IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO.2013 CD 00024

BETWEEN	**TRI-STAR ENGINEERING COMPANY LIMITED**	**CLAIMANT**
AND	**ALU-PLASTICS LIMITED**	**1ST DEFENDANT**
AND	**PAMELA JOSEPHS**	**2ND DEFENDANT**
AND	**JUDITH JOSEPHS**	**3RD DEFENDANT**

IN CHAMBERS

Mr. Jerome Spencer and Mr. Hadrian Christie instructed by Patterson, Mair, Hamilton, Attorneys-at-Law for the Claimant.

Mr. Maurice Manning, Ms. Grace Lindo and Ms. Michelle Phillips instructed by Nunes, Scholefield, De Leon & Co, Attorneys-at-Law for the Defendants.

HEARD: 2nd,12th, 16th April, and 3rd May 2013.

APPLICATION FOR STAY OF PROCEEDINGS- SECTION 5 ARBITRATION ACT- WHETHER FACT THAT CLAIM MADE AGAINST DIRECTORS OF COMPANY IN ADDITION TO COMPANY SHOULD PREVENT REFERRAL-

AFFIDAVIT EVIDENCE ALLOWED AFTER MATTER HEARD AND JUDGMENT RESERVED-TO DEAL WITH READINESS AND WILLINGNESS TO PROCEED AT TIME OF COMMENCEMENT OF PROCEEDINGS - WHAT PROOF REQUIRED OF READINESS AND WILLINGNESS-STAGE DISPUTE/BREAKDOWN HAD REACHED WITH PARTIES RELEVANT-WHETHER GOOD REASON NOT TO REFER TO ARBITRATION

Mangatal J:

[1] By Notice of Application for Court Orders filed March 15 2013, the 1st Defendant Alu-Plastics Limited ("Alu-Plastics"), the 2nd Defendant Pamela Josephs, and the 3rd Defendant Judith Josephs (collectively "the Josephs"), applied for the following relief:

> ***"....3. That there be a stay of proceedings pursuant to section 5 of the Arbitration Act, pending the submission of the matters in dispute herein to arbitration."***

[2] The stated ground of the application is that the Claimant Tri-Star Engineering Company Limited ("Tri-Star") and Alu-Plastics are parties to a contract that provides that in the event of disputes or differences arising, the matters be referred to arbitration. Alu-Plastics disputed Tri-Star's termination of the Agreement and claimed damages. The application has been vigorously opposed by TrI-Star.

[3] Other aspects of the application concerned a freezing order which was first granted by me ex parte on March 1st 2013, and have already been dealt with on earlier hearing dates. My written decision can be found at neutral citation [2013] JMSC Comm. 7. The allegations and background have been set out in that judgment in detail.

[4] The clause of the Sub-Contract that is relevant to the present issue is Clause 15, headed "Disputes" and Sub-Clause 15(a) provides as follows:

> ***"15. DISPUTES***
> ***(a) In the event of any dispute or disagreement between the parties touching and concerning this Agreement the same shall be referred to a single Arbitrator to be agreed upon by the parties."***

[5] Section 5 of the Arbitration Act provides as follows:

> ***"5. If any party to a submission, or any person claiming through or under him, commences any legal proceedings against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings and a 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 for the proper conduct of the arbitration, may make an order staying the proceedings."

THE DEFENDANTS' SUBMISSIONS

[6] The Defendants' Attorneys say that they have brought this application for a stay pending referral to arbitration pursuant to clause 15(a), which was clearly agreed by the parties to it and thus it was the common intention of both Tri-Star and Alu-Plastics that any disputes or disagreements between the parties would be referred to arbitration. Mr. Manning submitted that the words of the clause are very wide and cover the issues pleaded by Tri-Star.

[7] It was further submitted that Alu-Plastics is a party to the Sub-Contract and that the Josephs are directors of Alu-Plastics and are therefore parties claiming through Alu-Plastics. The submission continues that they are entitled to have the issue of whether the mobilization payment was for the exclusive purpose of procuring raw materials determined by the arbitrator. It was further submitted that all other claims flow from this finding of fact. Tri-Star's claim against Alu-Plastics is for breach of trust and in the alternative breach of contract, and against the Josephs for dishonest assistance in the breach of trust by Alu-Plastics. It was contended that the disputes involve the purpose for which the mobilization payment was to be used and thus fall squarely within the matters of the Sub-Contract.

[8] Mr. Manning referred to and relied upon a number of cases, including **Tauton-Collins v. Cromie and others** [1964] 1 W.L.R. 633, cited by Mr. Spencer on behalf of Tri-Star, as supporting a position that arbitration between Tri-Star and the three Defendants would be the most sensible solution. Counsel referred to page 637 of the judgment where Pearson L.J., while agreeing with the majority stated:

"I still feel that the most sensible solution to the problem which has arisen in this case would be to have a tripartite arbitration in which the architect would be concerned as well as the employer and the contractors."

