

ANGUILLA

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 2020

CLAIM NO. AXAHCV 2019/0013

BETWEEN:

DESMOND PAUL
(TRADING AS UNIQUE LANDSCAPES)

Claimant

and

DCK INTERNATIONAL LLC

Defendant

Appearances:

Ms. Jean M. Dyer, Dyer & Co. of Counsel for the Claimant
Mr. Carlyle Rogers of Counsel for the Defendant

2020: March 19th;
June 19th;
July 20th.

JUDGMENT

- [1] **INNOCENT, J.:** The claimant, Mr. Desmond Paul ('Mr. Paul'), filed a claim against the defendant, DCK International LLC ('DCK'), on 22nd February 2019, seeking the balance due to him from DCK for work done and materials supplied by him pursuant to subcontract agreement dated 13th July 2018 (80255-237) and 30th July 2018 (80255-259) respectively (the 'Subcontracts'), and made between Mr. Paul and DCK; and for additional work undertaken by Mr. Paul at the request of DCK or DCK's servants and/or agents.
- [2] Mr. Paul claimed damages for breach of contract, the sum of US\$33,471.56 being progress payments due and owing to him by DCK and unpaid under the subcontracts for the period 26th October 2018 to 8th November 2018; the sum of

US\$95,400.00 due and owing to him by DCK and unpaid in respect of additional work done by him on a quantum meruit basis; the sum of US\$21,799.83 unpaid by DCK in respect of trucking and heavy equipment services supplied by him; and solicitor's collection commission of US\$15,067.14 being 10% of the total sum due and owed to him.

- [3] DCK was served with the claim form on 22nd February 2019 at Centurion Financial Services Inc. ('Centurion') located at Spencer House, The Valley, Anguilla, DCK's registered agent and DCK's registered office. A copy of the proceedings was personally handed to Mr. John Wigley ('Mr. Wigley'), a director of Centurion.¹
- [4] On 12th March 2019 Mr. Paul filed a Request for Entry of Judgment in Default of Acknowledgment of Service pursuant to CPR 12.4, 12.7, 12.10(4) and (5) (the 'Default Application').
- [5] Judgment in default of acknowledgement of service was granted by the master on 1st April 2019 (the 'Default Judgment'). DCK was ordered to pay Mr. Paul costs, unless otherwise agreed, and the terms and other remedies to be decided by the court on 18th June 2019.
- [6] A copy of the Default Judgment was served on DCK by leaving a copy of the same with the secretary at Centurion.²
- [7] On 18th March 2019, the court directed that Mr. Paul file and serve on DCK all witness statements and written submissions on which he intended to rely on the assessment of damages. The assessment of damages was adjourned to 15th July 2019.
- [8] A copy of the order dated 18th March 2019 was served on DCK on 27th June 2019 by employing the same method as before.³ A copy of the witness statement and

¹ Affidavit of Service filed 25th February 2019

² Affidavit of Service filed 4th April 2019

³ Affidavit of Service filed 1st July 2019

the written submissions were served on DCK on 28th June 2019 by a similar method as before.⁴

- [9] DCK did not comply with CPR 16.2 and filed no notice in accordance with CPR Form 31. DCK did not appear at the assessment of damages hearing on 15th July 2019.
- [10] On 17th July 2019, the court ordered that judgment be entered for Mr. Paul in the sum of US\$224,383.41, disallowed the sum claimed as collection commission and prescribed costs in the sum of US\$18,328.76 in accordance with CPR 65.5 (the 'Judgment Debt').
- [11] Mr. Paul sought to enforce the Judgment Debt by filing a Writ of Execution pursuant to CPR 46 on 23rd August 2019 for the sum of US\$244,586.57 by levying against DCK's goods.
- [12] On 27th August 2019 DCK was served with a copy of the court's order of 17th July 2019 along with a copy of the Writ of Execution.⁵
- [13] On 24th September 2019 DCK applied to have the Default Judgment set aside (the 'Application') pursuant to CPR 13.3(1). Accompanying the Application was the affidavit of Mr. Ray W. Crothers ('Mr. Crothers'), DCK's General Counsel. Exhibited to the Application was a draft defence (the 'Draft Defence')
- [14] The Application was opposed by Mr. Paul who filed an Affidavit in Opposition to the Application.⁶
- [15] On 7th October 2019, DCK filed and served an Amended Notice of Application (the 'Amended Application') that included the additional ground not contained in the Application, namely, that there are exceptional circumstances justifying the setting aside of the Default Judgment pursuant to CPR 13.3(2).

⁴ Affidavit of Service filed 1st July 2019

⁵ Affidavit of Service filed 27th August 2019

⁶ Affidavit in Opposition filed 4th October 2019

[16] The court having determined that the Application was one that could be determined on paper, was ably guided by the written submissions filed by the parties.

[17] CPR 13 sets out the procedure for setting aside default judgments obtained pursuant to CPR 12. CPR 13.3(1) deals with the circumstances where the court may set aside a default judgment if certain conditions are met, and provides:

“If Rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –

- (a) Applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
- (b) Gives a good explanation for the failure to file an acknowledgement of service or a defence as the same case may be; and
- (c) Has a real prospect of successfully defending the claim.”

The provisions of CPR13.3(1) are to be read conjunctively so that a party relying on this rule must satisfy each of the requirements contained therein before the Default Judgment can be set aside.

[18] In the Amended Notice of Application, DCK sought to rely on the provisions of CPR 13.3(2) which provides:

“In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.”

Promptitude

[19] DCK’s application was supported by the first affidavit of Mr. Crothers, general legal counsel for DCK’s legal department in the United States. According to Mr. Crothers, on 21st July 2019 Mrs. Fleming Lake, DCK’s Anguilla counsel, adverted his attention to the fact that he had seen a matter involving Mr. Paul and DCK on the court’s cause list for an assessment of damages. Mr. Crothers maintained that this was the first time that he became aware of the pending litigation.⁷

⁷ At para. 4 first Crothers affidavit

- [20] Mr. Crothers indicated that he was aware that the Default Judgment was extracted from the court's file on 22nd July 2019.⁸ He went on to say that the Default Judgment was sent to his office by Mrs. Fleming Lake and was received on or about 6th August 2019. Mr. Crothers alleges that it was on this occasion that DCK became aware of the Default Judgment and the pending litigation. Mr. Crothers also stated that neither his records nor that of DCK's legal department had prior knowledge of the proceedings.⁹
- [21] On 12th August 2019, Mr. Crothers says he telephoned Centurion and spoke to Mr. Ravi Bahadursingh (Mr. 'Bahadursingh') regarding the proceedings. He also stated that he tried to contact Centurion on 21st August 2019 by email at which point he was advised by Mr. Bahadursingh that service was effected on Centurion and that the documents had been forwarded to one Mr. Puzo, presumably for onward transmission to DCK's Anguilla counsel.¹⁰
- [22] Not surprisingly, Mr. Paul took issue with the explanation given by DCK for the failure to act promptly to set aside the Default Judgment. Mr. Paul's opposition to DCK's assertions arises primarily within the context of the chronological timeline of events relied on by DCK as appears from Mr. Crothers' affidavits.
- [23] According to Mr. Paul, the Crothers' affidavit did not state when Mrs. Fleming Lake saw the cause list, which was in fact circulated by the court office on 12th July 2019, and the electronic communication of the same was also addressed to Mrs. Fleming Lake. It appears that the matter was only brought to Mr. Crothers' attention by Mrs. Fleming Lake some nine days after the list was circulated.¹¹
- [24] Mr. Paul, in his affidavit, also alluded to the dates on which the claim form, Default Judgment and application for assessment of damages were served on DCK's registered agent in Anguilla (Centurion). In particular, Mr. Paul pointed out that the

