In The Supreme Court of Judicature of Jamaica
In Civil Division
Suit No. 2003 HCV 1883

Between Construction Developers Associates Limited Claimant

And Coffee Industry Board Defendant

Kipcho West instructed by Grant, Stewart, Phillips & Co for the Claimant.

Maurice Manning and Miss Sherry-Ann McGregor instructed by Nunes, Scholefield, DeLeon & Co for the Defendant.

Heard: March 29, 2004 and May 4, 2004

Harris, J.

By an amended fixed date claim form, the Claimant sought the following orders:-

(1) That the parties agree the appointment of an arbitrator within 10 days of the date of the order of the court.

(2) That if the parties fail to agree the appointment of an Arbitrator within the time specified, then the court should appoint an arbitrator within 10 days thereof.

On May 30, 1994 the Claimant and the defendant entered into a contract whereby it was agreed, inter alia, that the Claimant would carry out the execution of certain work on a project in consideration of the sum of $247,583,656.01. The Claimant thereafter commenced the work specified in the Contract.

Clause 19 .1 of the contract provides as follows:-

"19.1 Settlement of disputes (Arbitration): If any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor or the Engineer and the Contractor in connection with or

> arising out of the contract, or the execution of the works, whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the Engineer who shall, within a period of ninety days after being requested by either party to do so, give written notice of his decision to the Employer and the Contractor."

Express provision is made by this clause, primarily, for the referral to and the settlement of disputes or differences arising between the Contractor (the Claimant) and the Employer, (the Defendant) or the Contractor and "the Engineer" to "the Engineer", in the first place, who shall within a period of 90 days after being requested by either party so to do, deliver written notice of his decision. The contract defines "the Engineer" as the appointed architect/consulting Engineer directly or through his authorized representative or other engineer appointed from time to time by the employer.

It is also provided by the Clause, that, in the event of the Engineer giving written notice of his decision and no claim to arbitration has been communicated to him by either the Claimant or the defendant within ninety days of the receipt of such notice, the Engineer's decision shall be final.

Messrs McMorris, Sibley, Robinson were appointed the Engineer. Between 1997 and 1999 correspondence passed between the Claimant, the Engineer, the quantity surveyor for the project Messrs Stoppi Cairney and Bloomfield, and the Claimant's quantity surveyor Messrs Woodrow Whitely and Associates, relating to the submission of a final statement of account, among other things.

On one hand, the Claimant contended that a dispute arose between the Engineer and itself. The Engineer gave a decision in October and November 1999 with which it was dissatisfied a consequence of which notification of its claim to arbitration was communicated to the Engineer on December 22, 1999 within the period mandated by the contract. The defendant, on the other hand, asserted that a final decision was made in December 1997 and the Claimant's request for reference of the matter to arbitration was outside the time prescribed by the contract.

The fundamental issue for consideration is whether the Engineer had made a decision in 1999 which could validly be referred to arbitration. The determination of this issue revolves around the question as to whether a final

decision touching a dispute or difference between the parties was made in 1997 or in 1999.

It is first necessary to refer to Clause 22.5 of the Contract, which, provides:-

> "Not later than one month after the issue of the Maintenance Certificate, the Contractor shall submit to the Engineer a final statement of account with supporting documents, showing in detail the value of the work done in accordance with the contract together with all further sums which the contractor considers to be due to him under the contract. Within six (6) months after receipt of the final Statement of Account and of all information reasonably required for its verification, the Engineer shall issue a final certificate stating:
>
> (a) The amount which in his opinion is finally due under the contract and (after giving credit to the Employer) for all amounts previously paid by the Engineer and for all sums to which the Employer is entitled under the contract.
>
> (b) The balance, if any due from the Employer to the Contractor or from the Contractor to the Employer as the case may be. Such balance shall, subject to clause 17.8 hereof be paid to or by the contractor as the case may require, within (28) days of the Certificate."

Clause 17.8 of the Contract outlines terms for payment in the event of the termination of the contract and is therefore not relevant to the resolution of the issue.

Clause 22.5 of the contract places an onus on the Claimant to prepare and submit a final statement of account within 28 days consequent on the issue of a Maintenance Certificate by the Engineer. This final account must be accompanied by supporting documents outlining details of the value of the work done, as well as all further sums considered by the Claimant to be due and owing to it. The Engineer is thereafter obliged to issue his certificate with respect to the amount finally due, if any, to the Claimant under the contract, within six months of the receipt of the final statement of account.