As Mr. Manning points out, the tripartite arbitration could not occur because the arbitrator was not represented. However, Pearson L.J. felt it important to make the point "in case it might have some bearing in possible future cases."
Counsel argued that the Josephs are clearly persons claiming through Alu-Plastics in accordance with section 5 of the Arbitration Act, and that arbitration would have the effect of resolving the issues between the parties.

[9] Counsel further submitted that Tri-Star is now seeking to avoid arbitration in circumstances where it was the party that expressly provided for arbitration. Mr. Manning posited that Tri-Star cannot seek to avoid arbitration by joining third parties to the very dispute it has with a contracting party and then use the fact of joinder to argue multiplicity of claims.

[10] It was further Mr. Manning's submission that in any event, the court enjoys an inherent jurisdiction to grant a stay generally and can do so in the instant case with regard to claims by persons who are not parties to the submission since the outcome of the submission to arbitration is binding on the parties. Therefore, no-one can proceed to assert or refute breach of trust since that matter would have been determined by the arbitrator.

[11] Mr. Manning comments on the fact that Tri-Star, apart from claiming that reputation and questions of law being involved are reasons not to proceed to arbitration, has also relied upon expense as another factor. Reference was made by Counsel to the case of **Ford v. Clarkson** [1971] 2 All E.R. 454 where, Davies L.J., at page 454 A-B, and D-F stated:

> **"*It is perfectly true that the Plaintiff in this case had, as it were, this arbitration clause imposed on him by the standard form of the Defendant's contract; but he did agree to it; and he is bound by it. I cannot see that the possible extra cost (and I am not very convinced that it would be all that extra) is a proper reason for refusing a stay.... Finally and somewhat surprisingly counsel for the plaintiff submitted that there was no reason why this case should go to arbitration. Edmund Davies LJ pointed out, rightly of course, that from the defendants' point of view there would be every reason for a dispute***

such as this to be heard in private rather than in public when it might be given a great deal of publicity. The real answer to that point is that it is no good saying that there was no good reason why this case should go to arbitration. The boot is on the other leg. The parties have agreed, in the view I take of the clause, to go to arbitration. The plaintiff has to show solid ground why, having made that agreement, he should not be bound by it."

TRI-STAR' S SUBMISSIONS

[12] It was Tri-Star's submission that Alu-Plastics has not met the requirements of section 5 of the Arbitration Act and therefore that the application for a stay ought to be refused.

[13] Reference was made by Mr. Christie, one of the Counsel appearing for Tri-Star, to the work of Sir Michael Mustill and Stewart Boyd, **The Law and Practice of Commercial Arbitration in England**, 2nd Edition, at page 467 and Counsel referred to what he described as a checklist of requirements provided by the learned authors. When all of the requirements of the section are considered, it was submitted that Alu-Plastics' application should fail because:

a. All the applicants are not parties to the arbitration agreement or a party claiming through it;
b. This claim involves matters outside the Sub-Contract;
c. The applicant has not demonstrated any readiness or willingness to do all things necessary to the proper conduct of the arbitration;
d. There is sufficient reason why the dispute should not be referred to arbitration.

a. All the applicants not parties to the arbitration agreement

[14] The only parties to the arbitration agreement are Alu-Plastics and Tri-Star. Counsel for Tri-Star therefore submit that the Josephs are not proper persons to bring this application. Therefore, the submission continues, even if Alu-Plastics were to succeed, the claim against the Josephs lives on. Counsel submit that for that very reason there is sufficient reason not to refer the matter to arbitration.

Response to Alu-Plastics argument regarding inherent jurisdiction

It was Tri-Star's position that the application made by all of the Defendants is expressly made pursuant to section 5 of the Arbitration Act, and not under the Court's inherent jurisdiction.

b. This claim involves matters outside of the Sub-Contract

[15] It was argued that Tri-Star has a claim against Alu-Plastics for breach of trust, which resulted from an operation of law and not the contract itself. It was submitted that the trust was not formed upon signing the agreement, but was formed when the mobilization payment was paid over to Alu-Plastics to procure the materials. Mr. Christie submitted that this falls outside the contract and is also an issue of law proper for the court to consider, as opposed to an arbitrator.

c. Alu-Plastics has not demonstrated any readiness or willingness to do all things necessary to the proper conduct of the arbitration

[16] Reference was made to the decision in **Piercy v. Young** (1879) 14 Ch. D. 200, where, it was submitted, the English Court of Appeal held that an Applicant under a section equivalent to section 5 of our Act must provide affidavit evidence to support their submission that they are ready and willing to partake in arbitration. Reference was made to page 209 where Jessel M.R. stated:

> ***"As regards the second point, I think it is right to say that the Court should have required an affidavit to be produced of readiness and willingness to refer to arbitration at the time when the motion was heard in the Court below. I suppose in the hurry of vacation business the point escaped the attention both of the legal advisers and the Judge, but the Court is required to be satisfied under the section, and therefore of course the Court must see that there is some evidence in support of the affirmative proposition. In this case there was none...."***

