



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. 2018CD00559**

<b>BETWEEN</b>	<b>CHAMPION INDUSTRIAL EQUIPMENT &amp; SUPPLIES LIMITED</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>RIVI GARDNER &amp; ASSOCIATES LIMITED</b>	<b>DEFENDANT</b>

**Paul Beswick, Gina Chang instructed by Ballantyne Beswick & Co. for the Claimant**

**Abe Dabdoub instructed by Dabdoub Dabdoub & Co. for Defendant**

**Heard: 13<sup>th</sup> March, 27<sup>th</sup> May, 19<sup>th</sup> June and, 26<sup>th</sup> July, 2019**

**In Chambers**

**Coram: Batts, J.**

[1] Before me were three Notices of Application. One, filed by the Claimant on the 12th November 2018, seeks interim relief which includes, among other relief, an order for Interim payment. Another, filed by the Defendant, seeks among other things an order that the matter be stayed and referred to arbitration. The third application, filed on the 22<sup>nd</sup> February 2019 by the Claimant, seeks to add a party. On the first morning of the hearing Claimant's counsel elected not to pursue the application to add a party "*at this time*". He indicated that he would pursue the application for interim payment. I decided to hear the application for interim payment and the application to stay proceedings at the same time.

- [2] The Claim was commenced by Fixed Date Claim Form. There are 20 paragraphs of relief. These include declarations, orders for payment, damages for defamation and general damages. The Claim concerns two related contracts. These are, an “Equity/Works” agreement and its addendum (respectively dated 21st September 2015 and 30<sup>th</sup> August, 2016) and, a Construction Agreement dated the 22<sup>nd</sup> day of August 2016. These agreements concern investment in, and construction of, a housing development known as “The Orchards.”
- [3] Several affidavits have been relied on in the applications before me. They are: (i) Affidavit of Samuel Scott filed on the 27 September 2018 in support of Fixed Date Claim, (ii) 2<sup>nd</sup> Affidavit of Samuel Scott filed 12th November 2018 (iii) Affidavit of Rivington Gardner in opposition filed on 20<sup>th</sup> November 2018, (iv) Affidavit of Rivington Gardner in Defence filed 20<sup>th</sup> November, 2018 (v) Affidavit of Michael Cater filed 22<sup>nd</sup> November 2018 (vi) 3<sup>rd</sup> Affidavit of Samuel Scott filed 21st December 2018 (vii) 4<sup>th</sup> Affidavit of Samuel Scott, in reply to Michael Carter, filed 21 December 2018 (viii) 5<sup>th</sup> Affidavit of Samuel Scott, in reply to opposition to application for interim remedy, filed 21<sup>st</sup> December 2018 (ix) Further Affidavit of Rivington Gardner filed 21 December 2018 (x) 2<sup>nd</sup> Affidavit of Michael Cater filed 21<sup>st</sup> December 2018 (xi) 6<sup>th</sup> Affidavit of Samuel Scott filed 3<sup>rd</sup> January 2019 in opposition to notice of application (xii) Affidavit of Samuel Scott filed 22<sup>nd</sup> February, 2019 in support of application to add a party. The parties filed written submissions and speaking notes. Extensive oral submissions were also entertained. Having carefully considered them all, I have come to the conclusion that, the application for interim payment is to be refused and an order made to stay these proceedings pending arbitration. My reasons and the detailed orders of the court are stated below.
- [4] Claimant’s counsel asserted that the claim related to money already determined to be due to his client. That money, he argued, could not form part of any issue to be arbitrated. In any event, he submitted that, the Claimant had attempted to initiate arbitration and the Defendant had been unresponsive. The Defendant’s

Counsel contends that, as all the issued certificates had been paid, there was no uncontested sum due to the Claimant. On the matter of arbitration he asserted that the Defendant's letter terminating the contract, had invited arbitration and that there had been no reply.

