

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2022/0473

BETWEEN:

MICHELLE BATES

Claimant

-and-

KIMBERLY CASSIDY

Defendant

Appearances:

Mr. Sylvester Carrott for the Claimant

Mr. Jarid Hewlett - Amicus Curiae on the subject of Arbitration

Ms. Kimberly Cassidy - Litigant in Person

2023: November 8th;

2024: April 4

RULING

[1] **WILLIAMS, J.:** The narrow issue for determination is whether this landlord and tenant dispute should be referred to arbitration in accordance with the tenancy agreement entered into between the parties?

[2] This matter commenced as a claim for possession, arrears of rent, and mesne profits commenced by Michelle Bates-the Claimant by Fixed Date Claim Form filed on 29th November 2022. The Defendant has entered no Defence to the Claim but has attended court on nearly every occasion when this matter has been heard.

Background

[3] The material facts as contained in the Claimant's affidavit in support of the claim are as follows:

1. The Claimant is the registered proprietor with absolute title of premises known as “The Olive House” located at Ffryes Estate, St. Mary’s, Antigua.¹
2. The Defendant is a tenant of the premises pursuant to a tenancy agreement dated 22nd January 2022. According to the Claimant this tenancy agreement was drawn up by a firm of real estate agents.
3. Under the terms of the tenancy the rent was EC\$5400.00 monthly with an additional US\$130.00 monthly for gardening and another US\$130.00 for pool maintenance.²
4. The Claimant complains that since August 2022 the tenant has paid no rent, gardening, or pool maintenance fees. According to her, the Defendant complains that she has overpaid by US\$3240.00 for the past eighteen (18) months.³
5. The Claimant continues “The rent and arrears are \$20,471.00 far in excess of what she claims to have been an overpayment and I am advised and verily believe to be true that since she agreed to pay the charges with the real estate agents this is not in law my concern.”⁴
6. The Claimant states that as of 24th November 2021, the total including arrears of rent and charges and mesne profits stands at \$21,177.80. Most likely the Claimant means 24th November 2022 based on the date of filing of the Fixed Date Claim and the commencement of the tenancy.⁵
7. The Claimant issued a Notice to Quit which required the Defendant to vacate the premises by 28th October 2022.⁶
8. As previously stated, the Claimant commenced proceedings against the Defendant on 29th November 2022.

[4] The first hearing of this claim took place before the Honourable Justice Dia Forrester on 8th February 2023. At the commencement of the hearing, learned counsel for the Claimant Mr. Carrott indicated that the Defendant having filed no defence, his client was ready to proceed with a summary trial. Mr Carrott also informed the learned judge that the Defendant had vacated the premises although she had briefly returned ostensibly to collect some of her belongings and had assaulted the Claimant in the process.

¹ Affidavit in Support paragraph 2

² Affidavit in Support paragraphs 2 and 3

³ Affidavit in Support paragraph 7

⁴ Affidavit in Support paragraph 8

⁵ Affidavit in Support paragraph 9

⁶ Affidavit in Support paragraph 10

- [5] However, the learned judge referred counsel to clause 5.1 of the lease which states as follows: “All disputes or differences which arise between the landlord and tenant during the term of this Tenancy Agreement will be referred to arbitration by a single arbitrator appointed by the landlord.” The judge therefore questioned whether the court had jurisdiction to hear the claim in light of this clause.
- [6] The learned judge therefore ordered the parties to file submissions on the issue of whether the matter should be referred to arbitration in accordance with the terms of the lease. When the matter came before me for hearing I noted that the Defendant was without the benefit of counsel and thus would be unable to provide submissions on what is a purely legal issue. Mr. Jarid Hewlett graciously volunteered to act as amicus and provide legal submissions to assist the court.
- [7] Mr. Carrott on behalf of the Claimant filed submissions with authorities on 16th May 2023 and supplemental submissions on 11th June 2023. Mr. Hewlett for his part filed submissions on 26th June 2023. On 8th November 2023 Mr. Carrott on behalf of the Claimant made further oral submissions whilst the Defendant indicated verbally that she wished the matter to proceed to arbitration.