[17] Counsel's argument continues, that the Master of the Rolls, with whom the rest of the Court agreed, opined that such an Applicant should be turned away at first instance

and asked to return with proof of this. However, in the instant case, there is no need to turn back Alu-Plastics, it was submitted, because:

a. neither Pamela Josephs nor Judith Josephs has expressed any intention or willingness to go to arbitration. In fact, arbitration, it was pointed out, is not mentioned in their respective affidavits;
b. Based on the finances of Alu-Plastics, it is indeed questionable if it is able to partake in arbitration (which includes not only Attorney's costs, but also the Arbitrator's fees); and since this can be a costly venture, it was Tri-Star's contention that the court's discretion should favour allowing these proceedings to continue; and
c. there are sufficient reasons not to refer this matter to arbitration.

d. Sufficient reasons why disputes should not be referred to arbitration

[18] These reasons, Mr. Christie submitted, are as follows:

a. to stay the claim against Alu-Plastics would result in a multiplicity of proceedings based on the same facts and issues;

b. the dispute involves matters of law, which ought properly to go before the court; and

c. further reasons for this matter to go before the court is that there are allegations of dishonesty on both sides.

Multiplicity of Proceedings

[19] Counsel made reference to the case of **Taunton Collins v. Cromie and Another** [1964] 2 All E.R. 332 . The plaintiff employed an architect and also contractors to build him a house. The contract between the building owner and the contractor contained an arbitration clause. The Architect was not a party to this contract, and therefore was not bound by the arbitration clause. A dispute then arose between the building owner and the architect, which resulted in the owner suing the architect. The architect responded to the suit by blaming the contractors, who were joined as a

defendant by the building owner. An application was made by the contractors to stay the proceedings in light of the arbitration clause.

[20] The application was refused. It was held that the application ought to be refused because otherwise the result would be a multiplicity of proceedings which was to be avoided. Lord Denning M.R., sitting in the English Court of Appeal cited and agreed with McNair J. who in an earlier case, stated:

> ***"I think that a serious risk would be run that our whole jurisprudence procedure, at any rate in relation to this claim, would be brought into disrepute if, as I have indicated, there was a serious possibility of getting conflicting questions of fact decided by two different tribunals...."***

[21] Mr. Christie submitted that a similar danger is present in the instant case. This is because, were the claim against Alu-Plastics to be stayed, there would still remain claims against the Josephs based on the same facts in relation to the very same breach of trust levelled against Alu-Plastics. He submitted that there would be no way to reconcile a court finding that there was dishonest assistance with a breach of trust and an arbitrator finding that there was no trust.

DISPUTE INVOLVES ISSUES OF LAW

[22] On this point, reference was made to the English decisions in **Bonnin v. Neame** [1910] 1 Ch. 732, as well as **Turner v. Fenton and others** [1982] 1 All E.R. 8. It was submitted that since the disputes here concern more than the performance of the contract, but also includes a question of law-the operation of a trust-which requires a sound knowledge of the law, this is not a matter which should proceed to arbitration. Nor should it proceed to arbitration only to have a special case stated to the court to deal with this issue; this issue is an outright claim of its own and that if the court finds that a trust was created that would bring an end to the arbitration proceedings.

REPUTATION

[23] In this regard, reliance was placed upon the cases of **Radford v. Hair** [1971] 2 All E.R. 1089, and **Turner v. Fenton** in support of the proposition that where there are allegations of dishonesty, the matter should be tried by a Court.

[24] Counsel submitted that in light of all the circumstances concerning the application for a stay, the expense that would be incurred and the time lost by proceeding with two separate proceedings to address the same issue is sufficient reason to refuse this application.

AFFIDAVIT EVIDENCE ADMITTED AFTER JUDGMENT RESERVED

[25] On the 2nd of April 2013, having heard both the application for extension of the freezing order until trial and the application by the Defendants for a stay of the proceedings, I reserved my judgment and indicated that I would give my decision on the 12th April 2013. However, on the 5th of April 2013, Mr. Manning indicated that he had filed an Affidavit by Judith Josephs on the same date, and was seeking to rely upon that Affidavit in accordance with the principles in **Piercy v. Young.**

[26] Mr. Spencer on behalf of Tri-Star indicated that his client was opposed to the affidavit being admitted into evidence and thus I allowed the parties to make further submissions if so advised in relation to that point.

[27] On the 16th of April 2013, I ruled that the Defendants be permitted to refer to and rely upon the 3rd Affidavit of Judith Josephs, filed 5th April 2013. I also ordered that Tri-Star file and serve, if so advised, an Affidavit in response by April 23 2013, and the parties be at liberty to file brief further submissions limited to the additional evidence by April 26 2013.