It is also of import to recount the chronology of events occurring between October, 1997 and December, 1999. The first of these was contained in a letter dated October 16, 1997, sent by the Engineer to the Claimant, transmitting a copy of a Maintenance Certificate it had earlier issued to the defendant by way of letter dated September 9, 1997.

By a letter dated October 24, 1997 the Claimant informed the Engineer that it was unable to meet the deadline for the delivery of the final statement of account, and requested that the time for so doing be extended to December 31, 1997. The Engineer, responding on October 27, 1997 that there was no necessity to extend the period for the presentation of accounts beyond November 17, 1997, made reference to a provisional statement of account which had been submitted 8 months earlier to the Claimant by Messrs Stoppi Cairney Bloomfield, the project's quantity surveyors.

On November 7, 1997 the Engineer wrote to the Claimant, again alluding to the provisional statement of account and informing it that it had ample time within which to have reviewed the document which had been prepared by Messrs Stoppi, Cairney Bloomfield At that time, a further request by the Claimant for an extension of time for the submission of the accounts was denied.

Having not received a response from the Claimant, by letter dated December 4, 1997, the Engineer informed the Claimant of its intention to secure the assistance of Messrs Stoppi Cairney Bloomfield to carry out an assessment of the final costs of the project. To this proposal, the Claimant objected in a letter of December 12, 1997. In its reply, by a letter of December 16, 1997, the Engineer informed the Claimant that the accounts were a month late and Messrs Stoppi, Carney, Bloomfield were requested to prepare a final statement of account.

The Claimant again wrote to the Engineer registering its objection to the preparation of the final accounts by Stoppi Cairney Bloomfield. On January 16, 1998 the Claimant sent a further letter to the Engineer pointing out that several outstanding issues touching the final statement of account remained unresolved. Messrs Stoppi Cairney Bloomfield sent the Claimant a draft final statement of account for its perusal and approval by letter dated November 2, 1998. On January 19, 1999 the Claimant's quantity surveyor Messrs Woodrow Whitely and Associates dispatched to Messrs Stoppi Cairney Robinson a proposed final statement of Account showing the sum of $601,043,625.68 as being due to the Claimant and outlined that they proposed to carry out a

comparative review of the Claimant's submission against that which was sent by Messrs Stoppi Cairney Bloomfield.

Messrs Stoppi Cairney Bloomfield replied on January 21, 1999 informing Messrs Woodrow Whitely and Associates that the statement of account was not valid, as it had not been submitted within the prescribed contractual period and that a final statement of account had previously been submitted by the Claimant on January 14, 1998 had been assessed by the Consultants.

Following this, Messrs Woodrow Whitely and Associates wrote to Messrs Stoppi Cairney Bloomfield on February 5, 1999, challenging their assertions. Further correspondence was exchanged between Messrs Woodrow Whitely and Messrs Stoppi Cairney Bloomfield up to August 16, 1999 centering around the submission of the final accounts.

On October 5, 1999 the Claimant wrote to the Engineer seeking his decision on the issue relating to the final statement of account. In a letter by the Engineer to the Claimant on October 19, 1999, he outlined that the opinion expressed in his letter of December 1997 stood unchanged but would again communicate with it after consulting the Project's quantity surveyor upon his return to the island. A further letter was sent by the Engineer to the Claimant on November 9, 1999 informing it that his views remained unchanged.

It is clear that the matter of the submission of the final statement of account gave rise to disagreement between the Claimant, the Engineer and Messrs Stoppi Cairney Bloomfield. The seeds of the discord having been sown by the Engineer, were fertilized and germinated by Messrs Stoppi Cairney Bloomfield, the duly authorized representative of the Engineer. The preparation and submission of the final accounts were commissioned by the Engineer on whose behalf Messrs Stoppi Cairney and Bloomfield acted. The acts of the Engineer and Messrs Stoppi Cairney Bloomfield are attributable to the defendant.

The Engineer's opinion that the Claimant had failed to submit its final statement of account within one month after the issue of the Maintenance Certificate and was therefore in breach of the Contract is unassailable. However, there can be no doubt that the Claimant had appreciated its failure to submit the final statement of account within the prescribed time, as, on two occasions, it requested extension of the time within which to do so. These requests were denied by the Engineer. Therefore, there could have been no dispute relating to a breach of contract. However, it is obvious that the

Engineer's direction that Messrs Stoppi Cairney Bloomfield prepare the final statement of account formed the foundation of an impasse.