Claimant's Submissions

- [8] The Claimant has argued that the arbitration clause in issue is not permitted by legislation namely the **Small Tenements Act**⁷ nor is the clause effective. The Claimant points out that the arbitration clause in issue does not refer to the qualifications of the arbitrator, the procedure to be employed, or whether the arbitrator has the power to tell the tenant to quit the premises. The Claimant also notes that the claim for mesne profits falls outside the arbitration clause as mesne profits can only be claimed after the tenancy has ended and not during the lease as required by the arbitration clause. Thus, the Claimant is of the view that the clause is badly drafted and therefore ineffective. Finally, the Claimant submits that the Defendant has not applied for a stay of proceedings pursuant to **section 5(1)** of the **Arbitration Act**.⁸

Defendant's Submissions

- [9] Mr. Hewlett contends that the arbitration clause contained within the lease agreement is valid and effective according to both statute and common law principles. Thus, it would only be right to permit the parties to be

⁷ Cap. 406 Revised Laws of Antigua and Barbuda

⁸ Cap. 33 Revised Laws of Antigua and Barbuda

bound by their contracted medium of dispute resolution. Further, the court should exercise its powers and consider viva voce evidence from the Defendant as to her willingness to refer this matter to arbitration.

Discussion/Analysis

[10] The starting point is **section 5** of the **Arbitration Act** which provides as follows:

“5(1) If any party to an arbitration agreement or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, before delivering any pleadings or taking any other steps in the proceedings, apply to that 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 agreement, 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, make an order staying the proceedings.”

[11] Apart from the Arbitration Act, at common law, the court has wide discretion to grant a stay of proceedings if it is just and convenient to do so. In **Channel Tunnel Group Ltd. v. Balfour Beatty Construction**⁹ Lord Mustill giving the main judgment of the House of Lords stated:

“First, as to the existence of the power to stay proceedings in a case which comes close to section 1 of the Act of 1975, and yet falls short either because of some special feature of the dispute-resolution clause, or because for some reason an agreement to arbitrate cannot immediately, or effectively, be applied to the dispute in question. It is true that no reported case to this effect was cited in the argument, and in the only one which has subsequently come to light, namely *Etri Fans Ltd. v. N.M.B. (U.K.) Ltd.* [1987] 1 W.L.R. 1110, the court whilst assuming the existence of the power did not in fact make an order. I am satisfied however that the undoubted power of the court to stay proceedings under the general jurisdiction, where an action is brought in breach of agreement to submit disputes to the adjudication of a foreign court, provides a decisive analogy.¹⁰

[12] In terms of procedure Rule 9.8 of the Revised Civil Procedure Rules 2023 provides as follows:

⁹ [1993] 1 All ER 664

¹⁰ [1993] 1 All ER 664 at 667

- (1) A defendant who contends that the court should not exercise its jurisdiction in respect of any proceedings may apply to the court for a declaration to that effect and for a stay of the proceedings.
- (2) Except where a defendant also disputes service, a defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service if one has not been previously filed.
- (3) An application under paragraph (1) of this rule may be made at any time.
- (4) An application under this rule must be supported by evidence on affidavit.
- (5) If on application under this rule the court does not make a declaration, it -
 - (a) May-
 - (i) Fix a date for a case management conference; or
 - (ii) Treat the hearing of the application as a case management conference; and
 - (b) Must make an order as to the period for filing a defence if none has yet been filed.”

[13] In this case, the Defendant has not filed an acknowledgment of service or made an application to stay these proceedings. Mr. Hewlett in addressing this issue states “that the court using its wide case management powers under the CPR, may take viva voce evidence from the Defendant as to her willingness and ability to engage in arbitration and refer the matter to arbitration on its own volition.” He further argues that “Alternatively, if the Defendant retains counsel, she can at any time, make an application under CPR Rule 9.7 and dispute the court’s jurisdiction.”¹¹

Whether there is a dispute capable of being referred to arbitration?