[28] The basis of my ruling, which I indicated to the parties, was as follows:

> I am of the view that the Court plainly retains a discretion to allow the use of this Affidavit. Whilst I disagree with Mr. Manning that this Affidavit introduces no new facts, I think that justice requires the Defendants to use and rely upon

the Affidavit so that the Court can properly decide whether to stay the proceedings pursuant to section 5 of the Arbitration Act. Notwithstanding the late stage of the application, indeed after I had already reserved my ruling, along the lines discussed in **Piercy v. Young**, I think it is appropriate to allow the Defendants to rely upon this Affidavit. As stated by Jessel M.R. at page 209:

> *"**A Court is required to be satisfied under the section, and therefore of course the Court must see that there is some evidence in support of the affirmative proposition...."***

I am therefore providing the Defendants with the opportunity of "making their case complete". Complete, of course, does not necessarily mean successful. It is also just and appropriate to give the Claimant time to respond to that evidence. Indeed, on the last occasion, Mr. Spencer on behalf of Tri-Star, had indicated that he would welcome that opportunity if I were to rule in the Defendants' favour.

RESOLUTION OF THE ISSUES

[29] In my judgment, one starts from the premise that whether the court exercises the power to stay the claim pursuant to section 5 of the Arbitration Act is entirely a matter of discretion. Thus, citing the case of **Charles Osenton v. Johnston** [1942] A.C. 130, which was applied in **Turner v. Fenton**, the learned authors of the well-known work **Russell on Arbitration**, 19th Edition, page 187, state:

> ***" This discretion, in accordance with the ordinary rules of law, must be judicially exercised, but where it has been so exercised it will not readily be interfered with, even though the tribunal which is asked to review it may feel that, if the decision had rested with them, their own conclusion might have been different."***

[30] Another principle stated in the **Russell on Arbitration** which represents my understanding of the law in this area is stated at page 190, under the heading "Principles on which the discretion is exercised", as follows:

" Where parties have agreed to refer a dispute to arbitration, and one of them, notwithstanding that agreement , commences an action to have the dispute determined by the court, the prima facie leaning of the court is to stay the action and leave the plaintiff to the tribunal which he has agreed.....Once the party moving for a stay has shown that the dispute is within a valid and subsisting arbitration clause, the burden of showing cause why effect should not be given to the agreement to submit is upon the party opposing the application to stay."

[31] Mr. Spencer and Mr. Christie cited from page 467 of the work **The Law and Practice of Commercial Arbitration in England**, where the requirements of the English section equivalent to our section 5 are summarized as follows:

*"**The requirements of section 4(1) of the 1950 Act may be summarised as follows-***

(a) The person applying for the stay must prove the existence of an arbitration agreement, viz. A written agreement to submit present or future differences to arbitration.

(b) The applicant must prove that the proceedings in respect of which a stay is sought are of a type to which section 4(1) applies, namely that-

(i) They are legal proceedings commenced in a Court;

(ii) They are brought in respect of any matter agreed to be referred;

(iii) They are brought by a party to the arbitration agreement or by a person claiming through or under such a person

(c) The applicant must prove that the application is made in an appropriate manner, namely that-

(i) the applicant is a party to the arbitration agreement or a person claiming through or under such a person;

(ii) the applicant is a party to the legal proceedings;

(iii) The application is made after the applicant has entered an appearance but before he has

delivered any pleadings or taken any other steps in the proceedings.

(d) The Court must be satisfied that-

(i) The applicant was and is ready and willing to do all things necessary to the proper conduct of the arbitration;

(ii) There is no sufficient reason why the dispute should not be referred to arbitration.

(e) If the above requirements are satisfied, the applicant has a prima facie right to a stay, and the Court will grant one unless the person resisting the application persuades the Court that there are good reasons why one should not be granted.

The burden of proof shifts whilst the Court goes through the process of ascertaining whether the requirements are satisfied. Logically, it should remain on the applicant throughout stages (a) to (d), shifting to the plaintiff at stage (e). It appears, however, that the burden is a ls o on the pla intiff in re s pec t of re quire me nt (d)(i).”

(Underlining emphasis mine)

[32] I find this summary quite instructive, and it is useful to discuss the relevant circumstances under the categories there discussed. It is not in dispute that the “requirements” at sub-paragraphs (a),(b)(i) and (c)(iii) have been met. I will now therefore go through the rest of them.

