C.A Civil – Contract – Building contract – Arbitration clause providing for reference to arbitration – construction – whether dispute between parties was matter which they agreed to refer to arbitration – whether court justified in staying proceedings – whether abuse of process of court to seek to have defence struck out entered while summons to stay proceedings pending. Appeal dismissed; Order of Wolfe J staying proceedings affirmed.

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 103/91

COR: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	BENTLEY ESTATES LIMITED	PLAINTIFF/APPELLANT
A N D	CASTLE CONSTRUCTION LIMITED	
	A.L. RICHARDS (t/a A.L. Richards & Associates)	DEFENDANTS/RESPONDENTS

Gordon Robinson for the appellant

K.C. Burke for respondents

October 5 & December 18, 1992

DOWNER, J.A.

Bentley Estates Ltd., the appellant, instituted proceedings in the Supreme Court against Castle Construction Ltd., the contractor in respect of a building project known as Melwood Villas. The claim was founded on allegations of breach of contract or in the alternative, negligence. The averment ran thus:

> "3. By a contract in writing dated the 1st day of April, 1989, and made between the Plaintiff as Employer and the First Defendant as Contractor the First Defendant was engaged by the Plaintiff to construct certain works namely the Permanent and Temporary Works in connection with the Plaintiff's said proposed project (hereinafter called 'Melwood Villas') for consideration therein set out.
>
> 4. It was an express and/or implied term of both contracts that the Defendants would perform the services agreed with due diligence and professionalism and use their best efforts to ensure the success of Melwood Villas.

> "6. Negligently and/or in breach of the contract between the parties the First Defendant failed to properly proceed with the construction of Melwood Villas so that the Plaintiff was forced to terminate the First Defendant's services on the 15th day of June, 1990."

The contractor responded promptly, by issuing a summons to stay proceedings pursuant to section 5 of the Arbitration Act and prayed in aid, the agreement of April 1, 1989 which referred to the Conditions of Contract. Clause 35 (1) of those conditions provides for arbitration. It was in these circumstances that Wolfe, J., granted a stay and Bentley Estates Ltd., as the aggrieved party has appealed.

The agreement incorporated a number of other documents. One of these was the Conditions of Contract. This is how the conditions were introduced:

> "The following documents shall be deemed to form and be read and construed as part of this Agreement viz:-
>
> ...
>
> (c) The Conditions of Contract."

The significance of clause 35 (1) is that the outcome of this case depends on its true construction. Since either party could invoke this clause to resolve disputes, if the issues raised in the statement of claim were covered by clause 35 (1), then the proceedings instituted by the appellant were misconceived and were properly stayed. It is therefore essential to determine the scope of the clause. It reads:

> 35 (1) Provided always that in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith

> " (including any matter or thing left by this Contract to the discretion of the Architect) or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in clause 30(6)(b) of these Conditions or the rights and liabilities of the parties under clauses 25, 26, 31, 32 or 33 of these Conditions, the same shall not be allowed to interfere with or delay the execution of the Works but either party shall forthwith give to the other notice in writing of such dispute or difference and such dispute or difference shall be settled by reference to a single arbitrator in the case the parties agree upon one, otherwise by two arbitrators one to be appointed by each party and their umpire in a manner provided by the terms of the Arbitration Act."

The first issue to be resolved is the meaning to be attributed to the phrase "as to the construction of this contract." Since the appellant has alleged a breach of contract, before the breach is determined, there must be a construction of the contract and therefore the matter was within the remit of the arbitration clause. On this aspect, the contractors could have obtained a stay of proceedings in the Supreme Court.

As the statement of claim particularises specific breaches of contract, it is appropriate to mention all the documents which are incorporated with the contract. They are, the tender, the drawings, the conditions of contract, the specification and the priced bill of quantities. Because the Conditions of Contract are of prime importance, the caption at its commencement should be noted. It reads

> "FORM OF CONTRACT
>
> The Form of Contract shall be the standard Form of Building Contract Private Edition with Quantities First Revision 1984 prepared by the Joint Consultative Committee for the building construction industry of Jamaica."

Then under the bills of quantities there is the caption "Procedures relating to Practical Completion and Handover of Works." To my mind the detailed provisions set out under this heading cover the averment in the statement of claim which reads - "Failure to proceed regularly and diligently with the works."

