**[2016] JMCA Civ 35**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 21/2016**

**BEFORE: THE HON MR JUSTICE BROOKS JA**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA**
**THE HON MR JUSTICE F WILLIAMS JA**

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| **BETWEEN** | **SANDALS RESORTS INTERNATIONAL LIMITED** | **APPELLANT** |
| **AND** | **NEVILLE L DALEY & COMPANY LIMITED** | **RESPONDENT** |

**Written submissions filed by Patterson, Mair, Hamilton for the appellant**

**Written submissions filed by Brown, Godfrey & Morgan for the respondent**

**6 June 2016 and 7 November 2017**

**PROCEDURAL APPEAL**

**(Considered by the Court on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)**

**BROOKS JA**

[1] This is a procedural appeal by Sandals Resorts International Limited (Sandals) against the decision of Batts J, who, at a pre-trial review of a claim against Sandals, by Neville L Daley and Company Limited (NLDL), among other orders, refused Sandals'

application for the claim to be completely struck out or, alternatively, that it be stayed. Batts J did strike out NLDL's claim to recover the sum of $22,390,966.76 as damages for breach of contract, but granted it permission to amend its particulars of claim so as to claim a sum on a *quantum meruit* (the amount that was earned) basis. The learned judge made those orders on 8 February 2016.

[2] It is these two orders that form the bases of this procedural appeal. The first main issue raised by the appeal is whether the learned judge ought to have allowed NLDL to amend its claim. That issue has two parts. Sandals contended that the amendment would improperly allow NLDL to proffer a claim, based on a new cause of action, after the applicable limitation period had expired. It also contended that there was no proper application before the learned judge for the amendment. The second main issue to be resolved is whether Sandals was entitled to have the claim stayed as a result of a contractual term that required disputes between the parties to be referred to arbitration. An outline of the factual background to the claim will aid understanding of the issues.

**Factual background**

[3] NLDL had been contracted by Sandals to do construction work at Sandals' property, called Royal Caribbean Hotel. The property is located at Ironshore in the parish of Saint James. NLDL was contracted to construct a new block of hotel rooms as well as to carry out a substantial upgrade of an existing block of rooms.

[4] According to Sandals, the principal terms and conditions pertaining to the contract were to be found in (i) a letter of intent dated 21 February 2008, from Sandals to NLDL; (ii) the Preliminaries and Conditions of Contract and (iii) the building contract (Standard Form Building Contract Private Edition with Quantities 2007 Revision issued by the Construction Industry Council). Sandals contended that clause 38(1) of the building contract mandated that any dispute or difference between the parties to the contract should be settled by way of arbitration in accordance with the Arbitration Act.

[5] NLDL averred in its claim that the contract was not for a fixed sum but it was agreed the quantity surveyor would carry out measurements of the work done and issue, "from time to time", interim certificates against which Sandals would make payments to NLDL. It asserted that that procedure was followed for the period January 2008 through December 2008. There were delays in the completion of the project, but by the end of December 2008, practical completion certificates had been issued for both blocks of rooms.

[6] In February 2009, NLDL submitted documentation in order that final measurements and valuation of the work could be carried out, and for the final certificate to be issued. The submission included claims for compensation for variations which NLDL alleged that Sandals had specifically requested. The submission was made to the quantity surveyor. The variations were not approved until October 2009 and NLDL submitted its claim for the final certificate in December 2009.

[7] Sandals objected to the issuing of the final certificate. It contended that the submission for the final certificate was made after the period, which was allowed by the contract, had expired. As a result of the objection, the quantity surveyor did not issue the final certificate.

[8] NLDL contended that the decision concerning the issue of the final certificate was communicated to it in March 2010. It filed the present claim and the particulars of claim on 14 April 2011.

**The proceedings in the court below**

[9] In its claim, NLDL sought damages, including the sum of J$22,390,966.76, which it asserted is the amount due under the contract. On 22 July 2011, Sandals filed a defence to the claim. In that defence it agreed that it had a contract with NLDL for construction work to be done. It asserted, however, that NLDL caused delays to the completion of the contract and was also late in filing documentation for final measurements to be done in respect of the work. Sandals asserted that it did not owe anything to NLDL.

[10] NLDL asserted that the claim was referred to mediation and that both parties attended and participated in the mediation process. It further asserted that a case management conference was held on 3 February 2015 and that the trial of the claim was fixed for 25 April 2016. Those assertions have not been contradicted.