⁸ At para. 5 first Crothers affidavit

⁹ At para. 6 first Crothers affidavit

¹⁰ At para. 7 first Crothers affidavit

¹¹ At para. 4 Paul's affidavit

Default Judgment was only dispatched to Mr. Crothers by Mrs. Fleming Lake some 15 days after she retrieved a copy from the court's office.¹²

- [25] According to Mr. Paul, the application to set aside the Default Judgment was filed one hundred and seventy-two (170) days after the claim had been served on DCK's registered office, and sixty-three days (60) after DCK caused a search of the court's file to be made.
- [26] In the circumstances, Mr. Paul contends in his affidavit that DCK's conduct fell nothing short of being entirely contumelious. Therefore, Ms. Dyer, counsel for the claimant argued that DCK has failed to satisfy the requirements of both CPR 13.3(1)(a) and CPR 13.3(1)(b).
- [27] The general principle is that although CPR 13.3(1)(a) does not specify any time, the court ought to scrutinize the peculiar circumstances of each case in making a determination as to whether or not a party has applied to the court as soon as reasonably practicable after finding out that a default judgment has been entered against them.

Good Explanation

- [28] In his first affidavit, Mr. Crothers gives what purports to be an explanation, which he held out as amounting to a good reason for the failure to file an acknowledgment of service or a defence to the claim.¹³
- [29] Essentially, the explanation proffered for the failure was what can be conveniently described as the systemic failure of DCK's legal department's email server. According to Mr. Crothers, he discovered that DCK's "internal IT processes failed" in such a way that they "did not deliver the email from Mr. Bahadursingh to an inbox in the manner expected, within DCK's legal department, which would have alerted them to the claim and permit DCK to take the necessary steps." This internal email failure, Mr. Crothers alleged, was totally outside of DCK's control.

¹² At paras. 6-9 Paul affidavit

¹³ At paras. 8-12 first Crothers affidavit

- [30] Ultimately, Mr. Crothers insisted that the court should accept this as a good explanation for the failure because, inasmuch as DCK accepts responsibility for what transpired, “the fact is that in an increasingly technological age these mishaps occur”.¹⁴
- [31] Mr. Crothers then appears to take the very quantum leap of suggesting that the court should also consider the aforementioned explanation for the failure as amounting to exceptional circumstances for the purposes of CPR 13.3(2).
- [32] Ms. Dyer argued that, the matters relied on by DCK as being a reasonable explanation for the failure to file an acknowledgment of service or a defence are highly untenable and ought not to be countenanced by the court. Ms. Dyer relied on the provisions of section 245 of the Companies Act¹⁵ in support of her contention that service had been properly effected on DCK.
- [33] It appears that DCK seeks to lay the blame for the noncompliance with the CPR squarely at the feet of their Anguilla counsel. However, this explanation cannot avail DCK. Mr. Crothers stated in his affidavit that the proceedings were received by Mr. Puzo and Mr. Bahadursingh. The failure of Mr. Puzo and/or Mr. Bahadursingh, both servants and/or agents of DCK, to inform their principals of the pending litigation was entirely the fault of their own agents, which fault can be clearly imputed to them.
- [34] In the court’s considered view, specific evidence to account for the failure of DCK’s registered agent to inform DCK of the pending litigation or the Default Judgment has not been provided.
- [35] In addition, no direct evidence came from either Mr. Bahadursingh or Mr. Puzo to account for the reasons for their failure to inform DCK of the pending litigation. In

¹⁴ At para 14 first Crothers affidavit

¹⁵ **245.** A notice or document may be served on a company—

(a) by leaving it at, or sending it by telex or telefax or by prepaid post or cable addressed to, the registered office of the company; or

(b) by personally serving any director, officer, receiver, receiver-manager or liquidator of the company.

the court's opinion, the explanations given for the failure to file an acknowledgement of service or a defence does not amount to a good explanation at all.

[36] The matters put forward by DCK as amounting to a good explanation for the failure, fails to properly explain how the failure came about. The explanation given by Mr. Crothers on behalf of DCK connotes real or substantial fault on the part of DCK, its servants and/or agents. Therefore, it cannot be said that DCK has provided a good explanation for the failure. In other words, to describe a good explanation as one which properly explains how the failure came about simply begs the question of what is a good explanation.¹⁶

[37] In the court's view, it is difficult to see how inexplicable and inexcusable oversight can ever amount to a good explanation. This is even more so the case where the explanation for the failure amounts to administrative inefficiency.¹⁷

[38] In the case of **The Marina Village Limited v St. Kitts Urban Development Corporation Limited**,¹⁸ the appellant's explanation for the failure to file an acknowledgment of service was almost an analog of the explanation given by DCK in the present case. The appellants in **Marina Village Limited** set out in the affidavit of its director that essentially it was not aware of the claim form and statement of claim. The reasons advanced why it was not aware of the claim were (i) its P.O. Box was not manned regularly, rather periodic checks were made by one Ms. Morton who was not an employee of the appellant; (ii) the respondent was aware that the appellant's directors and shareholders are based in New York and in the past they communicated with the appellant by sending correspondence to the New York address; (iii) on receiving the claim form and statement of claim on 17th October 2014, the appellant immediately sought assistance from counsel in St. Kitts to deal with the claim but was only able to get assistance on

¹⁶ Attorney General v Universal Projects Limited [2011] UKPC 37 at para. 23

¹⁷ *Infra*

¹⁸ [2016] ECSCJ No. 98

19th November 2014, and the acknowledgement and defence were filed on 21st November 2014.

[39] The Court of Appeal held, per Thom JA that:

"CPR 13.3(1) (b) requires that an applicant who seeks to engage the discretion of the court to set aside a default judgment must give a good explanation for failing to file the acknowledgement of service or defence. The explanation given by the appellant as set out in the affidavit of its director is essentially that it was not aware of the claim form and statement of claim. The reasons advanced why it was not aware of the claim are: (i) the P.O. Box was not manned regularly, rather periodic checks were made by one Ms. Morton who was not an employee of the appellant; (ii) the respondent was aware that the appellant's directors and shareholders are based in New York and in the past they communicated with the appellant by sending correspondence to the New York address; (iii) on receiving the claim form and statement of claim on 17th October 2014, the appellant immediately sought assistance from counsel in St. Kitts to deal with the claim but was only able to get assistance on 19th November 2014 and the acknowledgement and defence were filed on 21st November 2014.

The learned judge having considered the explanation found it was not a good explanation. She found the reason why the appellant did not become aware of the claim form until October 2014, was in effect due to its own administrative inefficiency.

Every company incorporated in St. Kitts is required by law to have a registered office in St. Kitts and whenever there is a change in the address of the registered office, the company is required to notify the Registrar of Companies of its new address. The registered office is the official place at which the public is able to communicate with the company. It is the place at which service of legal process may be effected on the company. CPR 5.7 specifically states that:

"Service on a limited company may be effected -

- (a) by leaving the claim form at the registered office of the company;
- (b) by sending the claim form by telex, FAX or prepaid post or cable addressed to the registered office of the company."