[33] (b)(ii)-W hether proceedings brought in respect of any matter agreed to be referred

In my judgment, the whole dispute centres around the question of the purpose for which the mobilization payment was to be used and it thus falls squarely within the Sub-Contract. It seems plainly a dispute touching or concerning the Sub-Contract, which is what the Arbitration Clause in the Sub-Contract addresses. Tri-Star’s Attorneys have spent a lot of energy and ingenuity on the argument that Alu-Plastics has acted in breach of trust and that the Josephs dishonestly assisted with that breach of trust. The submission is that the breach of trust “...resulted from an operation of law and

not the contract itself. The trust was not formed upon signing the agreement, but when the mobilization payment was paid over to Alu-Plastics to procure the materials". I must say, that this argument seems rather far-fetched to me. As Mr. Manning argued, for a trust to come into existence there must be certainty of intention. That certainty of intention must be present at the time of formation of the sub-contract. In other words, it should have been the mutual intention of the parties at the inception of the Sub-Contract on March 20, 2012, or alternatively, there would have to be other evidence evincing the common intention of the parties as to the exclusivity of purpose of the mobilisation payment. The unilateral assertion of Tri-Star in September 2012 cannot retroactively insert Tri-Star's intention into the Sub-Contract. How it could be argued that the Trust was formed when the mobilization payment was paid over and not on the signing of the agreement, is difficult to conceive because the only evidence of the common intentions of the parties is to my mind to be gleaned from the terms of the Sub-Contract. The trust argument is a very attractive one from the point of view of interesting or creative legal or juridical reasoning. However, in my view, on the facts of this case, there really is no solid evidence to support the elegant arguments.

[34] The alternative claim against Alu-Plastics for breach of contract incontestably is a dispute touching and concerning the Sub-Contract. Further, the entire claim against the Josephs does not get off the ground unless there is a finding that it was the common intention of the parties that the mobilization payment would be used exclusively for the purpose of procuring materials.

(b) (iii)-Whether the proceedings are brought by a party to the arbitration agreement or by a person claiming through or under such a person

[35] These proceedings have been brought by Tri-Star, which is a party to the arbitration agreement.

(c) (i)- Whether the applicant is a party to the arbitration agreement or a person claiming through or under such a person

[36] Alu-Plastics is clearly a party to the arbitration agreement. Mr. Manning sought to argue that since the Josephs are Directors of Alu-Plastics they are persons claiming through, or under it. Counsel for Tri-Star referred me to the **Russell on Arbitration** , 20th Edition, pages 169-170, where the examples given of persons claiming through or under a party to the agreement are an assignee of the contract, the personal representative of a deceased party, the Trustee of a bankrupt, and an insurer who had a right of subjugation to rights of insured person. In my judgment, Mr. Spencer and Mr. Christie are correct that the Josephs are not persons claiming through or under Alu-Plastics within the meaning of section 5 of the Arbitration Act.

(c)(ii) whether the applicant is a party to the legal proceedings

[37] All of the Defendants are parties to the legal proceedings under challenge.

d (i)-The Court must be satisfied that the applicant was and is ready and willing to do all things necessary to the proper conduct of the arbitration.

[38] In her Affidavit filed April 5th 2013, at paragraphs 2-5 (inclusive) Judith Josephs states that :

> ***"2. That I have sat in Court and heard that one requirement for arbitration is that the First Defendant should demonstrate a willingness to go to Arbitration.***
>
> ***3. That the whole purpose of the Defendants seeking to stay proceedings in this matter is because of the willingness of all three defendants to go to Arbitration or some form of mediation to resolve the differences arising under the subcontract between the First Defendant and the Claimant.***
>
> ***4. That, to put the issue beyond argument, I confirm, on behalf of the First Defendant, that it is and has always been ready and willing to go to arbitration.***
>
> ***5. That it is pursuant to those our instructions that our Attorneys-at-Law filed the Notice of Application for, inter alia, a stay of these proceedings at the same time of filing our affidavits herein and before preparing for filing any defence."***

[39] It should be noted that although Tri-Star were given permission to file an Affidavit in response to Ms. Josephs's Affidavit if so advised, it did not chose to do so.

[40] However, in further written submissions filed, April 26 2013, learned Counsel for Tri-Star submit that the provision about readiness and willingness in section 5 of the Arbitration Act is unequivocal, and they argue that there is no evidence before the Court to satisfy this requirement. Reference was made to the Trinidadian High Court decision in **Sharma v. Adit et al** , Claim No. C.V. 2012-04258, delivered 8th February 2013. Counsel refer to paragraphs 4-6 of the decision where Gobin J stated:

> ***"4. The defendants now apply to have these proceedings stayed for a period of six months pursuant to S. 7 of the Arbitration Act. An affidavit filed by the defendants in support of this application includes the statement:***
>
> ***"Both myself and the 2nd Defendant have always been ready and willing to do all that is required and necessary for the determination of these questions, disputes and differences via arbitration."***
>
> ***5. It is well established that whether or not the Court exercises its power to stay the proceedings is entirely a matter of discretion (Russell on Arbitration 18th Edition p. 154). The burden is on the claimants to show cause why effect should not be given to the agreement to submit to arbitration, and on the defendants to show they were ready and willing to do all things necessary for the proper conduct of the arbitration. Having read the submissions on both sides I find that the claimants have satisfied me that I should refuse this application.***
>
> ***6. I accept the submission that by their conduct the defendants, the bold statement contained in the affidavit referred to above notwithstanding, have not demonstrated that at the time of the commencement of the proceedings they were ready and willing to do e v e ry thing ne ce s sa ry for the c onduc t of the a rbitra tion."***
>
> (Counsel's emphasis)

