IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. HCV 3034 OF 2004

BETWEEN	**1-STOP BUILDING SUPPLIES LTD**	**CLAIMANT**
AND	**MERIDIAN CONSTRUCTION COMPANY LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Norman Wright Q.C. instructed by Heron S. Dale and Company for the claimant

Miss Hilary Phillips Q.C. and Miss Lauren Saddler instructed by Grant Stewart Phillips and Company for the defendant

June 27, July 10 and 20, 2006

ARBITRATION ACT, STAY OF PROCEEDINGS,

SYKES J

1. The defendant applies, by way of an amended notice of application for court orders dated May 26, 2006, for a stay of proceedings pursuant to section 5 of the Arbitration Act or in the alternative, a stay of proceedings pursuant to the inherent power of the court. This stay of proceedings is last until the determination of final accounts between Orme Limited ("Orme") and Meridian Construction Company Ltd ("Meridian"). On the face of it there is no immediate connection between Orme and 1-Stop Building Supplies Limited ("1-Stop"). To make the link Meridian has embarked on a variation of the economic reality argument often invoked by those who wish to make an end run around the fundamental principle that two companies separately incorporated are indeed distinct legal entities despite common directorships and shareholders. Miss Phillips Q.C. expressly disavowed any reliance on this argument and to describe her submission in this way would be a severe mischaracterisation of her submission. I have listened to her submissions and read her written submissions and in my view all that has happened is that the submission has changed its garb but it has all the DNA of the economic reality argument.

2. Let me identify the parties more precisely. Orme is a limited liability company incorporated under the Companies Act and has registered offices at 8 Queen Street, Morant Bay, St. Thomas. The directors and shareholders of Orme are Messieurs Eric Chung, Ruel Chung, Oahn Ho and Michael Doon. 1-Stop is also a limited liability company incorporated under the Companies Act. The address, directors and shareholders are identical to Orme. Even the share capital is identical. Meridian is a construction company incorporated under the Companies Act with offices at 35 Ward Avenue, Mandeville, Manchester. Mr. Michael Housen is the managing director of Meridian. From the affidavits, it seems that Mr. Oahn Ho was the director of both companies who dealt directly with Meridian. There are two claims that involve Orme and 1-Stop. I shall separate them for the purposes of this case.

Claim number HCV 3033 of 2004 ("the Orme Claim")

3. On or about September 5, 2003, Orme contracted Meridian to erect a supermarket at Newlands Road, Portmore, St. Catherine. The commencement date was September 8, 2003 with completion set for December 8, 2003. The consideration was JA$42,000,000.00. The completion date passed and up to July 2004, the supermarket was not finished. Orme filed suit against Meridian on December 10, 2004. The claim is not, as one would expect, for a breach of contract in that Meridian failed to complete the contract on time. Instead, Orme claims JS$3,591,563.00 for moneys paid in September 2004 to the defendant for light fixtures and bathroom partitions which were to be installed at the supermarket but this was not done. No defence has been filed. Meridian secured an order from Sinclair-Haynes J. on May 12, 2006, staying proceedings until the arbitration is completed. It was able to do this because clause 35 of the contract has an arbitration clause diverting any dispute from the courts to arbitration. The order of Sinclair-Haynes J. was designed at ensuring compliance with the dispute resolution mechanism embodied in the contract.

4. In an affidavit filed in the Orme claim Meridian complained that the main reason for the non-completion was that it had undertaken the job on the basis that it would be paid every two weeks but this was changed to one month. Meridian has said that there was consistent under-certification by the project manager, one Mr. Michael Robinson, the effect of which was that the sums paid were less than anticipated. It appears that during the negotiations Orme wrote on the contract that the payments would be made monthly instead of every two weeks. Meridian failed to notice the change and signed the contract thinking that the

fortnightly period of payment applied. There is no suggestion that the change was done fraudulently. I can only say that Meridian has learnt the hard lesson that Harriet L'Estrange learnt from the lips of Scrutton L.J. who said in ***L'Estrange v F. Graucob Ltd*** [1934] 2 K.B. 394, 403:

> *When a document containing contractual terms is signed, then, in the absence of fraud, or I would add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.*

Claim number HCV 3034 of 2004 ("the 1-Stop Claim")

5. In this claim, 1-Stop has sued Meridian for goods alleged to have been delivered to Meridian between June 2004 and July 2004. The sum claimed is JA$6,974,494.00. The claim asks for interest, court fees and attorneys costs. 1-Stop alleged that it delivered the goods to Meridian during construction of the supermarket in Newlands. No defence has been filed.