[11] Sandals filed an application on 29 October 2015 seeking the following orders:

i) The claim be struck out.

ii) Alternatively, the claim to recover the sum of J$22,390,966.76 be struck out.

iii) Such part of the claim that is not struck out be stayed.

iv) Costs of the application and of the claim be paid by NLDL to Sandals.

v) Such further and other relief as may be just.

Batts J heard the application on the date that was scheduled for the hearing of the pre-trial review.

[12] NLDL filed an affidavit in response to Sandals' application. The affidavit was sworn to by Mr Lloyd Daley on 29 January 2016 and sought, among other things, to particularise the amounts that Mr Daley said were due to NLDL by Sandals, and the basis for the claim for each amount. At paragraph 19 of that affidavit Mr Daley asked "that the Court refuse to strike out the Claim or grant any of the reliefs sought and to grant the amendments to the particular[s] of claim". He exhibited to his affidavit a draft amended particulars of claim. The affidavit and its attachments are said to have been before the learned judge. They were not contained in the record of appeal and had to be sourced from the Supreme Court.

**The learned Judge's ruling**

[13] The minute of order for the hearing before Batts J recorded that he made the following orders:

"1. Application to strike out claim for 22,330,966.76 [sic] is granted.

2. Applications for summary judgment and stay of proceeding refused.

3. Permission granted to the Claimant to amend Particulars of Claim to allege sum due on a *quantum* [*meruit*] basis.

4. Amended particulars to be filed and served on or before the 12th February 2016.

5. Permission granted to the defendant to file an amended defence on or before 26.2.16.

6. Time extended for the defendant to file and serve list of documents and witness statement[s] to the 25th March 2016.

7. Permission granted for the claimant to file and serve a further witness statement on or before 25.3.16.

8. Permission granted for the Claimant to put in an expert report from Mr Errol Spence Quantity Surveyor at the trial of this matter. Expert is to be available for cross examination if required.

9. Permission granted for the defendant to put in an expert report [from] a Quantity Surveyor at the trial of this matter. Expert is to be available for cross examination if required.

10. Expert reports are to be exchanged on or before the 8 April 2016.

11. Parties are to agree a bundle of documents if possible and file same on or before 18.4.16.

12. In respect of the document[s] not agreed then notices of intention to rely and or notices under the Evidence Act are to be filed and served on or before the 18.4.16.

13. Counter notices are to be filed and served on or before 21.4.16. Time is abridged accordingly.

14. No order as to costs.

15. Defendant's attorney to prepare file and serve formal order.

16. Permission granted to appeal orders 1, 2 and 3 above."

Sandals has appealed against orders 2 and 3. NLDL has not filed a counter-notice of appeal. Both parties filed written submissions for the appeal.

**Grounds of Appeal**

[14] The following grounds of appeal were filed by Sandals:

"(1) The learned Judge fell into error in granting permission to [NLDL] to amend its statement of case to pursue a claim for *quantum meruit* in circumstances where such a claim was statute barred.

(2) The Learned Judge wrongly exercised his discretion by permitting [NLDL] to amend its statement of case to allege sums due on a *quantum meruit* basis in the absence of:

a. a written application;
b. an order dispensing with the requirement that the application be made in writing;
c. grounds on which the application to amend to claim *quantum meruit* was being pursued; and
d. any evidence to support such a claim.

(3) In refusing the stay of the claim for breach of contract, the Learned Judge failed to take into account the written agreement of the parties to arbitrate all disputes which arose in connection with the construction contract, particularly where no evidence was led by [NLDL] to explain its failure to resolve all disputes and differences by arbitration."

The orders Sandals seeks on appeal are:

"(a) The Order of the Honourable Mr Justice Batts dated February 8, 2016 be varied.

> (b) The claim for damages for breach of contract in Claim No. 2011HCV01802 be stayed.
>
> (c) Costs in this court and in the court below [be granted] to the Appellant."

**Ground 1**
**The Learned Judge fell into error in granting permission to [NLDL] to amend its statement of case to pursue a claim for *quantum meruit* in circumstances where such a claim was statute barred.**

[15] In its written submissions, Sandals submitted that there were two bases on which a claim on a *quantum meruit* basis could not be pursued. The first basis was premised on the contention that where a contract existed, it would be improper to refer to a restitutionary principle such as *quantum meruit*. Learned counsel for Sandals, Mr Jerome Spencer, submitted that it was the contract to which the court should look in determining the resolution of the matters in issue.

