IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. E048/88

BETWEEN	EASTERN BANANA ESTATES LIMITED	PLAINTIFF
A N D	UNITED BRANDS COMPANY	DEFENDANTS

R.N.A. Henriques Q.C., and A. Wood instructed by Livingston, Alexander and Levy for Applicant/Defendant.

D.M. Muirhead Q.C., and Noel Levy and Steve Shelton instructed by Myers, Fletcher and Gordon, Manton and Hart for Respondents/Plaintiffs.

IN CHAMBERS - Summons applying for Stay of Proceedings December 10, 11 and 13, 1988.

ELLIS, J.

By a summons dated 11th November, 1988 the applicant seeks an Order staying all further proceedings in this action pursuant to sections 5 of the Arbitration Act.

The plaintiff sued the defendant for breach of Contract, fraudulent misrepresentation, breach of duty of care, breach of the Sale of Goods Act and Negligence.

To that Writ, the defendant made a conditional appearance and on the 29th November 1988 the plaintiff obtained an order to proceed to assessment of damages having obtained an Interlocutory Judgment in Default of Appearance.

Mr. Henriques for the applicant/defendant and Mr. Muirhead for the plaintiff/respondent are agreed as to the five requisite conditions of obtaining a stay under the Arbitration Act. They are:

(a) A valid Arbitration Agreement which covers the dispute in question;

(b) The applicant must be entitled to rely on the agreement;

(c) The applicant must have taken no step in the proceedings after appearance;

(d) The applicant must be ready and willing to arbitrate;

(e) There must be no sufficient reason for refusing stay.

Mr. Henriques contends that the applicant has satisfied the first condition.

He says there is a valid agreement to go to arbitration to be found in Clause 5 of the Joint Venture Agreement. That Clause he says, is the applicant's imput into the agreement and the plaintiff entered into a contract with the defendant on the terms of that Clause. He says that disputes or differences between the parties with regards to the agreement are to be settled by arbitration (Sec. Clause 7 of the Agreement) and therefore he submits that that contract is the valid contract which is required in the first condition. Furthermore, it covers the dispute between the parties as the clause on which it is based sets out the obligations of the defendant and it is the breach of those obligations for which the plaintiff is seeking damages. Even if there is a separate contract the express intention of the parties in the Joint Venture Agreement could by necessary implication incorporate a provision for Arbitration.

The applicant's entitlement to rely on the agreement is to be found in the affidavit of Marshall Hall and paragraph 18 of the Statement of Claim. The plaintiff it is said is merely the vehicle to carry out the terms of the Joint Venture Agreement of 27th October 1982 between The Government of Jamaica, Jamaica Banana Producers Association and United Brands Company (Applicant). It is so inextricably bound up with the defendant and the other parties that it should come within the arbitration clause in the Joint Venture Agreement.

Roussel Uclaf vs. D. Searle and Company Limited [1978] R.P.C. 748 was cited in support of this contention.

The conditions 3,4 and 5 on the facts of the case did not attract much argument from the applicant.

Mr. Muirhead argues that section 5 of the Arbitration Act does not support the applicant's contention. The plaintiff he says is not a party to any submission within the statute it being a limited liability company separate from its shareholders.

He therefore submits that the basis for a stay pursuant to the statute cannot be satisfied.

He disputes the existence of any written contract between the plaintiff and defendant and advances the argument that since there is none there can be no arbitration clause covering any dispute.

On the aspect of the arbitration clause being incorporated Mr.Muirhead's terse submission is that a pre-incorporation contract cannot bind the Company.

He cited many cases to support his arguments and sought to distinguish the Roussel-Uclaf case. The conditions of obtaining a stay of proceedings are to be satisfied cumulatively.

On the arguments, I am not convinced that the applicant has satisfied the conditions as to the existence of a valid arbitration agreement which covers the questions in dispute and its entitlement to a reliance on such a contract.

I am not convinced for the following reasons:

(i) The Joint Venture Agreement does not avail the applicant in that it has nothing to do with the plaintiff.

(ii) The existence of a separate contract is not attractive of the incorporation of the arbitration clause in the Joint Venture Agreement because there is no privity of contract between defendant and the plaintiff. If there is a separate agreement, there can be incorporation of one document containing an arbitration clause in one in which the dispute arises, but the parties must be the same. Tracomin case [1983] 1W.L.R. 662; [1983] 1 All E.R. 404 is therefore good law but does not assist the applicant here as there is no commonalty of parties here;

(iii) The separate entity, the plaintiff, albeit the creation of the applicant and others is not its subsidiary. It may be a beneficiary but that does not make it so inextricably bound up with the applicant so as to attract the wide construction of subsidiary used in the Roussel-Ucalf case cited above.

(iv) The plaintiff has denied any agreement with the defendant to submit to arbitration. If there has never been a contract with the defendant there can not be a clause to arbitrate.

The defendant has not shown such an agreement and has not satisfied the existence of a valid agreement.

Heyman's Case [1942] 1 All E.R. 337 cited by Mr. Muirhead supports this reason. The applicant in the circumstances has not shown that the matter in dispute are referrable to arbitration.

The summons is dismissed and the plaintiff is to have certificate for Queens Counsel and Counsel to have costs agreed or taxed.

Leave to appeal granted.