

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 53/2013

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)**

BETWEEN TRI-STAR ENGINEERING LTD APPLICANT

**AND ALU-PLASTICS LTD
PAMELA JOSEPHS
JUDITH JOSEPHS RESPONDENTS**

Jerome Spencer instructed by Patterson Mair Hamilton for the applicant

**Maurice Manning and Miss Michelle Phillips instructed by Nunes Scholefield
DeLeon & Co for the respondents**

26 February, 13 and 27 March 2015

PANTON P

[1] On 13 March 2015, we ordered as follows:

“The application for permission to appeal is refused.
Costs of the application to the respondents to be
agreed or taxed.”

These are our reasons.

[2] The applicant (Tri-Star) sought permission to appeal against the judgment of Mangatal J delivered on 3 May 2013, whereby she stayed proceedings in the instant suit, pending the submission of the matters in dispute to arbitration. In order to grant permission, this court would have had to be satisfied that Tri-Star had “a real chance of success”.

The nature of the suit

[3] Tri-Star is claiming the sum of \$10,488,141.80 from Alu-Plastics for breach of trust and, alternatively, for breach of contract. Tri-Star is also claiming the sum of \$5,133,000.00 and continuing at the rate of \$87,000.00 per day for “further damages for breach of contract”, and interest at 1% above the average commercial banks’ prime lending rate.

[4] In its particulars of claim, Tri-Star states that on 21 December 2011, it entered into a contract with ATL Automotive Ltd to construct two showrooms at 1c Oxford Rd Kingston 5. It sub-contracted Alu-Plastics on 20 March 2012 to purchase and install curtain walls, aluminum windows and doors on the project. Tri-Star was to provide the funds for Alu-Plastics to procure the material. In April 2012 Tri-Star paid over to Alu-Plastics the sum of \$20,217,252.50 to apply same towards the procuring of the material. According to Tri-Star this sum would be held on resulting trust by Alu-Plastics as Tri-Star was to be repaid by equal deductions from the sums approved for payment to Alu-Plastics under the sub-contract.

[5] Alu-Plastics failed to honour the terms of the sub-contract as it has only paid a portion of the sum advanced to the Guatemala-based supplier of the material, and has withheld the balance of \$10,488,141.80 without any legal justification. Tri-Star has had to pay that amount to the supplier in order to complete the contract with ATL Automotive Ltd.

[6] Tri-Star has joined in the action Pamela and Judith Josephs, whom it has described as “the two controlling minds of Alu-Plastics” on the basis that they have allegedly “dishonestly assisted Alu-Plastics to breach the terms of the resulting trust”. Pamela and Judith Josephs are the only two directors of Alu-Plastics.

[7] The written agreement between Tri-Star and Alu-Plastics states that it is supplemental to the agreement made 21 December 2011 between Tri-Star and ATL Automotive Ltd. Clause 15 of the agreement between Tri-Star and Alu-Plastics provides that in the event of any dispute or disagreement between them, in respect of their agreement, it “shall be referred to a single Arbitrator to be agreed upon by the Parties”. The law of Jamaica is also stated as the proper law of the agreement.

The judgment of Mangatal J

[8] Before Mangatal J was an application by the respondents for a stay of proceedings pursuant to section 5 of the Arbitration Act, pending the submission of the matters in dispute to arbitration. That section 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 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 steps in the proceedings, apply to the Court to stay the proceedings and a Court or a Judge thereof, is 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 the proceedings.”

The learned judge dealt with the matter by considering firstly, the position of Alu-Plastics as a party to the agreement for the referral, and then the consequential position of the other respondents, Pamela and Judith Josephs. She concluded that Alu-Plastics was “entitled to the stay” under section 5 of the Arbitration Act, and said that Tri-Star had not satisfied her that there was a good or sufficient reason to deny Alu-Plastics’ application. In respect of Pamela and Judith Josephs, she noted that they were not a party to the agreement so they could not properly apply under section 5. However, she invoked the inherent jurisdiction of the court and ordered a stay of the proceedings against them on the ground that until the main issue has been decided, there can be no determination as regards the allegation of dishonest assistance in breach of trust.

The application

[9] The applicant sought permission to appeal from Mangatal J but she refused the application. The application before us was therefore a renewal and was made under rule 1.8(9) of the Court of Appeal Rules which reads:

“The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success.”

The submissions

[10] In making the instant application, Mr Jerome Spencer for Tri-Star contended that the respondents have failed to satisfy the strict requirements of section 5, and that no application had been made to the learned judge for her to invoke the court’s inherent jurisdiction. He conceded that the learned judge was “seised of inherent jurisdiction and is empowered to act on her own initiative under the Civil Procedure Rules 2002”. However, he contended that the learned judge did not give Tri-Star a reasonable opportunity to address her “after deciding to invoke said jurisdiction on her own initiative”. According to Mr Spencer, the learned judge’s decision amounted to “a judicial compulsion” of Tri-Star to go to arbitration with Pamela and Judith Josephs, and a denial of the opportunity for Tri-Star to pursue its case against them in circumstances where the claim against them is unconnected to the arbitration. Finally, in summarizing the position of Tri-Star, it has to be mentioned that Tri-Star was contending that since it has no agreement to arbitrate disputes with Pamela and Judith Josephs, any decision arising from the arbitration between Tri-Star and Alu-Plastics, would not bind Tri-Star nor Pamela and Judith Josephs. Indeed, Mr Spencer submitted that the judge erred in granting the stay to these respondents as not only is the arbitration of no concern to them, but it is also “without legal authority.”

[11] Mr Maurice Manning for the respondents submitted that the only issue for this court to consider was how to treat the matter so far as it relates to Pamela and Judith Josephs. He said this was due to his view that the learned judge cannot be faulted for her application of section 5 of the Arbitration Act to the agreement between Tri-Star and Alu-Plastics. However, Mr Manning said that he was at a loss as regards Tri-Star's submission that the findings of the arbitrator will not bind Pamela and Judith Josephs. This, Mr Manning said, was contrary to Tri-Star's pleadings.

Conclusion

[12] Having considered the facts and the submissions, we found no error in the decision of the learned judge or in the process by which she arrived at that decision. We rejected the complaint that no reasonable opportunity had been given to the applicant to address the judge in respect of her inherent jurisdiction. The question of a court's inherent jurisdiction is always a live matter which parties cannot afford to ignore. In any event, there was sufficient pause in the proceedings during the period that the affidavit of Judith Josephs was filed and comment invited by the judge.

[13] So far as the grant of the stay is concerned, we concluded that the learned judge made the only order that was appropriate in the situation. Tri-Star is claiming damages from Alu-Plastics for breach of trust and breach of contract. Tri-Star is also claiming damages from Pamela and Judith Josephs for dishonest assistance allegedly given to Alu-Plastics in its breach of trust. Tri-Star and Alu-Plastics have agreed to refer their disagreements to arbitration. It must follow that whatever results from the arbitration will have an impact on the complaint against the other respondents. We therefore

found it difficult to understand the submission made to the contrary. In the circumstances, it was correct that the action be stayed until the arbitral process has been completed.

[14] In our view, Tri-Star does not have a real chance of achieving success in an appeal against the judge's decision. Consequently, we refused permission to appeal and awarded costs of the application to the respondents, such costs to be agreed or taxed.