6. Meridian, instead of filing a defence, has responded by seeking an order to stay this claim. It says that the claim should await the outcome of the arbitration between Orme and Meridian. Meridian submits that I have the inherent power to stay the proceedings. The ground for the stay is stated to be that 1-Stop was nominated to be the supplier of goods for construction of the supermarket and is therefore bound by the terms of the contract between Orme and Meridian. Meridian boldly submits that the parties, including 1-Stop, are bound by the arbitration clause between Orme and Meridian. What is the basis of this submission? Mr. Malcolm Housen has sworn three affidavits that he has placed before the court.

The affidavit evidence

7. Meridian relied on the affidavit filed in the Orme claim to support their application in the instant case. Meridian also relied on affidavits filed specifically for this application. Mr. Michael Housen swore to all Meridian's affidavits. The first affidavit in the 1-Stop claim, dated June 17, 2005, complains that Orme nominated 1-Stop as the main supplier - a development not contemplated when the contract between Orme and Meridian was signed. However, he does admit that Orme's nomination of 1-Stop occurred from the "inception of the contract" (see para. 7).

8. He adds that because 1-Stop was located in Morant Bay, Meridian had to await the arrival of supplies from Morant Bay. He says that there were times when 1-Stop was unable

to supply any goods and material and Meridian had to wait for quite sometime for the supplies to arrive. The payment arrangement for the supplies was that Meridian would pay the supplier (1 Stop) when it (Meridian) was paid by Orme. Orme, in turn, would only pay Meridian when the particular work done was certified.

9. It is at this point that Meridian seeks to highlight what it perceives to the machinations of Mr. Michael Robinson. According to Meridian, Mr. Robinson was project manager, architect and quantity surveyor. Meridian insinuates that Mr. Robinson did not act fairly in all the circumstances of the case and he contributed significantly to its problems. Mr. Housen swore that Mr. Oanh Ho would insist that Meridian pay 1-Stop even if there was no certification, that is to say, if Mr. Robinson did not certify the work done, which would mean Orme would not pay Meridian, Meridian still had to pay 1-Stop for good supplied. From Meridian's standpoint, it appeared that the Mr. Ho (through 1-Stop) would demand payment even though he (Mr. Ho through Orme) had not paid Meridian. Mr. Ho is the voice and face of both Orme and 1-Stop. The picture painted is that both companies although separate in law were working in tandem through Mr. Ho to put "the squeeze" on Meridian. It is clear that Miss Phillips wanted the court to get this image and to look at the reality of the matter rather than the form of separate incorporation and separate contracts.

Mr. Ho's affidavit

10.I shall deal with Mr. Ho's affidavit at this point. He accepts that there was a contract between Orme and Meridian for the construction of the supermarket. He asserts that 1-Stop was not a party to the contract. The significant parts of Mr. Ho's affidavits are paragraphs 7 – 12. I now set them out.

> ***7.*** *That the Directors (sic) and owners of the Claimants' company were (sic) responsible for the construction of the Supermarket (sic) by Orme Limited.*
>
> ***8.*** *That it is not correct that the employer, Orme Limited insisted in the contract with Meridian Construction Company Limited that 1-Stop Building Supplies Limited would be the exclusive supplier of all goods and material relevant to the construction of the Supermarket (sic).*
>
> ***9.*** *That it was orally agreed between myself and Mr. Malcolm Housen that Meridian Construction Company Limited would purchase material from 1-Stop Building*

Supplies Limited in so far as 1-Stop Building Supplies Limited could supply the materials as 1-Stop was a supplier of building materials.

