocably and unconditionally submit to the jurisdiction of a competent court in any jurisdiction in which a party may have assets and waive any defenses to such enforcement based on lack of personal jurisdiction or inconvenient forum".

[8] Clause 27.3 provides that the parties irrevocably agree to resolve all disputes by binding arbitration in accordance with the Arbitration Act. The clause specifies the curial law and the place of arbitration.

[9] The claimant's response is that the claim is not based on the construction agreement. Instead, it is contended, the present cause of action arises from the payment agreement between the parties and, therefore, the agreement to refer a dispute to arbitration is of no relevance to the claim.

Should the claim be struck out?

- [10] Section 5 of the Arbitration Act makes provision for an action to be struck out or stayed on the application of a party to a submission. The section states:

“If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the court against another party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering and pleading or taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court if satisfied that there is not sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.”

- [11] A submission is defined by section 2 of the Arbitration Act to mean a written agreement to submit present or future differences to arbitration, whether an arbitrator is named or not. Section 3 of the Act provides that a submission agreement is irrevocable except by leave of court, unless the submission expresses a contrary intention, and it will have the same effect in all respects as if it had been made an order of the court.
- [12] An examination of the pleadings is critical in deciding whether the defendant's application can succeed. The defendant did not file a defence. Section 5 of the Arbitration Act allows a party to a submission at any time after appearance in legal proceedings, and before delivering and pleading or taking any other steps in the proceedings, to apply to court to stay proceedings. The rules allow the defence to be filed after the application for stay is determined.
- [13] The claimant has pleaded that the parties entered into a payment agreement so that the defendant could liquidate the outstanding debt in installments. Although the claimant has not exhibited a written payment agreement with the statement of claim, the pleadings make it clear that the parties had such an agreement. According to the claimant the defendant made payments in July, October and November 2017 and in January, February, March and June 2018. According to the claimant, an aggregate of seven monthly payments were made to the claimant by the defendant after the payment agreement.
- [14] The defendant states that although the parties may have varied the terms of the construction agreement, this does not amount to a novation of the construction agreement or the creation of a new contract. The defendant states that there is no evidence at all that a new contract was entered into in place of the construction agreement.
- [15] The defendant submits that novation of a contract takes place where a new contract is substituted (with the consent of the parties) for an existing contract,

which is discharged, and that this must be supported by valuable consideration. In this case, it was submitted, consideration did not move from the parties towards a binding new agreement, or as the claimant says the payment agreement.

- [16] In its supplementary submissions filed on 8 May 2024, the claimant submitted that both parties received benefits under the payment agreement. The claimant's benefit was to receive payment without having to make a claim, and the defendant benefitted by receiving time to pay by installments. The claimant submits that the practical benefit it received constitutes consideration for the defendant's promise to pay in installments. Reference is made to **Chitty on Contracts**², which cites the England & Wales Court of Appeal decision in **Willaims v Roffey Brothers & Nicholls (Contractors) Ltd**³.
- [17] Chitty on Contracts states that the decision in *Williams v Roffey* regards factual benefit to the promisor as sufficient, even in the absence of a legal benefit to him or of a legal detriment to the promise. The authors state that the approach to consideration in **Stilk v Myrick**⁴ is no longer desirable or necessary. The claimant submits that it did not raise a dispute under the construction agreement as the defendant made payments pursuant to the payment agreement, and that this forbearance constitutes consideration.
- [18] The defendant says that the claimant has pleaded the construction agreement, its basic terms and sum owed under the construction agreement. Simply put, the defendant submits, the claim is for damages for breach of the construction agreement, which contains a dispute resolution clause. The defendant relies on the decisions in **Anna Gonzalez v Belize Social Security Board**⁵ and **Kelly Greene v Legacy Global Development LLC**⁶.
- [19] In *Anna Gonzalez v Belize Social Security Board*, the court allowed an application for a stay of proceedings and referred the matter to arbitration. In that case, the employer applied to court for a stay on the basis that the employment contract between the parties contained an arbitration clause. The court held that arbitration is the way by which the parties agreed to settle their disputes.
- [20] In *Kelly Greene v Legacy Global Development LLC*, the court allowed an application for default judgment to proceed in the absence of an objection by the defendants to the case being litigated although the agreement between the parties contained an arbitration clause.
- [21] The issue in this proceeding is not the same as the issues that were raised in the cases referred to by the defendant. Where the parties agree upon arbitration as

² Vol 1 (32nd Ed.) 4-006

³ [1990] All ER 512

⁴ [1809] 2 Camp 317

⁵ Claim No.499 of 2014

⁶ Claim No.228 of 2023

the way of settling their disputes, the courts will give effect to what the parties have chosen. This principle has been long recognised.⁷ Section 5 of the Arbitration Act allows court to grant a stay on the application of a party to a submission agreement. The question here is whether the dispute between the parties is caught up by the agreement to arbitrate contained in the construction agreement. The claimant insists that it does not; the defendant argues that it does.

- [22] The decision reached by the court is premised mainly on the claimant's statement of claim. The statement of claim pleads a payment agreement. The claim is based on this agreement. The claimant has pleaded that an aggregate of seven payments were made by the defendant pursuant to the payment agreement. If the claim is based on the construction agreement, the dispute resolution clause would be at play, and the maintainability of this action may not be possible.
- [23] The court makes no definitive finding that there exists a payment agreement or that the cause of action arises from such an agreement. The parties' evidence will have to be considered to make a finding on the matter. The circumstances in which the defendant made the alleged installment payments is a relevant consideration. Implicit in this is the issue whether the alleged debt was to be collected in terms of the construction agreement or whether it is attributable – as the claimant argues – to the later agreement? Inquiring into these matters at this point is not necessary.
- [24] This is not the end of the matter, and the issue in this proceeding is by no means conclusive. The claimant must prove his claim by evidence at the trial. The evidence laid before the court will help answer the critical issues in this case. If the claimant is not able to establish a payment agreement that exists independently of the construction agreement, the defendant stands the possibility of succeeding in its contention that the claim can only be referred to arbitration in terms of the dispute resolution clause.
- [25] The court agrees with the cautionary dicta of the Caribbean Court of Justice in **Barbados Rediffusion Services Ltd v Marchandani**⁸. The decision was cited by the claimant. The court observed that a judge dealing with an application to strike out should start by reminding himself that to strike out a party's case and so deny him a hearing on the merits, is an extreme step not to be lightly taken.
- [26] The court's absence of jurisdiction must not be a matter of speculation. At this point, there is no evidence that the court lacks jurisdiction to hear the claim as pleaded. The claimant must be allowed to proceed with the claim.
- [27] For these reasons, the defendant has not succeeded in its application.

⁷ Scott v Avery [1843 – 1860] All ER Rep. 1

⁸ [2006] 1 CCJ (AJ) 44

ORDER

1. The summons to strike out the claim is struck off.
2. The defence is to be filed in terms of the rules.
3. The defendant is to pay the claimant's costs as agreed or as assessed.

M. Javed Mansoor

Judge