

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA

Civil Action No. HBC 108 of 2016

BETWEEN : **ROADWORX FIJI LIMITED** a limited liability company
having its registered office in Nadi, Fiji.

PLAINTIFF

AND : **FLETCHER CONSTRUCTION (FIJI) LIMITED** a limited
liability company having its registered office in Fiji and of
Wailada Estate, Lami, Suva, Fiji.

DEFENDANT

Counsel : Mr Ronal Singh for Defendant/Applicant

: Mr K. Patel for Plaintiff/Respondent

Date of Hearing : 20.10.2016

Date of Ruling : 20.10.2016

R U L I N G

Introduction

1. This is an application for stay of proceedings filed by the Defendant/Applicant ('the applicant'). The applicant filed notice of acknowledgement of service of writ of summons and thereafter filed notice of summons to stay court proceedings ('the application'). The application seeks the following orders:

1. *An order that all further proceedings in this actions be stayed*
2. *A declaration that in the circumstances of the case this Honourable Court has no jurisdiction to hear and determine the subject matter of the claim and/or to grant the relief/remedy sought in the action*

3. *An order for costs to be paid by the Plaintiff to the Defendant/Fletcher Construction (Fiji), a division of Fletcher Building (Fiji) Limited, on an indemnity basis.*

UPON THE GROUNDS that:

- a) *The defendant is a non-existing party; and*
 - b) *the parties have submitted to arbitration in express terms (meaning the High Court has no jurisdiction over the matter at this stage)*
2. The application is supported by an affidavit sworn by John Matthews, the Director of Fletcher Construction (Fiji), a division of Fletcher Building (Fiji) Limited. The applicant also filed affidavit in response to the affidavit in opposition of Fazil Nazim.
 3. The respondent filed an affidavit in opposition of Fazil Nazim.
 4. At the hearing, both parties orally argued the matter and only the defendant filed written submissions. The plaintiff did not file any.

Background

5. In May 2015, Roadworx Fiji Limited ("**RFL**") entered into a written subcontract with Fletcher Construction (Fiji), which is a division of Fletcher Building (Fiji) Limited ("**FBL**") ("**the Agreement**").
6. In January 2016, the Agreement was determined by FBL following a dispute with RFL.

7. In June 2016, RFL issued these proceedings against Fletcher Construction (Fiji) by filing the Writ of Summons (“Writ”) and the Statement of Claim (“Claim”).
8. The Agreement clearly records that Fletcher Construction (Fiji) is a division of FBL.
9. In the Claim the Plaintiff alleges that Fletcher Construction (Fiji), amongst other things, unilaterally terminated the Agreement by not making payments as required under the Agreement.
10. On 22 June 2016, the Defendant filed an acknowledgement of Service of the Writ of Summons (“Acknowledgment”) and on 8 July 2016, formally applied to stay the proceedings and challenge the jurisdiction of the Court.
11. On 31 August 2016, the Plaintiff filed an amended writ of summons without leave of the Court.
12. Subsequently, after filing the purported amended writ of summons the Plaintiff filed the affidavit in opposition of Fazi Nazim.

The Law

13. The Application is made pursuant to:
 - a) Section 5 of the Arbitration Act Cap 38 (“Act”)
 - b) Order 12, Rule 7 of the High Court Rules 1988 (“HCR”); and
 - c) The inherent jurisdiction of the Court.
14. Section 5 of the Arbitration Act provides:

“Power to stay proceedings where there is a submission

5. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any other 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 any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings, and that court, if satisfied that there is no 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.”

15. Section 3 of the Act states:

“Submission to be irrevocable and have effect as an order of the court

3. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or by mutual consent and have the same effect in all respects as if it had been an order of the court”.

16. With regard to dispute as to jurisdiction, Order 12, rule 7 (1) of the HCR states:

Dispute as to jurisdiction

“7.-(1) A defendant who wishes to dispute the jurisdiction of the Court in the proceedings by reason of any such irregularity as is mentioned in Rule 6 or any other ground shall give notice of intention to defend the proceedings and shall, within the time limited for service of a defence apply to the court for –