The appellant by its own deliberate action determined not to ensure that there were adequate administrative arrangements in place to access correspondence sent to it in a timely manner. The appellant cannot rely on the consequences of its own deliberate action as a good explanation. In

these circumstances, I find that there is no merit in this ground of the appeal.”¹⁹

Real Prospect of Successfully Defending the Claim

- [40] In respect of whether DCK had a real prospect of successfully defending the claim, Mr. Crothers alluded to the fact that the subcontracts relied on by Mr. Paul as the basis of his claim against DCK specifically provide for dispute resolutions that are tied to other disputes and are outside the jurisdiction of the court in Anguilla. In this regard, DCK relies on what is contained in its Draft Defence exhibited to their Application.
- [41] The Draft Defence appears to raise several issues of both law and fact arising out of the performance of the contractual obligations of Mr. Paul and DCK set forth in the terms of the subcontracts whereby DCK disputes the payments owed to Mr. Paul. Therefore, on the basis of what is canvassed in the Draft Defence, there appears to be no doubt that DCK may have a real prospect of successfully defending the claim on the basis of the court assuming that the facts pleaded in the defence are true. The matters contained in the Draft Defence are not fanciful but raised real issues that may very well have been best left to be resolved at trial, assuming that the matter goes forward based on the view that the court forms of DCK’s assertions in relation to CPR 13.3(2).
- [42] However, the court notes that the averments made by DCK in its Draft Defence, to the extent that it intends to bring a cause of action against Mr. Paul for alleged breaches of the terms of the Subcontracts, is of no relevance to the present proceedings. DCK may very well chose to bring a separate claim to recover damages in relation to any such alleged breach. Also worthy of note is that DCK has not submitted a draft defence and counterclaim and neither have they specifically relied on setoff in their Draft Defence.
- [43] However, of particular interest is DCK’s averment in its Draft Defence that:

¹⁹ At para. 25-27

“Further, the Defendant asserts that as per the attached subcontract, Exhibit C, this Honourable Court has no jurisdiction to rule on this dispute because the Choice of Law and Dispute Clause set out in Section 33 of the said Exhibit C, incorporates the General Contract and Agreement which binds the Claimant and Defendant to the Owner’s Contract as per Section 1.D. The subcontract, which is the basis of the dispute between the Claimant and Defendant in this matter before this Honourable Court, is governed by the law of contract and the contract with the Owner referenced above. The Contract with the Owner is governed by and construed in accordance with the laws of the State of New York (Section 17).

The subcontract provisions also require mediation, arbitration, and include an agreement to stay all actions pending closure of Owner and Contractor disputes and the Contractor is currently in a dispute with the Owner on payment.”²⁰

- [44] Although, the arguments advanced by Ms. Dyer did not deal specifically with the issue of whether or not DCK had a real prospect of successfully defending the claim, it appears that inasmuch as DCK relies on the terms of the subcontract agreements and the General Contract as amounting to part of its defence, the court will treat Ms. Dyer’s arguments in relation to the jurisdictional point in relation to this aspect of the case as well. Indeed, as Ms. Dyer rightly points out, once DCK fails on any of the limbs of CPR 13.3(1), then the application to set aside the Default Judgment fails.
- [45] Therefore, it seems that Ms. Dyer’s main focus, having contended that DCK can succeed on none of the other grounds contemplated by CPR 13.3(1), was as it relates to countering DCK’s arguments as they relate to exceptional circumstances under CPR 13.3(2).
- [46] Ms. Dyer’s arguments in opposition to DCK’s position regarding CPR 13.3(1)(c), brings to the fore the jurisdictional point and issues regarding forum conveniens. Ms. Dyer expressed the view that the claim for breach of contract relates to matters arising in Anguilla and that the subcontracts required performance in

²⁰ Paras. 23-24 Draft Defence

Anguilla. Therefore, Ms. Dyer contended that the question of the court's want of jurisdiction clearly does not arise.

[47] In addition, Ms. Dyer refuted the underlying basis of DCK's contention on the ground that DCK never elected to proceed to mediation or arbitration and, in any event, the provision for arbitration contained in the Subcontracts was not binding on Mr. Paul.

[48] In the premises, Ms. Dyer denied that DCK has any reasonable prospect of successfully defending the claim on that basis.

[49] In any event, the court having already determined that DCK has failed on the first two limbs of CPR 13.3(1), sees no need to further scrutinize the merits of DCK's defence to the claim. In addition, it appears from what is contained in DCK's Draft Defence exhibited to the present application, that DCK alleged certain breaches of the Subcontract by Mr. Paul and alluded to their intention to file a separate claim against Mr. Paul on that basis. It also appears that given certain concessions made in the legal submissions filed on behalf of DCK that they seemed to have abandoned in its entirety the grounds advanced in relation to CPR 13.3(1) and have focused their energies on CPR 13.3(2). Furthermore, as will be seen, the court's findings in relation to the jurisdictional point and the alternative dispute resolution procedures contained in the Subcontracts would, in any event, determine the question of whether DCK had a real prospect of successfully defending the claim.

[50] In the premises, the critical issue which the court has to decide is whether the question of the court not having jurisdiction to hear the claim and the provisions of the conditional arbitration/mediation agreement in the manner advanced by DCK, can amount to special circumstances for the purposes of CPR 13.3(2).

Exceptional Circumstances

- [51] This appears to be the more technical aspect of the present application. DCK appears to be relying on exceptional circumstances as a fallback position should the court find that DCK has not satisfied the three pronged test of CPR 13.3(1).
- [52] The court having found that DCK has failed to satisfy the threefold test of CPR 13.3(1), the court must now consider whether DCK can succeed under CPR 13.3(2) on the basis of exceptional circumstances.
- [53] It appears that DCK relies on exceptional circumstances in two main respects. Firstly, in respect of what DCK held out as being a good explanation for the failure to file an acknowledgement of service or a defence; and secondly, the jurisdictional point in relation to the governing law and the arbitration clause in the subcontract.
- [54] Therefore, the issue that arises is whether any of the two matters upon which DCK relied can amount to exceptional circumstances for the purposes of CPR 13.3(2).
- [55] In support of their exceptional circumstances argument, DCK relies on the decision in **Meyer v Baynes**²¹ and what is contained in Mr. Crothers' second affidavit to establish the grounds put forward as exceptional circumstances.²²
- [56] It is evident that separate and apart from relying on some of the matters contained in Mr. Crothers' first affidavit as indicated previously, as amounting to exceptional circumstances, DCK also relies on the 'Choice of Law and Dispute' clauses contained in the Subcontract which DCK contends binds Mr. Paul to the 'Owner's Contract'. It also appears that DCK intends to rely on the terms and conditions with respect to the dispute resolution clauses and choice of law clauses to dispute the court's jurisdiction and to obtain a stay of the proceedings.

²¹ [2019] UKPC 3

²² At paras. 46 et seq. second Crothers affidavit

- [57] The issue that arises, and was succinctly described by Ms. Dyer in her written submissions, is whether Mr. Paul agreed to be bound or was bound by the terms of the General Contract which provided for the exclusive jurisdiction of the Federal and State Courts of the State of New York; and, if so, whether this amounts to a compelling reason (exceptional circumstances) for setting aside the Default Judgment.
- [58] In the court's view, Ms. Dyer rightly concluded that the resolution of this issue is entirely dependent on the construction placed on the relevant terms of both the General Contract and the Subcontracts.
- [59] According to Ms. Dyer, on its proper construction clause 33 of the subcontracts should be read in the following manner. Ms. Dyer argued that clause 33 of the subcontract does not in fact contain a 'jurisdiction clause'. According to Ms. Dyer, the construction placed on clause 33 of the Subcontracts by DCK has been mischaracterised as such. In Ms. Dyer's words, "the claimant merely thereby agreed for the subcontract to be interpreted and governed by the law stated in the General Contract".
- [60] DCK, she said, had not pleaded and proved that such an interpretation could be placed on clause 33. Ms. Dyer contended that matters of foreign law are questions of fact which must be specially pleaded and proved. Therefore, Ms. Dyer opined, that in the absence of expert evidence on the "foreign law applicable", clause 33 ought to be interpreted in accordance with domestic law.
- [61] Ultimately, Ms. Dyer contended that clause 33 of the Subcontracts ought to be treated instead as a "proper" or "applicable law" clause and not as an "exclusive jurisdiction" clause for the purposes of the present proceedings.
- [62] The next issue raised by Ms. Dyer was, whether the conditional agreement to arbitrate contained in the Subcontracts amounted to an arbitration agreement which bound Mr. Paul.