[41] Whilst it is clear that the Defendants must show that they were at the time of the commencement of the proceedings, ready and willing to do all things necessary for the proper conduct of the arbitration, it is obvious to me that the section must be interpreted reasonably and practically. The consideration must also depend on the circumstances existing, and the stage at which the party suing chooses to file a law suit against the

express agreement of the parties to submit to arbitration. Indeed, the extract from **The Law and Practice of Commercial Arbitration** is interesting, because it suggests that the burden is also on the claimant in respect of satisfying the court about the issue of whether the defendant is ready and willing to submit to arbitration.

[42] In my judgment, it is clear that it is easier to find that a party was not at the time of commencement of the proceedings ready and willing to do all things necessary for the arbitration, if there are overt acts upon which to carry out an evaluation. In the **Sharma** case, the Defendants did not respond to the claimant's pre-action letter to indicate their readiness and willingness to invoke the arbitration clause. In the instance case Mr. Spencer points out, that the letter dated January 31 2013 from the Defendants' Attorneys claiming that the Claimant was liable to Alu-Plastics in damages did not make any mention of the arbitration clause, much less any readiness or willingness to do all things necessary for the proper conduct of the arbitration. However, in **Sharma** the facts are quite distinguishable. At paragraph 8 Gobin J. states:

> *"**What puts it beyond doubt that the defendants were not so ready or willing is the institution** (by the defendants) **of summary proceedings in the Chaguaramas Magistrates Court for possession of the premises, almost four weeks after the pre-action letter was sent."***

[43] Those facts are quite different from the situation here. At paragraph 8 of their further written submissions dated April 12 2013, the Defendants emphasize that this matter had not reached the stage of discussion as to arbitration. In those circumstances, it would seem to me that there would be no reason to doubt, especially as Tri-Star has not filed any evidence to the contrary or challenging Ms. Josephs' assertion in the Affidavit that Alu-Plastics "is, and has always been ready and willing to go to arbitration". At paragraph 8, the submissions state:

> **"8. Prior to the litigation being filed the parties through their attorneys-at-law had been in discussions (see Affidavit of Grace Lindo sworn to on March 15, 2013). This is not contested. It is submitted that in the context of discussions on the disputed issues, following on the exchange of correspondence, the issue of Arbitration would not have arisen unless it became clear that the communication would not bear fruit. Only the filing of the litigation and its total failure to even reference discussions between the**

attorneys made it clear that dispute resolution would be required. Pursuant to the law, before taking any step in the litigation this application for the stay was made."

[44] In other words, let us take an extreme case. If the parties to the sub-contract were interacting and had a dispute, and one of them filed suit without any further discussion, could the party who rushes off to file the law suit get around the mode which the parties had agreed to employ to deal with their disputes, i.e. arbitration, by being "quick off the draw" or indeed, almost stealing a march? Could they simply file the law suit and trump whatever claim the other party may wish to make regarding enforcement of the agreement to arbitrate? That defies common sense to me. I think the section must mean that in respect of any matter connected with arbitration, as provided for in the contract, the party must show readiness and willingness to arbitrate. In the **Russell on Arbitration**, a similar point is well made. At page 186 of the 19th Edition, it is stated:

"A party not guilty of delay may plead that the arbitration is out of time, and yet be "ready and willing".

An arbitration agreement in a contract provided that obtaining an award should be a condition precedent to legal proceedings, and a clause of the agreement provided that any demand for arbitration had to be made within two months after the arrival of the goods. A dispute arose as to the weight of the packets of the goods and the buyer did not make a demand for arbitration within that time, but later brought proceedings in the courts. The sellers asked for proceedings to be stayed under section 4. Counsel for the buyers asked, inter alia, how a man could say that he was ready and willing to do all things necessary for the proper conduct of the arbitration when he was saying that the time for arbitration had elapsed and, therefore, an arbitration could not be got onto its legs. The court said "That proposition would mean that, where there is a time limit for a demand for arbitration or the appointment of an arbitrator, or whatever it may be, one party could defeat the rights of the other to have a dispute settled by this procedure merely by waiting until the time had elapsed and then issuing a writ and saying "You cannot say you are ready and willing because under the rule the time has elapsed"... Those words in section 4 mean that in respect of any matter connected with arbitration, according to the contract for arbitration, the applicant must show his readiness and willingness; but they do not mean that he cannot get a stay if the other party has allowed the time to run out.... I do not propose to lay down an absolute rule that the lapse of time might in no circumstances be a

re le va nt c onsi dera tion for a judge to c onsi der .. .." Bruce v. Strong
[1951] 2 K.B. 447 at 455."