(a) An order setting aside the writ or service of the writ on him, or

- (b) *An order declaring that the writ has not been duly served on him, or*
 - (c) *The discharge of any order giving leave to serve the writ on him out of the jurisdiction, or*
 - (d) *The discharge of any order extending the validity of the writ for the purpose of service, or*
 - (e) *The protection or release of any property of the defendant seized or threatened with seizure in the proceedings or*
 - (f) *The discharge of any work made to prevent any dealings with any property of the defendant, or*
 - (g) *A declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the submit matter of the claim or the relief or remedy sought in the action, or*
 - (h) *Such other relief as may be appropriate*
- (5) ***A defendant who makes an application under paragraph (1) shall not be treated as having submitted to the jurisdiction of the court by reason of his having given notice of intention to defend the action; and if the court makes no order on the application or dismiss it, the notice shall cease to have effect, but the defendant may, subject to rule 6(1), lodge a further acknowledgement of service and in that case paragraph (6) shall apply as if the defendant had not made any such application.*** [Emphasis added]

Determination

17. The defendant makes an application pursuant to O.12, r.7 (1) disputing the jurisdiction of the Court in the proceedings by reason of Arbitration Clause 23 of the Agreement entered between the parties and seeking orders under section 5 of the Act staying the proceedings.

18. The application is made on grounds that (a) the Defendant is a non-existent party and that the Parties have submitted to arbitration in express terms, i.e. the High Court has no jurisdiction over the matter at this stage.
19. It was not disputed that there is an arbitration Clause in the agreement entered between the parties. Clause 23 of the Agreement states:

“23. DISPUTES AND ARBITRATION

*In case any dispute or difference arise between the subcontractor and the contractor either during the progress of the works or after the determination abandonment, or breach of this subcontract, as to the construction of this subcontract, or as to any matter or thing of whatsoever nature arising hereunder or in connection therewith, **then either party shall give to the other notice in writing of such dispute or difference and at the expiration of three days unless it shall have been otherwise settled such dispute shall be and is hereby submitted to the arbitration of a suitably qualified arbitrator acceptable to both parties.***

The award made by the said Arbitrator shall be final and binding to both the Contractor and subcontractor and neither party shall be entitled to commence or maintain any action upon any such dispute or differences until such matter shall have been referred or determined or herein before provided, and then only for the amount of relief to which the Arbitrator by his award finds either party is entitled, and the costs of the submission, reference and award shall be in the discretion of the said Arbitrator.

Notwithstanding anything hereinbefore contained in the event that any dispute or difference referred to above shall also involve a dispute or difference between the Principal and the Contractor, the Subcontractor shall be bound by any decision relating to such dispute

or difference made by the Arbitrator in any Arbitration conducted pursuant to the terms of the Head Contract, and in all respects the Subcontractor agreed to be bound by the rulings of the Architect, Engineer or Supervising Officer or any Arbitration given pursuant to the Head Contract to the same extent and in the same manner as the Contractor is so bound. Any submission to arbitration under this clause shall not relieve either party of any of his obligations under this contract.”

20. In its affidavit in opposition filed on 5 September 2016 the Plaintiff Company agrees that the ‘Subcontract Agreement’ at para 23 contains an arbitration clause. However, the plaintiff states that the Defendant has submitted itself to the jurisdiction of the Court by filing the Acknowledgement of Service of Writ of Summons and by stating that the Defendant does intend to contest the proceedings before filing the summons to stay court proceedings (See para 7 of the affidavit in opposition).

21. Counsel for the plaintiff, Mr Patel submits that the Defendant has submitted to the jurisdiction of the court by filing acknowledgement of service and by stating therein that the defendant does intend to contest the action. He cited the case authority of ***Digicel Fiji Limited v Fiji Rugby Union*** (Civil Action No. 30 of 2014), where Hon. Justice Kumar refused stay of proceedings when such application was made by the defendant after filing affidavit in opposition to an application for interim injunction. Digicel case (above) cited by the plaintiff has no application to the present case. In the matter at hand the defendant did not file any pleading except for acknowledgement of service. I therefore reject as untenable the contention advanced by the plaintiff that the defendant has submitted to the jurisdiction of the court by filing acknowledgement of service. A defendant who makes an application to dispute the

jurisdiction of the court could not be treated as having submitted to the jurisdiction of the court by reason of his having given notice of intention to defend the action.