- [63] According to Ms. Dyer, the terms of the purported arbitration clause are not mandatory to the extent that Mr. Paul is inescapably bound to observe it. In Ms. Dyer's words, "The wording of clause 33(b) does not constitute a binding agreement" mandating arbitration. Ms. Dyer, argued that, clause 33 does not "create an immediate binding contract to arbitrate". Ms. Dyer further argued, that clause 33(b) only gave DCK a unilateral option to "nonbinding mediation" or "nonbinding arbitration".
- [64] The cusp of Ms. Dyer's argument on this point appears to be that Mr. Paul agreed that upon written request by DCK to join in and be bound, if the dispute was related to a dispute between the owner Belmond Cap Juluca (the 'Owner') and DCK. Ms. Dyer therefore contended that until DCK so elected a conditional agreement to arbitrate was not an immediately binding arbitration agreement to which Mr. Paul automatically became a party. In support of this contention Ms. Dyer relied on the decision in **Anzen Limited v Hermes One Limited**²³ in support of this proposition.
- [65] Distilled to its essence, Ms. Dyer's argument was that a binding arbitration agreement would have only come into existence in the event that DCK had elected to refer the dispute to arbitration, in which case they did not, and a dispute arose between the Owner and DCK, in which case no such dispute was extant.
- [66] In the premises, Ms. Dyer argued that the court's jurisdiction was not ousted by clause 33 of the Subcontract because there was no binding agreement for mandatory arbitration. That being the case, Mr. Paul, in bringing the present claim, had not circumvented the conditional agreement to arbitrate. According to Ms. Dyer, Mr. Paul was exercising the only option available to him under the subcontract. To support this argument Ms. Dyer relied on the decision in **Blayle Corporation Ltd. v James Todman DCK Construction (SPV) Ltd. and others**.

²³ [2016] UKPC 1

- [67] Ms. Dyer went on further to contend, that the time prescribed by the subcontracts for DCK to exercise its election to refer the matter to arbitration was “in the event a judicial proceeding is instituted by the subcontractor at any time prior to the last day to answer and/or appear to the summons and/or complaint of the subcontractor”. Therefore, Ms. Dyer argued that the time by which DCK was required to exercise the option and refer the dispute to arbitration had long expired.
- [68] In relation to the jurisdictional point, Ms. Dyer submitted that by making this application DCK has submitted to the jurisdiction of the court. Not surprisingly, Ms. Dyer took the position that DCK had not sought to have the proceedings stayed, or challenge the court’s jurisdiction.
- [69] In the circumstances, Ms. Dyer concluded that for all of the abovementioned reasons, exceptional circumstances under CPR 13.3(2) cannot avail DCK.
- [70] Contrary to Ms. Dyer’s submissions, Mr. Carlyle Rogers, counsel for DCK, contended that clause 33 of the Subcontracts must be read in conjunction with clauses 14 and 17 of the General Contract because as per clauses 1D and 2A of the subcontracts, the terms of the General Contract are incorporated into the subcontracts. In Mr. Rogers’ words:
- “This qualifies as a knock-out point and an exceptional circumstance in line with CPR 13.3(2) and *Meyer v Baynes* ... which calls for something more than just a realistic prospect of success. The universe of exceptional circumstances is infinite and the Court must look at each scenario on a case by case basis. Where there is a clear jurisdictional clause and procedure which oust the jurisdiction of the Court this is certainly an exceptional circumstance warranting the setting aside of the default judgment.”
- [71] It is worthy to note that DCK neither applied to stay the proceedings nor to dispute the court’s jurisdiction. In the circumstances, the question that arises is, whether DCK can rely on the alleged arbitration clause and the issue of *forum non conveniens* as amounting to exceptional circumstances warranting the setting aside of the Default Judgment.

Whether Mr. Paul is bound by the terms of the General Contract

[72] Section 14 of the General Contract made between DCK and the Owner sets out the procedure for the resolution of disputes between DCK and the Owner. Section 14.1 of the General Contract mandates that DCK and the Owner conduct negotiations towards a settlement in good faith. Section 14.2 of the General Contract sets out the procedure for Arbitration and specifically provides that:

“14.2.1 If any Dispute cannot be settled to the mutual satisfaction of the Parties pursuant to section 14.1, then either party may demand binding arbitration by the American Arbitration Association (the ‘AAA’) under its Construction Industry Arbitration Rules, including its Procedures for Large and Complex Construction Disputes and Fast Track Procedures, and judgment on the award rendered by the arbitrator(s) shall be binding on the parties and may be entered in any court having jurisdiction thereof. The arbitration shall take place in New York, New York.”

[73] In addition, Section 14.2.3 of the General Contract provides:

“Belmond and the Contractor, and the Contractor’s Subcontractors ...concerned with the construction of the structure are bound, each to each other, by this Section, provided they have (1) signed this Agreement or an agreement that incorporates this Agreement by reference; or (2) signed any other agreement to be bound by this Section. Each such party agrees that it may be joined as an additional party to an arbitration involving other parties under any such agreement.....”

[74] In determining the question of whether Mr. Paul is bound by the arbitration clauses contained in the General Contract, the court will, out of necessity, examine the terms of the Subcontracts, in particular the provisions of Section 33 under the rubric “Choice of Law and Disputes”.

[75] The relevant portions of Section 33 of the Subcontract with which the court is presently concerned and the interpretation of which forms the pith and substance of the arguments advanced before the court, are paragraphs B to D which provide as follows:

“B. Subcontractor agrees that any dispute of any kind, nature or description or any controversy or claim arising out of or relating to this Subcontract or breach thereof may, solely at the Contractor’s election, be settled by non-binding mediation or by binding

arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.

- C. Contractor shall have the right to elect to proceed to non-binding mediation or binding arbitration, as described in paragraph (b) above, at any time prior to the commencement of a judicial proceeding by the Subcontractor, or in the event a judicial proceeding is instituted by the Subcontractor, at any time prior to the last day to answer and/or appear to a Summons and/or Complaint of the Subcontractor.
- D. If the Owner and the Contractor, pursuant to the General Contract or by agreement, submit any dispute, controversy, or claim between them to arbitration or some other disputes resolution procedure specified in the General Contract and such a matter involves or relates to a dispute, controversy, or claim between the Contractor and the Subcontractor, Subcontractor agrees (i) to join in and be bound by the same arbitration or other disputes resolution procedure upon written request by the Contractor and (ii) to stay any action filed by the Subcontractor until the dispute resolution and appeals process between the Contractor and the Owner is exhausted. If the Owner refuses to allow this joinder (joinder) of the Subcontractor, Subcontractor agrees (i) to cooperate with the Contractor ... (v) to stay any action filed by the Subcontractor until the dispute resolution and appeals process between the Contractor and the Owner is exhausted, and (vi) to be bound by the results of the arbitration or other disputes resolution procedure as it relates to the dispute, controversy or claim of the Subcontractor.”