10. *That it was orally agreed that Meridian Construction Company Limited was free to* ***obtain the goods elsewhere if the prices was (sic) not competitive or not available by 1-Stop****. (My emphasis)*

11. *It was orally agreed that Meridian Construction Company Limited would order the materials which would be supplied promptly and paid for within a reasonable time – two (2) weeks.*

12. *That it was orally agreed with me that since 1-Stop was supplying the materials the mobilization amount was agreed at Two Million ($2.0M) (sic).*

11. I now come to Mr. Housen's second affidavit of May 11, 2006. The decision that Orme would supply the building supplies was communicated to him by Mr. Michael Robinson. The affidavit goes on to say that it was after the contract was executed with Orme that Meridian learnt that 1-Stop was connected to Orme through the directorships and shareholdings. He said that the mobilization amount was reduced from JS$4.2 million to JS$2.0 million because Orme would provide the building supplies. Mr. Housen states that it was also agreed that Orme would pay Meridian the full amounts certified by the project manager's certificate. After the moneys were received Meridian would then pay Mr. Ho for the supplies. It would appear that Mr. Ho would be receiving the money on behalf of 1-Stop.

12. This payment method was devised, according to the affidavit, to prevent the contract being reduced to a labour only agreement which, if so classified, would have dire consequences for Meridian's financial arrangements. The affidavit does not say what those arrangements were.

13. Mr. Housen added that when he stated in his June 17, 2005 affidavit (the first affidavit in the 1-Stop claim) that Orme insisted that 1-Stop would be the supplier that was incorrect. The true position was that Orme insisted that it (Orme) would supply the goods and materials but when the invoices were sent to Meridian they had the name of 1-Stop. It is alleged that Orme directed Meridian to send purchase orders to 1-Stop.

14. Miss Phillips seized upon this to say that this could only have happened if 1-Stop had taken over Orme's contract with Meridian. According to Queen's Counsel, the contract required that Orme supply the materials but they were being supplied by 1-Stop. How could

this be given that there was no contract between Meridian and 1-Stop? The answer to this may well be what Mr. Ho has said at paragraph 9 of his affidavit. He asserts that there was an oral agreement between Mr. Housen and Mr. Ho that Meridian would purchase supplies from 1-Stop. I need not decide whether this was in fact the case. What it does indicate is the possibility that there might well have been a variation of the written contract in which 1-Stop would now be the supplier and not Orme. If this is so, then one would have a contractual relationship between Meridian and 1-Stop which does not in any way affect the contractual relationship between Orme and Meridian.

15. Having read Mr. Housen's affidavits carefully it seems to be that he had no difficulty determining when he was dealing with Orme and when he was dealing with 1-Stop albeit he was dealing with one person, Mr. Ho. Meridian seems to have gone along with the proposals for using 1-Stop as the supplier of materials. When 1-Stop presented its bills to Meridian there is no evidence that Meridian ever said, "Now see here, I have no contract with you. My contract is with Orme Limited." The Sunday morning site meetings seem consistent with the understanding that Orme was separate and distinct from 1-Stop.

The submissions

16. Miss Phillips Q.C. submitted that 1-Stop's dispute with Meridian should be referred to the same arbitration proceedings involving Meridian and Orme. This argument is predicated on the mistaken notion that by some legal alchemy 1-Stop is bound by the contract between Orme and Meridian. The written submissions on behalf of Meridian highlight the identity of persons who are directors of 1-Stop and Orme; identity of registered offices; identity of share capital and the fact that Orme designated 1-Stop as the supplier of building materials. It will be recalled that 1-Stop is not a party to the contract. There is no suggestion that Orme contracted for and on behalf of 1-Stop. There is therefore no factual foundation for this submission and needless to say, there is no legal principle that can be pressed into service to cross the chasm facing Meridian. The argument raised here is similar to that raised in the case of ***Adams v Cape Industries*** [1990] 2 W.L.R. 657. In that case, an ambitious argument was launched on behalf of the claimants that in some circumstances courts may be prepared to ignore the rule that each company is a separate legal entity. Slade L.J. snuffed out that argument by stating at page 532:

> *There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that "each company in a*

group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities:" The Albazero [1977] A.C. 774, 807, per Roskill L.J.