22. Undoubtedly, it is clear that cl.23 of the Agreement entered into between the parties have irrevocably submitted to arbitrate the dispute or differences.
23. Section 5 of the Arbitration Act empowers the Court to stay the proceedings if it is satisfied that there is no sufficient reasons 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.
24. By reason of cl.23, the parties have irrevocably submitted to arbitrate the dispute or difference that may arise between them in respect of the agreement. Pursuant to section 3 of the Arbitration Act, a submission, unless a contrary intention is expressed therein, except by leave of the court or by mutual consent and shall have the same effect in all respects as if it had been an order of the court.
25. The plaintiff might have sought recourse through arbitration in accordance with the arbitration clause. The plaintiff has brought this legal action against the defendant in violation of arbitration clause. After submitting to arbitration the plaintiff should not have brought this action without the leave of the court or should have brought with the mutual consent of the defendant.

26. The defendant still remains ready and willing to do all things necessary to the proper conduct of arbitration. The defendant under para 5 of the affidavit in response states that Fletcher was, and remains, ready and willing to do all things necessary to enable all the matters in dispute to be determined by arbitration in accordance with the provisions of the arbitration agreement.
27. **In re Hinterland (Fiji Limited)** [2005] FJHC 655, Justice Connors, in striking out the proceedings, stated that:

*“... I am also of the opinion that the contract entered into by my parties requires that any dispute including the current dispute be referred to Arbitration. I do not accept the submission made on behalf of the petitioner that there is indeed no dispute between the parties. It is clear from the documents annexed to the affidavit filed on behalf of the petitioner that there is in fact a dispute. **There being a dispute, that dispute is required to be determined by Arbitration and until such time as that occurs then this court has no jurisdiction to deal with the matter or any other dispute arising out of the contract entered into between the parties...**”* [Emphasis added]

Non-existent company

28. Further, the plaintiff has filed its claim against a non-existing party, **FLETCHER CONSTRUCTION (FIJI)** a limited liability company. The plaintiff, Roadworx Fiji Limited (**RFL**) entered into a written subcontract with Fletcher Construction Fiji, which is a division of **Fletcher Building (Fiji) Limited**. In fact the plaintiff should have instituted the proceedings against Fletcher Building (Fiji) Limited and not against Fletcher Construction (Fiji), which is a non-existent company. Having conceded this point the plaintiff filed an amended writ of summons substituting Fletcher Building (Fiji) Limited as defendant in place of the current defendant, Fletcher Construction (Fiji) Limited, which is a non-existent company. It will be noted that the amended writ of summons has been filed without leave of the court after the defendant raised the point in its

application for stay of proceedings that the plaintiff has filed a claim against a non-existent company. The amended writ of summons consists of substitution of a party. As such it should have been done with the leave of the court (see O.20, r. 1 (3) of HCR). I therefore disregard the amended writ of summons filed by the plaintiff. I should say even if the amended writ of summons is allowed by the court it will not affect the decision of the court on the application to stay proceedings on the ground of submission to arbitration.

Conclusion

29. The court has power under section 5 of the Arbitration Act to stay proceedings where there is submission to arbitration by the parties to the proceedings. It is an admitted fact that the agreement entered between the parties consists of an arbitration clause (cl. 23). According to cl.23 the parties have agreed to arbitration irrevocably. The plaintiff has commenced legal proceedings in this court against the defendant, a party to the submission, in respect of the matter agreed to be referred to arbitration. The defendant after appearance and before delivering any pleadings or taking other steps in the proceedings has applied to the court to stay the proceedings. The defendant was successful in establishing all the requirement envisaged in section 5 of the Act for stay of proceedings. I am satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the defendant 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. I therefore hold that the parties have submitted to arbitration in express terms and that the High Court has no jurisdiction over the matter at this stage. Accordingly, acting under section 5 of the Arbitration Act, I stay the legal proceedings commenced by the plaintiff in this court.

Costs

30. The defendant asks for costs on indemnity basis. The plaintiff should not have commenced the action in the first place against a non-existent party. The plaintiff might have conceded to the application for stay. The plaintiff's conduct appears to be abusive. Counsel for the defendant who is coming from Suva has recorded three appearances in the proceedings. He has done an extensive research and filed a comprehensive written submission. I therefore, taking all into my consideration, order the plaintiff to pay the defendant summarily assessed costs of \$2,850.00, which is to be paid in 21 days from the date of this ruling.

Final Outcome

- 1) Stay of proceedings granted.
- 2) The plaintiff will pay to the defendant-Fletcher Construction (Fiji), a division of Fletcher Building (Fiji) Limited- summarily assessed costs of \$2,850.00 in 21 days from the date of this ruling.

*Hishangis
a. e. l. e. l. i. s*

M H Mohamed Ajmeer

JUDGE

At Lautoka

20th October 2016