Mr. Manning urged that the consequence of the breach of contract was the Engineer's determination that he would treat only with the account as prepared by Stoppi Cairney Bloomfield. The position was known to the Claimant from December 1997, the Engineer's authority was not challenged by the Claimant in December, 1997 and its letter of December 22, 1999 is out of time and void. He further submitted that the letters of October 19, and November 9, 1999 do nothing more than reiterate a decision made by the Engineer in December, 1997. With these submissions I am constrained to disagree.

Clause 19.1 of the Contract expressly provides for the settlement of disputes or differences by the Engineer, subsequent to his being requested by any of the parties so to do. The critical question here is, did the Claimant make a request of the Engineer to settle any dispute in 1997 to which a decision had been made by the Engineer? The answer is no. Therefore it cannot be acknowledged that there was a decision in 1997 which could have been challenged within the context of the provisions of Clause 19.1 of the contract.

Messrs Stoppi Cairney Bloomfield had submitted to the Claimant a provisional statement of account in February 1997. In December, 1997 the Engineer made reference to this account. The Claimant clearly informed the Engineer that the provisional account had not included work done since Messrs Stoppi Cairney Bloomfield submitted their account. The Engineer, nonetheless proceeded to instruct Messrs Stoppi Cairney Bloomfield to prepare a final statement of account. To this the Claimant raised an objection. On January 16, 1998 the Claimant wrote to the Engineer informing him of unresolved matters relating to the final statement of account, suggesting settlement amicably or by the method prescribed by the Contract. No response was received by the Claimant until November 2, 1998, at which time, Messrs Stoppi Cairney Bloomfield forwarded to it a draft copy of a final statement of account for its perusal and agreement.

Consequent to this, Messrs Stoppi Cairney Bloomfield questioned the validity of Messrs Woodrow Whitely & Associates' final statement of account sent by letter of January 19, 1999 on behalf of the Claimant on the basis that a statement had previously been submitted by the Claimant and its submission of the account was outside the contractual period. In response Messrs Woodrow Whitely & Associates maintained that the statement submitted by them on

January 19 did not represent a submission of a final account by the Claimant. They also challenged the validity of the accounts prepared by Messrs Stoppi Cairney Bloomfield as being out of time. These exchanges are indicative of the fact that up to this time the matter of the presentation or submission of the final statement of account was still an issue between the parties.

It is incontrovertible that the matters in dispute are grounded upon the preparation and submission of the final account. It is obvious that the matters which form the subject of the disagreement fall within the parameter of a dispute or difference between the parties within the context of Clause 19.1 of the contract. The Claimant and defendant are clearly parties to the dispute and are subject to all terms and conditions of the contract. Clause 19.1 mandates the reference of dispute or difference of any kind arising out of the contract to the Engineer, upon a request being made by either party.

The information communicated to the Claimant by the Engineer in December 1997 with respect to Messrs Stoppi Cairney Bloomfield furnishing the final account cannot be construed as a decision which was final and binding on the parties, as at that time, there was no request by the Claimant to the Engineer, to settle a dispute. Thereafter, a stalemate developed between Messrs Stoppi Cairney Bloomfield and the Claimant surrounding the final statement of account, following which, the Claimant by way of its letter of October 5, 1999 sought to obtain a decision from the Engineer touching the matters in dispute. Arising from this request, the Engineer by his letters of October 19 and November 9, 1999 gave written notice of his decision. On December 22, 1999 the Claimant notified the Engineer of its claim to proceed to arbitration. The date of the notification clearly falls within the 90 days stipulated by the contract for so doing.

The defendant has failed to act in conformity with the terms of the Contract with respect to the settlement of the dispute, despite the delivery of the Claimant's claim to arbitration. The parties ought to proceed to arbitration in compliance with the terms and conditions of the Contract.

It is ordered that:-

(1) The parties proceed to arbitration.
(2) The parties appoint an arbitrator within ten days of the date hereof.

(3) Should the parties fail to agree on an arbitrator within ten days of the date hereof then Mr. Justice Ransford Langrin shall be the arbitrator.

Costs to the Claimant to be agreed or taxed.