(Underlining emphasis mine)

[45] At page 185 of the **Russell on Arbitration**, sub-paragraph 8, and notes, under the heading "Ready and willing", there are cases cited which suggest to me that "the readiness and willingness" of the Defendant is measured in relation to things to do with the arbitration, and that merely not saying anything about arbitration, depending on the stage the dispute has reached, will not without more, demonstrate a lack of readiness or willingness.

"8. "Ready and willing"

The applicant for a stay must show not only that he is now but also that he was at the time of the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration.

1. An agreement for the employment by the defendant of the plaintiff as his agent provided for the reference to two arbitrators, one to be appointed by each of the parties, of "any difference arising between the parties hereto... in regard to anything related to this agreement." The defendant dismissed the plaintiff for alleged misconduct and then appointed an arbitrator on his part to determine whether the plaintiff had committed such breaches as to justify dismissal, but not to determine whether he (the defendant) had any right of dismissal. In an action by the plaintiff to restrain the defendant from dismissing him, it was held by the C.A. that at the time of the commencement of the action the defendant was not "ready and willing to do all things necessary to the conduct of the arbitration" within the meaning of section 4, and that a stay must be refused: Davis v. Starr (1889) 41 Ch. D. 242.

2. Insurers contended that arbitration should be held in London on the grounds that the contract was made in England. The insured contended the arbitration should be in Northern Ireland. No agreement having been reached the insured issued a writ. After delivery of the statement of claim the insurers agreed that arbitration should be in Northern Ireland and applied for a stay. Held, that the insurers had not complied with the requirements of section 4 of the Arbitration Act (Northern Ireland) 1937 in that they had not been, at the time when proceedings were commenced, ready and willing to do all things necessary to the arbitration: Northern

Publishing Office (Belfast) Ltd. v. Cornhill Insurance Co. Ltd. , and Ellis [1956] N.I. 157.
3. See also decision of Ackner J. IN Camilla Cotton Oil Co. v. Granadex S.A. and Tracomin S.A. : Shawnee Processors Inc. v. Same, referred to in H.L. [1976] 2 Lloyd's Rep. 10 at p. 16.
But in Renshaw v. Queen Anne Mansions Co [1897] 1 Q.B. 662, where the facts were substantially the same as in Davis v. Starr, a stay was granted by the Court of Appeal on the ground that the defendant was "ready and willing to do all things necessary to the conduct of the arbitration," whereas in Davis v. Starr, he was not. Davis v. Starr was further considered by Lindley M.R., who said: "In Davis v. Starr this court took a wrong view of the facts, though not, I think, of the law. The principle upon which we proceeded in that case was right enough...."

[46] In all the circumstances, and on the evidence before me, I am satisfied that Alu-Plastics, was, at the time of the commencement of the proceedings, and still is, ready and willing to do all things necessary to the proper conduct of the arbitration.

d. (ii) Whether there is no sufficient reason why the dispute should not be referred to arbitration

[47] Tri-Star's Attorneys have raised a number of points which they say show that there are good reasons why this matter should be allowed to remain with the Court. These are broadly, the issues of multiplicity of proceedings, the dispute involves points of law, reputation and expense. I will deal with each of these points in turn.

MULTIPLICITY OF PROCEEDINGS

[48] I agree with Mr. Manning that Tri-Star cannot be allowed to seek to avoid arbitration by joining third parties to the dispute that it has with the contracting party Alu-Plastics and then use the fact of joinder to argue that there would be a multiplicity of claims. I wish to refer to the judgment of Pearson L.J. in the useful case of **Taunton-Collins v. Cromie**, cited by Tri- Star's Attorneys. At page 334 F-I it is stated:

"In this case there is a conflict of two well-established and important principles. One is that parties should normally be held to their contractual agreements. The present parties, the plaintiff and the building contractors, have agreed that any dispute or difference between them shall be referred to arbitration. It can be said in support of the application here that that is what the parties have

agreed and that, when the question is brought before the court, the court should be willing to say by its decision what the parties have already said by means of their own contract. That is one principle. The other principle is that a multiplicity of proceedings is highly undesirable for the reasons which have been given. It is obvious that there may be different decisions on the same question and a great confusion may arise. Counsel for the plaintiff also was able to point out the serious procedural difficulties which might arise if one had an arbitration between two parties and an action between different parties. It would be difficult to know who should call the third party as a witness in either of the proceedings concerned. Moreover, there is this consideration here, that this is not a case in which an employer, wishing really to sue the contractor and primarily interested in suing the contractor, adds the architect as a second defendant in order to avoid the arbitration clause. This is not a case of that character at all. This is a case in which the primary action is against the architect. The plaintiff sued only the architect in the first instance, and would have continued to sue only the architect but for the fact that the architect in his defence put the blame for certain matters on the contractors. When that had happened, the only reasonable course for the plaintiff to pursue was to add the contractors as second defendants. That is a very well established practice in other classes of litigation, and was the reasonable thing to do."