Turning to the second allegation of breach in the statement of claim that there was a "failure to render a satisfactory standard of workmanship," that was anticipated in the bills of quantities by the provisions under the heading "Materials and Workmanship."

As regards the third breach specified, it reads - "misrepresenting to the plaintiff the capability to provide support services by B & H Structures Limited resulting in the failure to provide such services." The bills of quantities have provision for support services provided by the contractors. The relevant clause reads - "Works by nominated sub-contractor and goods and materials supplied by nominated suppliers."

The fourth particular as alleged in the statement of claim is also a clear case of construction of the contract. That particular reads:

> "(d) Persistently and despite warnings proceeding with the works in a manner contrary to the express and/or implied terms of written contract between the parties."

The pleader, it seems, has forgotten that the bills of quantities make provision for a performance bond under the heading Performance Security. To avoid the logic of this approach, it was contended by Mr. Gordon Robinson that there was also an averment of negligence in the alternative based on the same particulars used to allege breach of contract. The contractual obligation is fundamental since it was created by the parties, so clause 35 (1) must cover all the allegations in the statement of claim. There is also no need to consider the alternative in negligence as a tort since the negligence claimed is not independent of the contractual obligations.

The second crucial phrase in clause 35 (1) is "as to any matter and thing of whatsoever nature arising thereunder or in connection therewith," must refer to matters which arise "as to the construction of the contract" which was the initial critical phrase to construe. The sum and substance of the matter is that the breaches alleged were anticipated by the detailed provisions in the contract. Therefore the arbitration clause must be brought into play to resolve the disputed issues. Here it should be mentioned that prior to the proceedings being instituted in the Supreme Court, the contractors, in accordance with clause 35 (1), gave notice in writing of disputes to be referred to an arbitrator. The notice took the form:

> "Al Richards & Associates August 14, 1989
> 2A Caledonia Avenue
> Kingston 5.
>
> Dear Sir,
>
> Re: Melwood Villas Arbitration
>
> Be advised that further to clause 35 of the conditions of contract, JCC First Revision 1984, I hereby state that a dispute or difference has arisen between Castle Construction Ltd, and the Architect and we hereby request that arbitration proceeding begin to resolve the matters listed below which although attempted cannot be resolved by discussion and agreement. We await your response to the joint naming of an acceptable arbitrator to both parties.
>
> The disputes are:-
>
> (1) Castle Construction Ltd. disclaims responsibility for the delay and associated costs for the construction of units 5 & 6.
>
> (2) Castle Construction Ltd. disagrees with the nil extension of time granted by the architect as listed in letter dated July 21, 1989. Castle Construction Ltd. now asked for a revision of the extension of time decision and the associated costs.
>
> Yours respectfully,
> Castle Construction Ltd.
>
> Sgd/ Patrick Brown
> Managing Director."

In this context, it must be recalled that once the dispute arises between the appellant, as employer or the architect on its behalf, and the contractor, one of the essentials for reference comes into play: see clause 35 (1). As for this dispute, they were covered in the contract by clause 26 of The Appendix To Form Of Contract captioned "Period of Delay." From the outset therefore, the appellant by its conduct in not responding to this request, sought to avoid the arbitrator as a tribunal.

Did Wolfe J, exercise his discretion correctly to stay the proceedings contemplated by the statement of claim?

It was the appellant who instituted proceedings against the contractor by writ of summons. In support of the summons to stay proceedings, the following paragraphs appear in the contractor's affidavit:

> "6. The First-Defendant is claiming that the Plaintiff is in breach of the said Agreement, and that the employment of the First-Defendant, was terminated by the Plaintiff.
>
> 7. All these matters are within the scope of the said Agreement to refer disputes and differences arising thereunder to Arbitration, and arose before the commencement of this action, and are fit and proper matters to be referred to Arbitration and there is no reason why they should not be so referred and decided."

Then in a further affidavit the contractor stated as follows in paragraphs 5 and 6:

> "5. That I crave leave to refer to the standard Form of Building Contract, a copy of which is attached hereto marked 'B' for identity. I am also to refer particularly to Clauses 25, 26, 30, 31A, 31B, 31C, 32 and 33 thereof.
>
> 6. That I also crave leave to refer to letter Castle Construction Ltd., to A.L. Richards & Associates dated August 14, 1989, a copy of which is attached hereto marked 'C' for identity."