[16] To support this position, Mr Spencer placed reliance on the tenth edition of Hudson's Building and Engineering Contracts by Duncan Wallace. In the section entitled "Liability Apart From Contract", the learned author states, at page 62:

> "*Quantum meruit* is a right to be paid a reasonable remuneration for work done...
>
> **True *quantum meruit* arises in a number of situations where for one reason or another no contract exists**...Very importantly, *quantum meruit* is also available as an alternative remedy to damages to a party who has done work before accepting a fundamental breach by the other as discharging the contract..." (Emphasis supplied)

Mr Spencer also cited Lord Goff's opinion in the House of Lords' decision in **Pan Ocean Shipping Ltd v Creditcorp Ltd; The Trident Beauty** [1994] 1 All ER 470 at pages 473 and 474. The import of the portion of his Lordship's decision, on which Mr Spencer relies, is that where a contract exists, the principle of restitution does not usually apply.

[17] The second basis, on which Sandals contended that the learned judge erred in permitting an amendment of the claim, in order for NLDL to claim on a *quantum meruit* basis, is that such a claim was statute barred at the time that he granted the application to amend. Mr Spencer submitted that the parties had contracted between themselves, when and how sums payable to NLDL, including compensation for variations, were to be determined. The provisions of the building contract required the architect/contract administrator to determine the sums payable to NLDL upon submission of the requisite payment requests. Once the amount payable was determined, Sandals was required to make payment to NLDL within 28 days.

[18] Mr Spencer contended in his written submissions that, by virtue of the contract, time started running for the purposes of a limitation of actions defence, from 19 December 2008. Although learned counsel used the year 2009 in his submissions, it would seem, from the context, that what he meant was the year 2008; that being the year when practical completion of the construction project occurred. Using that date as a starting point, on learned counsel's submission, any claim for compensation would have been statute barred by the time the claim came on before Batts J.

[19] The limitation period having run, Mr Spencer submitted, the order made by the learned judge would have deprived Sandals of a limitation defence, because more than six years had passed since the services were provided by NLDL. Mr Spencer submitted that a court should not grant permission to amend a claim after the expiry of the relevant limitation period, so as to enable a claimant to pursue a new cause of action. For this reason, learned counsel submitted, the learned judge erred. He cited in support of his submissions, **National Commercial Bank and Jamaican Redevelopment Foundation Inc v Scotiabank Jamaica Trust and Merchant Bank Ltd** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 22/2008 judgment delivered on 19 December 2008 and **Reeves v Butcher** [1891] 2 QB 509.

[20] Mr Brown, on behalf of NLDL, submitted that the claim filed on 14 April 2011 was for a 'global sum'. He argued that the method that the parties had adopted for compensating NLDL for its work was by way of payment for the work done, as measured and approved by the architect/contract administrator. He submitted that a claim for compensation by way of *quantum meruit* was consistent with the adopted approach.

[21] Learned counsel also pointed to evidence which, he submitted, indicated that the delay in the submission of the claim for final payment was due to Sandals' delay in agreeing the variations. Sandals should not, he argued, be allowed to "take advantage of [its] own wrong in pleading that [NLDL] was in breach of the term of the contract as to time for delivery of the [relevant] documents to the certifier" (paragraph 20 of the written submissions).

[22] The issue that arises on this ground is whether the proposed amendment to the claim gives rise to a new cause of action after the limitation period had run. The starting point in making this determination is a reference to the Civil Procedure Rules 2002, as amended (CPR). The CPR does allow amendments to statements of case. The court may grant permission for a party to make such amendments. There are restrictions on amendments, however, where the relevant limitation period has expired. Rule 20.6 of the CPR addresses the issue, but only to a limited extent. It speaks only to amendments in respect of the name of a party to the claim. The rule states:

> "20.6 (1) This rule applies to an amendment in a statement of case after the end of a relevant limitation period.
>
> (2) The court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was -
>
> (a) genuine; and
>
> (b) not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question."

[23] The rule presumes the restriction on amendments after the expiry of the relevant limitation period. Whereas it allows amendments which concern the name of a party, it cannot be said that amendments are restricted to those circumstances alone. There is case law which suggests that other amendments may validly be made, despite the expiry of the limitation period. This can be gleaned from **The Jamaica Railway Corporation v Mark Azan** (unreported) Court of Appeal, Jamaica, Supreme Court

Civil Appeal No 115/2005, judgment delivered on 16 February 2006. In the judgment in that case, K Harrison JA stated at paragraphs 27 and 28:

> "27. There is provision in CPR, r. 20.6, for a party who wishes to amend a statement of case in respect of a change of name after a period of limitation has expired. There is no provision however, in our Rules for the substitution or addition of a new cause of action after the expiration of the limitation period.
>
> 28. Our Rules do not presently state any specific matters that the court will take into consideration in assessing whether a proposed amendment in fact amounts to a new cause of action (as opposed to a new party). In the final analysis, the decision whether or not to grant such an application, one ought to apply the overriding objective and the general principles of case management."