[5] The rules which allow for interim payments are Rules 17.5 to 17.9 of the Civil Procedure Rules (2002) as amended. The provisions, material to this case, are:

*"17.6 -*

*(1) - The Court may make an Order for an Interim Payment only if-*

- a) The defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the Claimant*
- b) The Claimant has obtained an order for an account to be taken as between the Claimant and the defendant and for any amount found due to be paid;*
- c) The Claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (including costs) to be assessed;*
- d) Except where paragraph (3) applies, it is satisfied that, if the claim went to trial the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs; or*
- e) The following conditions are satisfied:*

- (i) *The claimant is seeking an order for possession of land (whether or not any other order is also being sought); and*
  - (ii) *the court is satisfied that, if the case went to trial, the defendant would be liable (even if the claim for possession fails) to pay the claimant a sum of money for rent or for the defendant's use and occupation of the land while the claim for possession was pending.*
- (2) *In addition, in a claim for personal injuries the court may make an order for the interim payment of damages only if the defendant is –*
  - a. *Insured in respect of the claim*
  - b. *A public authority; or*
  - c. *A person' whose means and resources are such as to enable that person to make the interim payment*
- (3) *In a claim for damages for personal injuries where there are two or more defendants, the court may make an order for the interim payment of damages against any defendant if –*
  - a. *It is satisfied that, if the claim went to trial, the claimant would obtain judgment for substantial damages against at least one of the defendants (even if the court has not yet determined which of them is liable); and*
  - b. *Paragraph 2 is satisfied in relation to each defendant.*

(4) *The Court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment*

(5) *The court must take into account –*

a. *Contributory negligence (where applicable); and*

b. *Any relevant set off or counterclaim.”*

It is well established that an order for interim payment is only made if the court is satisfied that the defendant will be unsuccessful. The burden is on the party, who seeks the interim payment, to satisfy the court that the defendant will be unsuccessful at trial see, **Christopher Cunningham v Debulin Ewan et al [2019] JMSC Civ 39, 2014 HCV 05837** (unreported Judgment of Rattray J) at paragraphs 20 , 21 and 22.

[6] The evidence, in this case, does not satisfy me that the Defendant will be unsuccessful at trial. There are clearly triable issues, the resolution of which may go either way. I will demonstrate by reference to the evidence but will recite neither, the submissions of the parties nor, the full spectrum of evidence before me. It suffices, I believe, to highlight the areas of discord. It is important, at this stage, to note that both agreements, entered into by the parties, reference dispute resolution by arbitration.

[7] In or about, July or August, 2018 issues arose between the Claimant and the Defendant. A meeting was therefore convened in the presence of attorneys. It is alleged that a settlement agreement was arrived at that meeting. This is a point of dispute. The Claimant puts it this way, in the 2<sup>nd</sup> Affidavit of Samuel Scott filed 12 November, 2018:

*Para. 9 ” By letter dated August 8, 2018 the Claimant sent to the Defendant a draft terms of agreement pursuant to the Termination*

*Meeting as reflected in the email correspondence from the Defendant. To date the Defendant has failed and/or refused to agree the terms of the agreement and/or make any payments as agreed at the Termination meeting, including payments under the Construction Contract, as proposed and confirmed by the Defendant by email of July 23, 2018.”*

[8] In paragraph 11 of the said affidavit the complaint is that the Defendant :

- a. Failed to agree the terms of the draft termination agreement
- b. Failed to agree to the appointment of an adjudicator to determine the value of work done.
- c. Failed to repay the sums loaned.
- d. Failed to pay the balance due under certificate number 6 which has been duly certified by a Quantity Surveyor or the interest accrued.

[9] The Claimant relies heavily, for quantification of its claim, on accounts prepared by RVM Cost Consultant (a Company owned and operated by Ruda V. McFarlane a board certified Quantity Surveyor). This was not an expert agreed to by the Defendant or jointly instructed. The Claimant describes, the consultant’s report as “indisputable,” see paragraph 22 of the Affidavit of Samuel Scott filed on the 12<sup>th</sup> November, 2018.

[10] The Defendant, by way of an affidavit of Rivington Gardner filed 20 November, 2018 says that at all times any agreement between the Claimant and the Defendant was “*subject to*” a joint venture agreement with SCJ Holdings Limited. It is asserted that the Equity Works agreement involved the Claimant making a monetary contribution to the project, being entitled to a share in profits on completion and, “*provided that said contract for construction of infrastructure and buildings shall be subject to the parties negotiation and agreeing to the cost of carrying out said works, based on the determination of the Quantity Surveyor and the Project Manager duly appointed by the investor.* (Para 5 of the affidavit).