[76] It appears from the foregoing provisions of the Subcontract that the dispute resolution procedures and the arbitration were contingent or conditional on the occurrence of certain events mentioned in the provisions of Section 33B-D. To this extent it appears that the agreement to arbitrate was conditional.

[77] This leads to the question of what interpretation ought to be placed on the provisions of Section 33 of the Subcontract.

[78] The provisions of Section 33B specifically states that any dispute, controversy or claim arising or relating to the Subcontract or breach thereof, may, solely upon the Contractor's election, be referred to mediation or arbitration. In the circumstances, the right to elect a referral to a dispute resolution procedure is exclusive to the

Contractor. The Subcontractor has no right to elect the referral of a dispute, controversy or claim to a dispute resolution procedure. Therefore, the Contractor would first have to exercise his election; otherwise the Subcontractor would not be bound by the provisions of Section 33B. On the contrary, in the event that the Contractor so elects, then, the mediation and arbitration agreement would be triggered and the same conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.

[79] In the present case, it does not appear that any such election had been made by the Contractor. In fact, it appears that the legal practitioner acting for Mr. Paul had, prior to the filing of the claim, sent to DCK's Anguillian counsel a letter before suit, which in the court's view must have or at the very least ought to have placed DCK on notice that a dispute had arisen concerning the Subcontract. Therefore, DCK ought to have, if they so desired, elected to have the dispute referred to dispute resolution in accordance with the terms of Section 33B of the Subcontract.

[80] The Contractor's right to elect mediation or arbitration also arises within the context of Section 33C of the Subcontract. Under Section 33C, DCK had two options, as the court sees it. Firstly, make its election at any time prior to the commencement of a judicial proceeding by Mr. Paul; and secondly, in the event that Mr. Paul instituted judicial proceedings, make its election in accordance with Section 33C of the Subcontract. DCK exercised none of these two options.

[81] The court is of the opinion that given its findings in relation to the issues in the present case as they relate to CPR 13.3(1), it would appear absurd, at this stage, to set aside the Default Judgment when DCK clearly failed to take advantage of its right to elect pursuant to Section 33C of the Subcontracts. Indeed, as Ms. Dyer rightly pointed out in her written submissions, the time for DCK to exercise its election under Section 33C of the Subcontracts has already expired.

[82] However, the court has found that the provisions of Section 33D of the Subcontract envisages an entirely different situation from those of Sections 33B and 33C. Section 33D of the Subcontract envisages a situation where there is a

dispute, controversy or claim between the Contractor and the Owner that involves or relates to a dispute, controversy or claim between the Contractor and the Subcontractor. To this extent the provisions of Section 33D are also conditional. In other words, the Subcontractor can only agree to be bound if the dispute, controversy or claim “involves or relates to a dispute, controversy or claim between the Contractor and the Subcontractor”.

[83] The issue that emanates from the interpretation given to Section 33D of the Subcontract is whether in the present case there was a dispute, controversy or claim between the Contractor and the Owner that involved or related to a dispute, controversy or claim between the Contractor and the Subcontractor.

[84] In addition to the court’s earlier observations with regard to the grounds advanced by DCK as to what amounts to a reasonable prospect of success pursuant to CPR 13.3(1), it appears that DCK has also relied on the jurisdictional point and the arbitration agreement in support of their contentions in relation to exceptional circumstances.²⁴ Therefore, the court is of the view that DCK has confused reasonable prospect of success with exceptional circumstances for the purposes of CPR 13.3(2). The two concepts are not interchangeable.

[85] In the court’s view, if in fact the precondition set out in Section 33D of the Subcontract does exist, then clearly Mr. Paul would be bound by it. This then raises the issue of whether and in what circumstances Mr. Paul would be bound by a conditional agreement to arbitrate.

[86] Apart from the averments concerning the jurisdictional point and the dispute resolution procedure contained at Section 33 of the Subcontract, DCK has only raised for the first time evidence which they holdout as capable of satisfying the conditions of Section 33D of the Subcontract, that is, that there exist a dispute, controversy or claim between the Owner and the Contractor that involves or

²⁴ See: at paragraphs 41 – 48 of the Defendant’s affidavit in reply to the claimants affidavit in opposition filed 8th October 2019 (Second Crothers Affidavit)

relates to a dispute, controversy or claim between the Contractor and the Subcontractor. This evidence emanates from the second affidavit of Mr. Crothers.

[87] At paragraph 42 of his second affidavit²⁵, Mr. Crothers stated:

“I aver that currently there is a dispute between the Owner and Contractor and evidence to this effect will be made available at the hearing which would effectuate Clause D above in paragraph 35 which prevents the claimant from bringing this action.”

Exhibited to Mr. Crothers’ second affidavit was what appears to be a letter dated 12th April, 2019 representing an exchange from a representative of the International Centre for Dispute Resolution addressed to the law firms for DCK and the Owner referencing the conduct of a certain arbitration proceedings. However, this correspondence does not state specifically what the dispute concerns. Therefore, the court is unable to extrapolate from it whether it refers to a dispute, controversy or claim between the Owner and the Contractor that involves or relates to a dispute, controversy or claim between the Contractor and the Subcontractor. Therefore, the court is of the view that it is of little, if any, evidential value in the determination of whether the conditions of Section 33D are satisfied.

[88] Even more surprising is the fact that DCK in its further legal submissions²⁶ exhibited what purports to be a schedule for a mediation to be conducted between the Owner and the Contractor.²⁷ However, this exhibit does not give the substance of the mediation and provides no evidence that it refers to a dispute, controversy or claim between the Owner and the Contractor that involves or relates to a dispute, controversy or claim between the Contractor and the Subcontractor. In the circumstances, the court is constrained to treat it as having no evidential value.

[89] Therefore, on the basis of the above discussion the court holds that Mr. Paul was not bound by the provisions of Section 33 of the Subcontract and consequently he was entitled to bring the present claim.

²⁵ Affidavit in reply to the affidavit of opposition of the claimant filed on 4th October 2019

²⁶ Submissions filed 18th October 2019

²⁷ *Infra* Tab 2

- [90] In addition, when the provisions of Section 14 of the General Contract are read in conjunction with the provisions of Section 33D of the Subcontract, it appears from the above discussion that Mr. Paul is not bound by the terms of the General Contract.
- [91] In any event, given the court's findings in relation to the question whether Section 33 of the Subcontract created a non-binding or conditional agreement to mediate or to arbitrate, as the case may be, the real question that the court must consider is, whether the provisions of Section 33 of the Subcontract can amount to special circumstances.
- [92] The court is of the considered view that it is not entitled to treat DCK's arguments in relation to Section 33 of the Subcontracts and Section 14 of the General Contract as coming within the ambit of CPR 13.3(2) to qualify as exceptional circumstances. To hold otherwise would create the obvious absurd situation if DCK was to be heard to say to the court that they having failed to exercise a right of election, that the court must now grant them an opportunity to do so at this stage by setting aside the Default Judgment. In light of this, the court cannot agree that the circumstances hereinbefore described is consonant with the court's power to set aside the Default Judgment on the basis of CPR 13.3(2).
- [93] In the circumstances, the court is of the considered view that the issues raised by DCK in relation to Section 33 of the Subcontract cannot amount to a knockout blow which would effectually dispose of Mr. Paul's claim.
- [94] The leading authority in this jurisdiction is the case of **Meyer v Baynes**. In **Meyer v Baynes** the Privy Council was called upon to decide whether the Court of Appeal of the Eastern Caribbean Supreme Court (the 'Court of Appeal') had erred in deciding that the defence advanced by the appellant to the respondent's claim did not amount to exceptional circumstances within the meaning of CPR 13.3(2) which warranted the setting aside of the default judgment obtained by the respondent.