[49] In my judgment, **Taunton-Collins** has quite a different factual backdrop from the instant case. In my earlier judgment with regard to Tri-Star's freezing order application, I have already stated that I do not think that Tri-Star has a good arguable case for breach of trust (as opposed to breach of contract), against Alu-Plastics. If there is no good arguable case for breach of trust against Alu-Plastics, there can be no good arguable case against the Josephs, who are not in their personal capacity parties to the arbitration clause agreement, for dishonest assistance with breach of trust by Alu-Plastics. Thus I cannot say with the degree of conviction stated in **Taunton-Collins** what is the purpose of the Josephs being sued.

DISPUTE INVOLVES POINTS OF LAW

[50] I agree with Mr. Manning that the fact that the matter may involve points of law does not preclude arbitration or make it undesirable. Indeed, from the very nature of the Sub-contract it would seem that the question of breach of contract, which is a point of law, would be an obvious and therefore contemplated subject matter in respect of which

dispute could arise. In addition, section 20 of the Arbitration Act provides that the Arbitrator may state in the form of a special case for the opinion of the court any question of law arising in the course of the reference. In my judgment in any event, as regards the "purest" question of law (for want of a better term) which in theory could arise, i.e. the question of trust, that would only arise if the arbitrator finds that the mobilization payment was to be used for the exclusive purpose of procuring materials for the project. If, and only if, that determination is made by the arbitrator, then it is possible for the point to be stated by way of special case. However, there is in any event nothing to preclude the parties appointing an arbitrator with legal training to resolve all questions, including breach of trust. This arbitration agreement does not, for example, unlike others, specify that the arbitrator is to be an engineer, or quantity surveyor. It is for all of these reasons that I think that the tension (if any) between the principle that parties should be held to their bargain to go to arbitration, and the principle that points of law are best determined by the court, should resolve itself, and tip, in favour of a stay of the proceedings in order for the matter to be arbitrated as agreed.

REPUTATION

51. The cases demonstrate that it is at the instance of the party whose reputation is called into question that the Court will allow reputation- impinging issues to be aired in court rather than at arbitration. Thus, in many of the cases cited on behalf of Tri-Star, it is the party alleging the improper conduct against the other that applied for the stay. So for example, this is why in **Turner v. Fenton** it is stated (at page 18g), that: **"There is, however, a clear indication in *Charles Ostenton v. Johnston* that, where a professional man's reputation is at stake, he ought to have the benefit of a trial in the High Court."**(Underlining emphasis mine) In this case, it is the Defendants who have applied for the stay, and it is really their reputation that has been called into question by Tri-Star. Whilst the Defendants have in turn made allegations against Tri-Star and Mr. Clarke, these are really raising issues of credibility rather than reputation.

EXPENSE

52. Tri-Star has entered into an agreement with Alu-Plastics to take their disputes to arbitration. The case of **Ford v. Clarkson** and the quotation referred to in paragraph 11 of this judgment in my view demonstrates that this basis put forward by Tri-Star should find no fertile ground in the court's field of discretion.

DISPOSITION

53. In sum, I am of the view that Alu-Plastics is entitled to the stay which it has sought. Tri-Star has not satisfied me that there is any good or sufficient reason to refuse a stay. It is true that the application by the Josephs for a stay was also framed as being pursuant to section 5 of the Arbitration Act. I have already indicated that I am not of the view that the Josephs qualify as being parties claiming through or under Alu-Plastics, and hence they are not entitled to an order for a stay pursuant to section 5 of the Arbitration Act. However, I agree with Mr. Manning's submission that in the circumstances, where they too have applied for a stay, the Court has an inherent jurisdiction to grant one. One can call it inherent jurisdiction, or exercise of a case management power, or of plain logic and common sense. Or, it may well mean that the Court could use its power to make an order to put things right, along the lines of Rule 26.9 of the CPR. It seems to me, that once I have come to the view that the matter should proceed to arbitration against Alu-Plastics, and that the issue of whether the mobilization payment was for the sole purpose of the procurement of materials ought to be dealt with by the arbitrator, then it is obvious that the proceedings against the Josephs must also be stayed. Until that central issue is resolved, there is nothing for the Court or anyone else to try or to determine in relation to the allegation of dishonest assistance in breach of trust levelled against the Josephs.

54. I therefore make the following orders:

[1] As regards the First Defendant, a stay of proceedings is granted pursuant to Section 5 of the Arbitration Act, pending the submission of the matters in dispute to arbitration.

[2] As regards the Second and Third Defendant, a stay of proceedings is granted pursuant to the inherent jurisdiction of the Court, consequent on Order number 1.

[3] Costs to the Defendants to be taxed if not agreed.

[4] Defendants' Attorneys-at-Law to prepare, file and serve the formal order.

[5] Permission to appeal is refused.