[11] In paragraph 13, of the same affidavit, Mr. Rivington Gardner states that Certificates 1 – 5 were paid in full. He states that the document, alleged by the Claimant to be Certificate #6 (Exhibit SS4), is not a Certificate issued by the Quantity Surveyor. He attached as Exhibit RG4 what he asserts to be the correct Certificate #6. It is alleged that Certificate #6 included a large amount for pumps and that subsequently the Claimant removed the pumps. No payment was therefore made on that Certificate.

[12] Mr. Rivington Gardner asserts also that the Construction contract was terminated due to the Claimant's poor performance. However, the Equity Works agreement was not terminated.

[13] As regards the meeting with lawyers to discuss settlement, Mr. Gardner at Para 24 to 26 states that it is the Claimant who denied there was a settlement see paragraph 27 :

*“That the Defendant has always been willing and is still willing to arrive at a settlement on the terms and conditions outlined in Paragraph 24 of this my affidavit. Any payments due to the Claimant must be a payment which is certified by the Quantity Surveyor and there has to be deductions made for any defects and claims which the Defendant may have against the Claimant for poor and shoddy work.”*

He asserts in paragraph 28 that there are defects in workmanship being quantified. The draft agreement to settle to which the Claimant refers does not, he says, reflect the terms discussed at the meeting in July.

[14] The Defendant contends that the Claimant abandoned the work site and that this is in breach of the construction contract see, Para 32 affidavit of Rivington Gardner filed on the 20th November, 2018. It was after the project was

abandoned that the settlement meeting, the date and result of which are in dispute, took place.

- [15] The Defendant relies also on Clause 25 of the construction contract with respect to the methodology by which final payments are determined after termination. At Paragraph 37 of his affidavit he states :

*“That I am advised by Mr. Mike Cater the Director of projects at ASCO Project Consultants Limited that the compilation of defects and error by the Claimant are near completion and the claim will be prepared and filed in accordance with Clause 25 (3) (d) for preparation of the Final Certificate by the Quantity Surveyor. It is my understanding that no further payment can or should be made to the Claimant until the process set out in Clause 25 (3) (d) is completed and complied with.”*

- [16] In his affidavit filed on the 21st December 2018 Mr. Rivington Gardner says that the final accounts are ready and had been forwarded to the Quantity Surveyor for certification. It contains, he says, costing of acceptable work done by the Claimant and indicates amounts due from the Claimant to the Defendant. The affidavit of Michael Cater, filed 20<sup>th</sup> July 2018, is very relevant to the allegation of defective works.

- [17] The parties each reference correspondence supportive of their respective contentions. It suffices to say that, having reviewed same, I am satisfied that they do not conclusively determine the issues one way or the other. I choose to make no further comment as a trial, or arbitration, may yet take place. I cannot, given the nature of the rival contentions, be assured that the Claimant will prevail. This is not therefore a case in which an interim payment is appropriate.



[18] As regards, the Defendant's application, for a stay pending arbitration, I agree that this is the appropriate course of action. In the first place the Equity/ Works and the Construction Agreements both clearly provide for that. In the second place both parties appear to have, at one time or the other, sought to implement the contractually agreed mode of dispute resolution, see paragraph 25 of the affidavit of Samuel Scott filed on the 27<sup>th</sup> September 2018 and paragraph 47 of the affidavit of Rivington Gardner filed on the 20<sup>th</sup> November, 2018. In all the circumstances therefore I will, exercise my discretion and, stay these proceedings pending a referral to arbitration in accordance with the terms of the contract and the law.

[19] I wish, finally, to observe that the parties adopted the unhelpful practice of attaching a schedule of exhibits to each affidavit. This practice makes negotiation, of the judge's bundle, rather difficult particularly when it is not paginated. Paginated or not, the profession should be cautioned that, when an affiant has not signed to each identified exhibit to an affidavit, he does not vouch for it. Blame for an erroneous document scheduled may be laid at the feet of those preparing the document. It is I believe better practice, and much more prudent, to have the affiant sign an exhibit slip for each exhibit attached.

[20] In the final analysis, however, my orders are as follows:

1. The Application for Interim Payment is dismissed.
2. The Claim is stayed pending referral to arbitration.
3. Liberty to apply
4. Costs to the Defendant to be taxed or agreed.

**David Batts**  
**Puisne Judge**