

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 12 of 2020

BETWEEN

CHAHAN ENGINEERS PTE LIMITED a limited liability company
having its registered office at 121 Laucala Bay Road, Suva, Fiji.

PLAINTIFF

AND

COASTAL DEVELOPMENT LIMITED a limited liability company
having its registered office at 17/18 Aurora Avenue,
Makoi, Nasinu, Fiji.

DEFENDANT

Counsel : Mr. Singh S. for the Plaintiff
Mr. Fatiaki S. for the Defendant

Date of Hearing : 13th May 2020

Date of Ruling : 09th June 2020

RULING

(On the Application to Refer the Matter for Arbitration)

[1] The plaintiff instituted these proceedings to recover \$341,187.58, Damages under section 146 of Commerce Commission Decree 2010 and general damages from the defendant for professional engineering services provided to the defendant.

1. The defendant on 10th February 2020 filed a Notice of Motion seeking the following orders:
2. An order that this action be stayed pursuant to section 5 of the Arbitration Act 1965;
3. An order that the dispute in this matter be referred to arbitration for resolution;
4. An order that an Arbitrator be appointed from the Fiji Institute of Engineers; and
5. An order that the costs of this application be paid by the plaintiff on an indemnity basis.

[2] It is common ground that the plaintiff and the defendant entered in to two agreements for the plaintiff to provide professional engineering services to the defendant, on 08th November 2018 and 23rd March 2019. On 22nd November 2019 the defendant terminated both agreements.

[3] The plaintiff states that the defendant terminated both contracts unilaterally and if there was a dispute which could have resolved by the contractual mechanisms, then the defendant has bypassed that by issuing an unlawful termination notice. The plaintiff states further that contractual damages, general damages and damages payable under Commerce Commission Decree 2010 are not matters that can be arbitrated.

[4] Clause 15.1 of both agreements are identical and it provides:

The following procedure will apply if a dispute arises under this agreement between the parties:

- a. If any dispute arises, the party claiming that a dispute has arisen will give written notice to the other party indicating the nature of the dispute. Upon receipt of the written notice, the parties must appoint at least one senior representative, who must, within 7 days from the date of receiving notice of dispute, meet with each other, and attempt to resolve the dispute.
- b. If the parties fail to resolve the dispute within 14 days from the date of meeting, the dispute will be referred to each of the parties' respective Managing Director / Chief Executive Officer, or their nominees, who must then meet and attempt to resolve the dispute within seven days.
- c. If the parties fail to resolve the dispute within the further 7 day period, the parties must mutually agree to appoint an Arbitrator to determine the dispute.
- d. The decision of the Arbitrator, in the absence of manifest error, will be conclusive and binding. Such reference shall be deemed arbitration pursuant to the Arbitration Act [Cap. 38] of Fiji or any statutory modification of that Act.
- e. The costs of the Arbitrator will be borne equally between the parties.

[5] The learned counsel cited many authorities and submitted that the parties to the agreement are bound by its terms and conditions. In this matter there is no dispute between the parties that they are bound by the terms of the agreement but the issue raised by the plaintiff is whether the defendant has complied with clause 15.1 of the agreement before referring the dispute for arbitration.

[6] The defendant relies on the following paragraph in the judgment of the Court of Appeal in the case of **Stantec New Zealand Ltd v Fiji Roads Authority** [2020] FJCA 23; ABU 24 of 2019 (28 February 2020);

However, in this case, the parties are bound by the Agreement they have entered into. As a result, the parties have to follow the provisions of the Agreement. The Agreement does not require consensus ad idem for the parties to refer the matter

for mediation. Any affected party, after issuing a notice of dispute, can resort to mediation without the consent of the other party.

- [7] The question here is whether a party is entitled to ignore certain clauses in the arbitration clause and only rely on the part of it which provides that any dispute between the parties must be referred for arbitration. The finding of the Court of appeal in *Stantec New Zealand Ltd v Fiji Roads Authority (supra)* is that the parties have to follow the provisions of the agreement.
- [8] Clause 15.1(a) requires that the party claiming that a dispute has arisen will give written notice to the other party indicating the nature of the dispute. In this matter no such notice has been given by the defendant. The learned counsel for the defendant submits that the e-mails exchanged between the parties show that there is a dispute and what the dispute is. Parties may have known what the dispute is but the requirement is to serve notice on the other party, in this matter the plaintiff, indicating the nature of the dispute. I am therefore, of the view that the defendant has not complied with clause 5.1(a) of the agreement.
- [9] If the parties, after serving notice under clause 5.1(a) of the agreement, unable resolve the dispute mutually under clause 5.1(b) respective Managing Director / Chief Executive Officer, or their nominees of the parties must meet and resolve the dispute within seven days. No such meeting has been held. The defendant has failed to comply with clause 5.1(b).
- [10] The defendant was not conferred a discretion by the agreement to select which provision it should comply with. Like in any other agreement parties are bound to comply with all the terms and conditions of the agreement.
- [11] In the case of **Digicel (Fiji) Ltd v Fiji Rugby Union** [2014] FJHC 95; HBC30.2014 (21 February 2014) The High Court, refusing the application for stay, made the following observations:

- (i) No dispute notice have been served on by either party on the other (clause 25.1.1);
- (ii) If either believed that there was a dispute to be resolved by arbitration then it should have served dispute notice on the other;

Section 5 of the Arbitration Act 1965 provides:

If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any other 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 that court, 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 the proceedings.

- [12] Section 5 of the Arbitration Act 1965 does not confer jurisdiction on the court to refer matters for arbitration. The court only has power to stay the proceedings if it is satisfied that there is no sufficient reason for the matter to be referred for arbitration and the submission is still ready and willing to do all the things necessary for the proper conduct of the arbitration. Once the court stays the proceedings before it the parties will be compelled to refer the matter for arbitration.
- [13] The learned counsel for the plaintiff, referring to clause 17 of the agreement, submitted that the exclusive jurisdiction to decide on any matter pertaining to the agreement is with the courts of Fiji.

[14] Clause 17 of both agreements states:

17.1 This Agreement is construed and governed by the laws of Fiji and the parties herein submit to the exclusive jurisdiction of the Courts of Fiji.

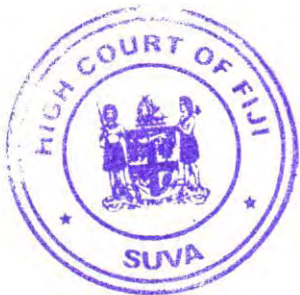
17.2 This agreement is governed by the Fiji Law, the Courts have jurisdiction in respect of this Agreement, and all amount are payable in Fijian Dollars.

[15] The learned counsel's attempt was to convince the court that it is the court that has jurisdiction to hear and determine this matter and not by an arbitrator. One cannot separate a particular clause from an agreement and interpret it in his favour. If the intention of the parties was to refer every dispute to court then they should not have included clause 5.1 in the agreement. The submission of the learned counsel that only the court has jurisdiction to determine any dispute between the parties under the agreement has no merit.

[16] Since the defendant has failed to comply with the requirements contained in clause 15.1 of the agreement its application for stay is liable to be refused.

ORDERS

1. The application of the defendant to stay the proceedings is refused.
2. There will be no order for costs of this application.



09th June 2020


Lyone Seneviratne

JUDGE