[95] The Court of Appeal had held, per Pereira CJ:

“What amounts to an exceptional circumstance is not defined by the Rules and no doubt, for good reason. What may or may not amount to exceptional circumstances must be decided on a case by case basis. I am in full agreement with the reasoning of Bannister J, as approved by this Court, that it must be 'one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained'. It must be something more than simply showing that a defence put forward has a realistic prospect of success. Showing exceptional circumstances under CPR 13.3(2) does not equate to showing realistic prospects of success under CPR 13.3(1)(c). They are not to be regarded as interchangeable or synonymous. CPR 13.3(2) is not to be regarded as a panacea for covering all things which, having failed under CPR 13.3(1), can then be dressed up as amounting to exceptional circumstances under sub-rule (2). Sub-rule (2) is intended to be reserved for cases where the circumstances may be said to be truly exceptional, warranting a claimant being deprived of his judgment where an applicant has failed, to satisfy rule 13.3(1). A few examples come to mind. For instance, where it can be shown that the claim is not maintainable as a matter of law or one which is bound to fail, or one with a high degree of certainty that the claim would fail or the defence being put forward is a "knock out point" in relation to the claim; or where the remedy sought or granted was not one available to the claimant. This list is not intended to be exhaustive. Indeed I would have been prepared to hold, had the learned master been correct as to the non-viability of the claims herein, that such could be regarded as an exceptional circumstance. In the exercise of the discretion afresh, and for the reasons set out above I find no basis for holding that the bases put forward by Mr. Meyer, amount to exceptional circumstances warranting Mr. Baynes being deprived of his default judgment. I would accordingly restore the default judgment.”²⁸

[96] The Board endorsed the decision of the Court of Appeal when their Lordships held:

“The Board can see no reason to question the approach taken by the Court of Appeal to the meaning of the phrase "exceptional circumstances" in the context of rule 13.3(2) of the CPR. The structure of the rule suggests that the phrase calls for something more than a real prospect of success and the Board respectfully endorses the reasoning of Pereira CJ at para 26 of her judgment as to its meaning in this context.”

²⁸ At para. [26]

[97] The Board held that the Court of Appeal was right to conclude that the defence advanced by the appellant and the evidence upon which he relied to support it did not constitute exceptional circumstances within the meaning of CPR 13.3(2).²⁹

[98] The Privy Council was prepared to accept, that the appellant had a defence to the claim for breach of statutory duty which had a realistic prospect of success, but that it certainly did not amount to a knockout blow or constitute a compelling reason to set aside the default judgment.³⁰

[99] In the more recent decision emanating from the Eastern Caribbean Supreme Court, in the case of **Tanzania Tobing Tanzil v Lindsay F.P. Grant and another**,³¹ Ventose J. performed a clinical examination of what constitutes exceptional circumstances within the meaning of CPR 13.3(2). After examining several judicial decisions on the point Ventose J. said in discussing the decision in **Meyer v Baynes**:

“The principles I distill from that paragraph are as follows: (1) what amounts to exceptional circumstances must be decided on a case by case basis; (2) there must be a compelling reason to permit the defendant to defend the proceedings; (3) exceptional circumstances under CPR 13.3(2) do not equate to showing realistic prospects of success under CPR 13.3(1)(c); (4) it is impermissible to dress up matters that have failed under CPR 13.3(1)(c) as amounting to exceptional circumstances; and (5) CPR 13.3(2) is intended to be reserved for cases where the circumstances may be said to be truly exceptional, warranting a claimant being deprived of his judgment where an applicant has failed, to satisfy CPR 13.3(1).”³²

[100] In **Tanzania Tobing Tanzil v Lindsay F.P. Grant and another**, just as in the present case, the explanations advanced by the defendants under exceptional circumstances were the same reasons advanced by them under CPR 13.3(1) and sought to interchange the grounds advanced under CPR 13.3(1) and CPR 13.3(2).³³

²⁹ At para. 20

³⁰ At para. 19

³¹ [2019] ECSCJ No. 358

³² At para. 32

³³ See: per Ventose J. at para. 35-36

[101] On the more pressing question of whether the fact that the proceedings were brought in breach of what DCK says was a binding arbitration agreement amounted to exceptional circumstances for the purposes of CPR 13.3(2), the court has examined two decisions emanating from the Eastern Caribbean Supreme Court, namely, **Inteco Beteiligungs AG v Sylmord Trade Inc.**³⁴ and **Blayco Corporation Ltd. v James Todman DCK Construction (SPV) Limited and others.**³⁵

[102] The case of **Inteco v Sylmord Trade** involved a dispute over a funding arrangement between the parties. Each Loan Offer was subject to the law of Austria and contained an arbitration clause at paragraph 4 in the following terms:

“The Parties agree that any dispute arising from and with reference to their legal relationships in case of a loan agreement concluded according to this Offer, and with reference to the validity, nullity and interpretation of this Offer; and with reference to the validity, nullity, enforceability and interpretation of this Arbitration Agreement, shall be exclusively submitted for resolution and decision to arbitration and the court of arbitration to be composed of a sole arbitrator. The Parties agree that Prof. Dr. Peter Dorait, Althanstrasse 39-45, 1090 Vienna, Austria, shall be appointed sole arbitrator. The Parties agree that proceedings shall be conducted in accordance with §§ 577- 618 Austrian Code of Civil Procedure ('ZPO') and that proceedings shall be conducted in English Language. The Parties furthermore agree that the decision (award) of the arbitration panel shall be final and binding and that the parties, accordingly, waive their right to appeal decision.”

Money was paid out to Sylmord in accordance with the Loan Offers which stipulated repayment at a certain time. Inteco demanded payment and Sylmord said that it had a complete defence to Inteco's demand for repayment. Subsequently, Inteco's solicitors wrote to Sylmord demanding repayment of the loans and stated that unless the loans were repaid or Sylmord agreed to arbitration within a stipulated time proceedings would be instituted in the BVI. There was no response to Inteco's request for arbitration and Inteco subsequently commenced proceedings. Sylmord filed no acknowledgment of service despite service on its registered agent. Inteco obtained judgment in default.

³⁴ [2013] ECSCJ No. 151

³⁵ [2019] ECSCJ No. 5

[103] **Sylmord** contended that the fact that the Loan Offer documents contained the arbitration clause, coupled with the fact that the commencement of these proceedings amounted to a breach of the clause, amounted to an exceptional circumstance, within the meaning of CPR 13.3(2). Bannister J. held:

“I do not think that that can be right. For an exceptional circumstance to fall within sub-rule 13.3(2) it must, in my judgment, be one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained. The fact that they were commenced in breach of an agreement to arbitrate cannot possibly amount to such a circumstance. So far from being exceptional, it is routine. Claimants regularly bring proceedings in breach of arbitration agreements where they prefer their chances in Court to the expense of arbitration and are prepared to take the risk of a successful stay application. Had Sylmord reacted timeously, it could have sought a stay in these proceedings. The fact that it did not is not a proper ground for setting aside the judgment.”