Since section 5 of the Arbitration Act is relied on in paragraph 7 of this affidavit, it must be cited. It reads:

> "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any person claiming through him or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at anytime after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay proceedings, and the Court or a Judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an Order staying proceedings."

It is admitted that the hearing of the summons for the stay took some time to come on because of mishaps in the Registry for which neither party was to be blamed. The issue therefore was whether the dispute raised in the statement of claim concerned matters which the parties agreed to refer to arbitration. The onus lies on the appellant to show that there was sufficient reason why the dispute should not be referred to arbitration: see **Hodgson v. The Railway Passenger Associate** [1881-1882] IX Q.B. 188 and **Vawdrey v. Simpson** [1896] 1 Ch. 166. It has already been established that the issues raised in the appellant's statement of claim ought to have been referred to arbitration so Wolfe J, exercised his discretion to stay proceedings correctly.

Apart from the notice of August 14 requesting that arbitration proceedings commence, the contractor was otherwise qualified to seek a stay. It is true that the contractor entered an appearance as he was permitted to, pursuant to section 5 of the Arbitration Act, but he did not deliver any pleadings or take any other steps. As for the duration of the contract, clause 35 (1) operates during the progress or after the completion or abandonment of the works.

Regarding the willingness of the contractor to go to arbitration, here is how paragraph 10 of the affidavit puts it:

> "10. At the time this action was commenced, Castle Construction Limited was and still remains ready and willing to do all things necessary and requisite to the proper conduct of the Arbitration and to enable all the matters in dispute as aforesaid to be determined by arbitration in accordance with the provisions of the said Agreement."

There has been no attempt to refute this statement. On this aspect of the case, the appellant's claim has no merit.

In the circumstance of this case was it an abuse of process for the appellant to seek to enter a judgment in default in the Supreme Court?

Between the period of the application for a stay of proceedings and the hearing of that application, the appellant sought a judgment in default to be entered against the contractor on the ground that no defence had been filed. Bearing in mind that the contractor had taken the step to commence arbitration proceedings and had entered an appearance in the Supreme Court, the contractor was obliged to await the hearing before Wolfe, J. on the summons for a stay. Had the contractor been lured into delivering a defence as the appellant contended, the protection of section 5 of the Arbitration Act as regards a stay, would have been lost. Two instances where seeking leave to defend in court were regarded as steps in the proceedings, were **Pitchers Ltd. v. Plaza (Queensbury) Ltd.** [1940] 1 All E.R. 151 and **Fords Hotel Co. Ltd. v. Barlett** [1896] A.C. 1. The Supreme Court then became the tribunal for resolving disputes although there was an agreement to refer such disputes to an arbitrator.

In the light of the construction of section 5 of the Arbitration Act and these authorities, it was an abuse of process to seek to have a judgment in default entered while the summons for the stay was pending. Lord Donaldson, M.R. would have regarded as "wholly inappropriate," the situation contemplated by the

appellant and that is just another way of describing an abuse of process: see **W.E.A. Records Ltd. v. Visions Channel 4 Ltd & Ors.** [1983] 2 All E.R. 589 at 594.

The result is that on every ground the contractor has succeeded in this interlocutory appeal. The order of Wolfe, J., must be affirmed and the respondent contractor must have taxed or agreed costs.

WRIGHT, J.A.

The relevant issues have been appropriately considered and I agree with the decision that the appeal must be dismissed, the order of the Court below be affirmed and that the respondent be awarded costs to be taxed or agreed.

MORGAN, J.A.

I also agree.

Cases referred to

(1) Hodgson v The Railway Passengers Assurance (1882) 1 Q.B. 188

(2) Vaudrey v Simpson (1896) 1 Ch 166

(3) Pritchard Ltd v Plaza (Queensbury) Ltd (1970) 1 All E.R. 15

(4) Friars Hotel Co. Ltd v Bartlett (1896) A.C. 1

(5) WEA Records Ltd v Visions Channel 4 Ltd & Ors (1983) 2 All E.R. 589