[14] In **Canisby Limited v. Flat Point Limited**,¹² the Court of Appeal outlined the approach to be taken to matters of this nature:

¹¹ Defendant’s submissions at paragraph 16

¹² ANUHCVP2016/0005 decided 13th February 2017 per Carrington JA

(22) “In **Ocean Conversion Limited v Attorney General of the Virgin Islands** at paragraph 17, this Court adopted the approach of the House of Lords in **Heyman and Another v Darwins Limited** that firstly the precise nature of the dispute should be ascertained; secondly, it should be determined whether the dispute is one that falls within the arbitration clause; and thirdly the court should determine whether there is a sufficient reason why the matter in dispute should not be referred to arbitration. The onus on the second and third matters is on the party resisting the referral to arbitration.

(23) In determining the precise nature of the dispute, the Court must have regard firstly to the statement of claim as this is where the grounds which the claimant advances for seeking relief should be laid out. These grounds will only mature into disputes, i.e. issues for determination by the relevant tribunal, so far as they are traversed by the defendant. Where a defendant is seeking to stay court proceedings, he must do so before he files his defence to the statement of claim. It is therefore in his evidence in support of the application for a stay that the precise nature of the dispute should take form.”

[15] In accordance with **Canisby v. Flat Point** quoted above, the onus is on the Defendant to demonstrate that there is a dispute which should be referred to arbitration. This information should be contained in the Defendant’s affidavit in support of the application for a stay pursuant to CPR Rule 9.8. Having failed to file any application or any affidavit evidence in support of a stay, there is no basis for the court to determine whether a dispute which should be referred to arbitration exists. Further, I have come across no authority where the court has stayed proceedings in the absence of an application by a party to the proceedings.

[16] Accordingly, I respectfully disagree with Mr. Hewlett that the Defendant’s viva voce evidence that she wishes the matter to proceed to arbitration may be taken into account. This indication on the part of the Defendant was not under oath and is therefore inadmissible as evidence.

[17] Finally, although pursuant to CPR Rule 9.8(3) an application for a stay may be made at any time, I have taken into account that these proceedings have been filed since November 2022. Although being made aware (via Mr. Hewlett’s submissions) of her right to make such an application the Defendant has failed to do so. It is contrary to the Overriding Objective of ensuring that matters are dealt with expeditiously that the Claimant should continue to wait upon the Defendant to file an application.

Good or sufficient reason why the matter should not be referred to arbitration

[18] In **Ginger Villa Incorporated v Caribbean Developments (Antigua) Ltd**¹³ Master Actie (as she then was) stated “*the overriding position is that contracting parties ought to be held to their bargain and if disputes fall within the scope of an arbitration clause then the Court would uphold the parties' contract to arbitrate and refer the matter unless a good reason is shown by the opposing party why it should not be so.*”

[19] Recently the Privy Council in **Family Mart China Holding Co. v. Ting Chuan**¹⁴ after examining the leading authorities stated:

*“The Board therefore accepts Ting Chuan’s submission that effect should be given to the arbitration agreement unless the agreement is contrary to the public policy of the Islands or there is a rule of law or statutory provision which renders the matters within the scope of the arbitration agreement incapable of resolution by arbitration.”*¹⁵

[20] The authorities quoted above emphasize that parties will normally be held to their agreement to arbitrate. However, in this case, the Defendant has failed to provide any evidence as to whether there is a dispute which is capable of being referred to arbitration. Accordingly, it is not necessary for me to consider the issue of whether there is a good and sufficient reason why the matter should not be referred to arbitration. Accordingly, the court will continue to exercise its jurisdiction with respect to this claim.

Order

[21] The Court therefore orders as follows:

1. The matter shall proceed in accordance with the Revised Civil Procedure Rules 2023.
2. The Defendant is granted an extension of time of (14) days from the date hereof to file a Defence pursuant to Rule 9.8(5) (b) of the Revised Civil Procedure Rules 2023.
3. The claim is listed for further hearing on a date to be notified by the Court Office.

¹³ ANUHCv 2012/0608 decided 17th February 2014 at Paragraph 16

¹⁴ [2023] UKPC 33

¹⁵ At paragraph 29

Rene Williams
High Court Judge

By the Court

Registrar