[104] **Sylmord** appealed the decision to the Court of Appeal.³⁶ The ground of appeal that is relevant for the purposes of this discussion was that the learned trial judge had erred in finding that a commencement of proceedings in breach of contract, and an express provision which provided for arbitration, was not of itself a sufficient reason to set aside the default judgment.

[105] The Court of Appeal held, applying the decision in **Vann et al v Awford et al**,³⁷ that the filing of claims arising from contracts with compulsory arbitration clauses is far from being an exceptional circumstance, within the meaning of CPR 13.3(2), for a court to set aside a default judgment. The appeal was dismissed.

[106] Michel JA, in giving the reasons for the court’s decision, made some rather interesting observations which the court finds deservingly appropriate when applied to the present case. His Lordship said:

“The criticism of this finding in the written submission by counsel for the appellant is interesting. Paragraph 37 of the written submission reads as follows:

“Whilst it might be the case that litigants do on occasion ignore their contractual obligations in relation to arbitration,

³⁶ [2014] ECSCJ No. 61

³⁷ (1986) 83 LSG 1725

that does not mean that the fact that proceedings have been begun in breach of contract does not amount to an exceptional circumstance for the purpose of CPR 13.3(2) as it goes to the propriety of the proceedings, which is an exceptional circumstance that can properly be brought into account and is entirely in keeping with the policy of the courts that parties should be held to their contractual bargains."

It is interesting because it effectively says that a party acting in breach of contract is an exceptional circumstance that justifies a court in setting aside a regularly-obtained judgment, which is an extraordinary argument. It is interesting too because it is made on behalf of a party whose case is founded on the court not holding the parties to their contractual obligations, in particular, the obligation of the appellant to repay the loans granted, at the times stated, with the interest stipulated. So it is not the circumstance which is exceptional, but it is the advancing of this argument by the appellant which, in the circumstances, is exceptional.

There is also case law directly on point, such as the case of *Vann et al v Awford et al*,⁴ in which the English Court of Appeal rejected the submission that the existence of an arbitration clause provided any arguable defence which could lead to the setting aside of a default judgment. Of course, if the instituting of proceedings notwithstanding the existence of a binding arbitration clause does not constitute even an arguable defence to satisfy one of the requirements for setting aside a default judgment, then it can hardly constitute an exceptional circumstance to justify on its own the setting aside of the judgment."³⁸

[107] In the present case, the court cannot put it more eloquently and subtlety as the Court of Appeal did. It appears that the argument advanced by the appellant before the Court of Appeal in the case of **Sylmord v Inteco** is substantially the same argument that DCK is attempting to make upon the present setting aside application.

[108] The decision in **Blayco** is distinguishable from the case of **Sylmord** in many respects. However, it in no way affects the findings made by the court in these proceedings. The case is merely referred to for the purpose of answering the assertions made by Ms. Dyer in her written submissions and to make the point which the court wishes to make more pellucid, that is, DCK cannot rely on the non-

³⁸ At paras. 38-39

binding mediation and binding arbitration clauses in the Subcontract as amounting to special circumstances within the meaning of CPR 13.3(2). The option that was available to DCK was to apply for a stay pursuant to CPR 10.3(4)³⁹ and the relevant provisions of the Arbitration Act, 1950. This they have not done.

[109] **Blayco** involved an application for a stay of a claim brought by the claimant for breach of contract. The contract contained an arbitration clause at paragraph 5 in the following terms:

“Subcontractor agrees that any dispute of any kind, nature or description or any controversy or claim arising out of or relating to this subcontract or the breach thereof may, solely at the contractor's election, be settled by non-binding mediation or by binding arbitration in accordance with the **Construction** Industry Arbitration Rules of the American Arbitration Association. In any such arbitration, full discovery will be allowed in accordance with the Federal Rules of Civil Procedure, **and** any remedy or relief granted by the arbitrator(s) shall not be empowered or authorized to add to, subtract from, delete or in any **other** way modify the terms of this subcontract. If arbitration is elected by the contractor, then judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. If the contractor elects to proceed by arbitration, the venue of such proceedings shall be Pittsburgh, Pennsylvania.

Contractor shall have the right to elect to proceed to no-binding mediation or binding arbitration, as described in paragraph (b) above, at any time prior to the commencement of a judicial proceedings by the contractor, or in the event a judicial proceeding is instituted by the subcontractor, at any time prior to the last day to answer **and/or** appear to a summons **and/or** complaint of the subcontractor.”

[110] In **Blayco**, citing the provisions of section 18(1) of the Arbitration Act 2013,⁴⁰ one of the defendants argued that, the court had no discretion but to refer the matter to arbitration if the matter is the subject of an arbitration agreement and a request has been made by a party no later than when his first statement on the substance

³⁹ If the defendant within the period set out in paragraph (1), (2) or (3) makes an application 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 a defence is extended to 14 days after the determination of that application.

⁴⁰ “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”

of the claim is required to be submitted. The only qualification of this mandatory provision is if it can be shown that the agreement is null and void, inoperative, or incapable of being performed. In these circumstances, it is argued that section 14 of the contract between the parties is a valid arbitration agreement and that the court ought to stay proceedings at the instance of the 1st defendant and refer this matter to arbitration.

[111] The defendant in **Blayco** went on further to argue that despite what the unilateral discretion provided for in section 14 of the contract, it is entitled to make an election to have these proceedings referred to arbitration. In support of this argument, they cited the decision in **Woolf v Collis Removal Services**⁴¹ in which the court had to decide on the enforceability of an arbitration clause. That case was cited as authority for the proposition that where, as in the present case, there was a unilateral right to request arbitration, there is nothing in its unequal operation to divest such an agreement of the character attributed to arbitration clauses in general.

[112] The court in **Blayco** was also directed to the decision in **Pittalis v Sherefettin**⁴² where it was observed, per Fox LJ that:

“Looking at the matter apart from authority, I can see no reason why, if any agreement between two persons confers on one of them alone the right to refer the matter to arbitration, the reference should not constitute an arbitration. There is a fully bilateral agreement which constitutes a contract to refer. The fact that the option is exercisable by one of the parties only seems to me to be irrelevant. The result in my view is that the parties are entitled, if they so choose, to confer a unilateral right to insist upon arbitration.”

[113] Therefore, the defendants in **Blayco** argued that there was a binding arbitration clause that provided a unilateral right to insist upon arbitration. The claimant in **Blayco**, in like manner as Ms. Dyer in the present case, argued that contrary to the defendant's assertions, that there was no arbitration agreement within the meaning of the Arbitration Act. They further argued that the wording of the

⁴¹ (1948) 1 K.B. 11

⁴² [1986] 2 All ER 227

arbitration clause in the agreement did not constitute a binding agreement for mandatory arbitration and what it merely did was to give a unilateral option to the defendant to refer the matter to arbitration.

[114] Master Moise, as he then was, in delivering the judgment in **Blayco** said:

“Therefore, there is no doubt that section 14A of the contract between the claimant and the 1st defendant is valid. However, it is only binding insofar as it gives the 1st defendant the option to refer any dispute to arbitration. This is not the same as a binding agreement to subject disputes which arises under the contract to compulsory arbitration.”⁴³

The court agrees with the master’s analysis on this point. In the present case, notwithstanding the conditions contained in Section 33 of the Subcontract, the agreement to arbitrate was still enforceable at DCK’s election. However, what Section 33 did not do was create a binding agreement to arbitrate which prohibited Mr. Paul’s option to litigate by bringing the claim.