17. Continuing at page 536 Slade L.J. was emphatic:

> *Mr. Morison described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As Sir Godfray submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.*

18. What Miss Phillips was trying to do was to add to the list developed by counsel in the ***Adams*** case. If Slade L.J.'s position applies to a group of companies and subsidiaries then it is all the more applicable when we are dealing with two companies that are not part of a group of companies or subsidiaries. Orme and 1-Stop are separate legal entitles with their individual rights and obligations. There is no evidence of any contractual arrangement between Orme and 1-Stop or between 1-Stop and Meridian that indicates even remotely that 1-Stop has agreed to be a part of the arbitration. Thus, to say that the management, directors, shareholdings and registered offices of 1-Stop and Orme are the same is completely irrelevant and cannot produce the result sought by Miss Phillips.

19. Miss Phillips submitted that 1-Stop is estopped from denying the oral agreement between the parties and the course of conduct established. Miss Phillips also submitted that 1-Stop is claiming through Orme and by virtue of that fact 1-Stop cannot be in a better position than Orme would have been in had Orme brought this claim.

20. These submissions in my view are the product of not keeping Lord Justice Slade's dicta in clear and unobstructed view. When Orme paid on the certificates, Orme was simply fulfilling its contractual obligation to pay the contractor for work that has been certified as properly done. That has nothing to do with the payments to 1-Stop. The fact that Meridian in fact paid 1-Stop after it was paid does not advance the point being made by Miss Phillips. The certification has nothing to do with payment to 1-Stop. The certification is merely a control mechanism designed to ensure that Orme does not pay more than it should for the work actually done. If Meridian contracts with any supplier for goods, absent clear and

compelling evidence, the courts would not readily conclude that payment to the supplier is dependent on Meridian being paid by whomever contracted it to do the job. The supplier of goods to Meridian is entitled to receive payment regardless of whether it is paid by other persons to whom it has provided services.

21. The arbitration clause between Orme and Meridian cannot bind 1-Stop. Arbitration proceedings are usually arrived at by agreement between the parties and not by force of law. 1-Stop has not agreed with anyone to arbitrate its dispute with Meridian and so cannot be compelled to subject itself to another forum.

22. Miss Phillips next submitted that I could stay the proceedings even if I found that 1-Stop was not bound by the arbitration clause. The source of this power is said to be the inherent power of the court. She has relied on the judgment of Vaughan Williams L.J. in ***Shackleton v Swift*** [1913] 2 K.B. 304, 311 – 312:

> *To stay an action, to say that an action shall not be tried, is generally to take a step which ought not to be taken except in a very clear case. It not unfrequently (sic) arises under the Judicature Act and Rules that there is an application to stay an action, or an application to declare that an action is frivolous, and in those cases the practice under the Judicature Act has always been not to stay the action under the general powers of the Judicature Act, because it is a strong thing to say to a plaintiff who is bringing an action that his complaint will not be heard, to say that it will be stayed without there having been a trial, without the evidence having been heard. Generally speaking, the consequence is that the judges are very slow to stay actions; that does not mean that there is no discretion in the judges; but the general practice is that you should not stay actions unless the action, beyond all reasonable doubt, ought not to go on. In other words, you ought not to stay an action unless one of two things occurs: either the action before the Court is what in old days would have been held to be a demurrable claim, or the action is of such a character that, although it may not be demurrable, there is plain reason why it must fail.*

23. The passage highlights two things: staying an action is not lightly done and the standard that must be met before such a course is adopted is very high. The reason must be that it is a grave thing to prevent a litigant from pursuing his case through the lawfully established courts. Litigants and citizens are to be encouraged to settle their differences by all lawful means at their disposal. The other thing to note about this passage is the source of the power to stay proceedings. Vaughan Williams L.J. does not locate the power simply in the fact of being a superior court of record but he also relies on the practices of the courts prior to the reforms introduced by the Judicature Acts of the 1870s. I dare say that Miss Phillips has not demonstrated to me that the Lord Justice's standard has been met in this case.

Conclusion

24. There is no basis for me to stay this action by 1-Stop against Meridian. It is a separate and distinct claim from that made by Orme. There is no evidence that 1-Stop was assigned the contractual rights and obligations of Orme. The attempt by Miss Phillips to invoke the spirit of Machiavelli covered with a diaphanous veneer of the economic reality principle cannot take her across the yawning gap she faced which is that 1-Stop is a separate legal entity from Orme despite the common features already mentioned and as such is entitled to pursue its rights as it sees them. The application is dismissed with costs to the respondent.