[115] On the authority of the Privy Council’s decision in **Anzen Limited v Hermes One Limited**⁴⁴ the learned master held:

“It cannot necessarily be said that the claimant has bypassed the arbitration clause by filing an action in court, as the option to refer this matter to arbitration is entirely unilateral and rests with the 1st defendant. Upon the filing of the claim however, the 1st defendant retained the right to refer the matter to arbitration. The question for determination is whether that option has been exercised. The claimant argues that to date there has been no referral of this matter to arbitration. The 1st defendant argues in response that by applying to have these proceedings stayed and referred to arbitration, the 1st defendant is exercising the option contained in section 14 A of the contract.”⁴⁵

[116] The learned master’s reasoning and approach, in the court’s view, appears to be consistent with the reasoning of the Privy Council in **Anzen v Hermes**. This is apparently the case when one examines what the learned master said in relation

⁴³ At para. 7

⁴⁴ [2016] UKPC 1

⁴⁵ At para. 8

to the defendant's application for a stay after the claimant had instituted proceedings in court. The learned master said:

"The parties willfully entered into the contract and are bound by its terms. It is to the provisions of section 14B of the contract that the court must turn. This section speaks to the election of the 1st defendant having to take place "at any time prior to the last day to answer and/or appear to a summons and/or complaint of the subcontractor." For my part, I do not agree with the submissions of the claimant that the time for electing to arbitrate expired when the 1st defendant filed an acknowledgment of service. I am not at all convinced that the filing of an acknowledgment is similar to the requirement to appear to a summons and/or complaint. However, the clause clearly indicates that the 1st defendant may elect to arbitrate any time prior to the last day to answer. To my mind the prudent approach for the 1st defendant to have taken was to file an acknowledgment of having received the claim form and statement of claim and provide the information required by the requisite form. That is precisely what was done. As determined earlier, it was not necessary for the 1st defendant, whether before or after the filing of the acknowledgment of service to refer the identical subject matter to arbitration prior to seeking to move the court to stay the proceedings, provided that the time for the filing of a defense had not yet elapsed. In these circumstances, the 1st defendant succeeds in its application for a stay of the proceedings pending the outcome of arbitration pursuant to section 14 of the contract between the parties and section 18(1) of the Arbitration Act 2013."

[117] In **Anzen v Hermes**, the Privy Council was concerned with the interpretation of an arbitration clause which provided that in the event of an unresolved dispute any party may submit the dispute to binding arbitration. The respondent commenced litigation in respect of an unresolved dispute and the issue arose as to whether the appellants were entitled to a stay, without themselves having commenced an arbitration. Both the Court of Appeal and the court of first instance held that they were not so entitled.

[118] In **Anzen v Hermes**, at paragraph 13 their Lordships said:

"As with any issue of construction, the language and context of the particular agreement must ultimately be decisive. But clauses depriving a party of the right to litigate should be expected to be clearly worded - even though the commercial community's evident preference for arbitration in many spheres makes any such presumption a less persuasive factor nowadays than it was once. The consequence of the appellants' case would, at least in theory, be that the respondent's commencement of litigation was a breach of contract, for which the appellants proving loss

could without more claim damages - though the prevalence of clauses providing that arbitration “shall” take place and the infrequency of claims for their breach may again reduce the weight of this factor. The fact remains that there is an obvious linguistic difference between a promise that disputes shall be submitted to arbitration and a provision, agreed by both parties, that “any party may submit the dispute to binding arbitration”. This clear contrast and the evident risk that the word “may” may be understood by parties to mean that litigation is open, unless and until arbitration is elected, are, in the Board's view, important pointers away from analysis I.”⁴⁶

[119] Their Lordships in **Anzen v Hermes** dispelled the notion that it was an essential ingredient of an arbitration clause that in order for it to be enforceable or binding, it must give bilateral rights of reference.

[120] However, according to the Board, this is no longer the case, and relied on the authority of **Pittalis v Sherefettin**⁴⁷ where it was held that parties are entitled, if they so choose, to confer a unilateral right to insist on arbitration. The court in **Pittalis v Sherefettin** said that it could see no reason why, if an agreement between two persons confers on one of them alone the right to refer the matter to arbitration, the reference should not constitute an arbitration.⁴⁸

[121] The Privy Council concluded that the decisions of the courts below were wrong and held that the appellant was entitled to a stay. After examining other authorities on the point their Lordships concluded:

“A rejection of analysis II provides further reinforcement of the Board's view that analysis I must be rejected, leaving analysis III as the correct analysis. Analysis III has none of the disadvantages of analysis II. It enables a party wishing for a dispute to be arbitrated, either to commence arbitration itself, or to insist on arbitration, before or after the other party commences litigation, without itself actually having to commence arbitration if it does not wish to. It comes close in effect to analysis I, save that, unless and until one party insists on arbitration, there is no promise by the other party not to litigate.”⁴⁹

⁴⁶ At para. [13]

⁴⁷ [1986] QB 868

⁴⁸ At para. [15]

⁴⁹ At para. [35]

- [122] The court agrees entirely with the decision in **Anzen v Hermes**. In the court's view, Section 33 of the Subcontracts did not oust Mr. Paul's entitlement to litigate the dispute. However, this did not prevent DCK from insisting that the dispute be referred to arbitration. There was a signed agreement between Mr. Paul and DCK.
- [123] In any event, the simple point is that DCK is not entitled to rely on the right to insist on a referral to arbitration as an exceptional circumstance within the meaning of CPR 13.3(2). There was indeed an alternative procedure which DCK could have employed were they minded to insist on arbitration. This they have not done.

Whether Jurisdiction an Exceptional Circumstance

- [124] It appears that Section 17.1 of the General Contract makes provision for the applicable law governing the General Contract. The section provides:
- "This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without reference to its conflicts of laws principles. The parties hereby unconditionally and irrevocably submit to the exclusive jurisdiction of the federal and state courts in the state of New York. The parties hereby further consent to the jurisdiction of, and to the laying of venue in, such courts for such purpose and waive any defenses based on lack of venue or personal jurisdiction or of inconvenient forum."
- [125] Mr. Rogers insisted that this exclusive jurisdiction clause was incorporated into the Subcontracts. Therefore, Mr. Rogers argued that on the basis of this clause, the court had no jurisdiction to entertain the present claim. This was specifically pleaded in the Draft Defence exhibited to the set aside application. DCK relied on the issue of forum non conveniens, which they say is raised by the provisions of Section 17.1 of the General Contract, as amounting to exceptional circumstances within the meaning of CPR 13.3(2).
- [126] The court finds this argument wholly fallacious. If it were that DCK intended to challenge the court's jurisdiction to entertain the claim, then clearly DCK had the option to apply pursuant to CPR 9.7.⁵⁰ They have failed to do so. Therefore, the

⁵⁰ (1) A defendant who disputes the court's jurisdiction to try the claim may apply to the court for a declaration to that effect.

court will not go into great detail examining this point which has been raised by DCK in the present application. It simply does not arise for the court's consideration. In any event, the court declines to hold that forum non conveniens can fall within the category of the case contemplated by CPR 13.3(2).

[127] In the circumstances, and for the reasons already given by the court, DCK's application to set aside the Default Judgment is dismissed.

[127] The defendant shall pay the costs of this application to be assessed in accordance with CPR 65.11 if not agreed within 21 days of this order.

Shawn Innocent
High Court Judge

By the Court

Registrar

(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.

(3) An application under paragraph (1) of this Rule must be made within the period for filing a defence; the period for making an application under this Rule includes any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed, to extend the time for filing a defence.