[24] The learned judge of appeal accepted that the addition of a new cause of action would, in some cases, result in injustice to the defendant against whom the proposed amendment was aimed. He stated, however, that in cases where the issues, which are the subject of the proposed amendment, are not new or would have to be the subject of the litigation in any event, the amendment would not necessarily result in a new cause of action, or even where it did, the defendant would not be embarrassed in his defence. Two principles provided overarching guidance for Harrison JA's approach. The first was that "an amendment should be allowed if it can be made without injustice to the other side" (paragraph 25). The second was that of the overriding objective contained in rule 1.1 of the CPR. He summarised the specific relevant principles, at paragraph 29 of his judgment, thus:

"29. The authorities establish certain principles in relation to what amounts to a new cause of action. The following instances are set out but they are not exhaustive:

(i) If the new plea introduces an essentially distinct allegation, it will be a new cause of action. In ***Lloyds Banks plc v Rogers*** (1996) The Times, 24 March 1997, Hobhouse LJ said inter alia:

> '…if factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.'

(ii) Where the only difference between the original case and the case set out in the proposed amendments is a further instance of breach, or the addition of a new remedy, there is no addition of a new cause of action. See ***Savings and Investment Bank Ltd v Finckin*** [2001] EWCA Civ 1639, The Times, 15 November 2001.

(iii) A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as give rise to a cause of action already pleaded.

(iv) In the case of ***Brickfield Properties Ltd v Newton*** (1971) 1 WLR 862 a general endorsement on the writ claimed damages against an architect for negligent supervision of certain building works. The particulars of claim were served after the expiry of the limitation period and contained claims both for negligent supervision and negligent design. It was held by the Court of Appeal that the negligent design claim arose substantially out of the same facts as the negligent supervision claim and in its discretion the court allowed the amendment."

[25] The learned judge of appeal used those principles to find that the judge at first instance in that case had properly exercised his discretion in allowing an amendment to a statement of claim to add a claim for money had and received to a claim for specific

performance, or alternatively, breach of a contract for the sale of land. The proposed amendment was in respect of the deposit that had been paid on the signing of the agreement. Harrison JA found that the proposed amendment was not a new cause of action, as it arose on the same facts as the original claim. In the second of two paragraphs numbered 29, the learned judge of appeal said, in part:

> "…In my view no new facts are being introduced by the Respondent. He merely wishes to say that if the Appellant succeeds in establishing that in law, there was no valid contract between the parties, he should be able to recover his deposit…."

[26] Harrison JA's reasoning was adopted by Dukharan JA in **The Attorney General of Jamaica and Another v Cleveland Vassell** [2015] JMCA Civ 47. In that case, this court upheld a decision of a judge of the Supreme Court, which allowed a claimant to amend his claim for damages for assault and battery to add a claim for false imprisonment and malicious prosecution. The application to amend was made after the expiry of the limitation period. Dukharan JA, who delivered the reasoning of the court, explained that the amendment was allowed because the additional claim arose from the same factual situation. He stated in part:

> "[22] … It seems clear in the present case that the facts that give rise to all three causes of action arise out of the single incident and are disclosed in the further statement of case of the respondent.
>
> [23] In our view, it could be said that new causes of action arise, that is, false imprisonment and malicious prosecution. However, such causes of action may be added as they arise out of the same facts, or substantially the same facts, as has given rise to a cause of action, assault, which is already pleaded. In our view, no new facts are being introduced by the respondent. He merely wishes to add false imprisonment

> and malicious prosecution to his statement of case which was omitted by mistake and which was already introduced in the claim. In our view, the learned trial judge did not err in granting the amendment. In the totality of the circumstances, the appellants have already demonstrated by their statement of case that they are able to prepare an amended defence that properly addresses the amended claim form and amended particulars of claim."

[27] The principles adopted in those cases are applicable to the present case. There is no dispute that the original claim was filed within the limitation period. NLDL's proposed amendments arise out of the same facts as the original claim. The issue in respect of the original claim as well as in the proposed amendment is that NLDL has done work for Sandals for which it has not been paid. It is the same work, alleged in the original claim to have been done, which is used to support the amended claim.

[28] On the issue of prejudice it should be noted that Sandals, in its application to strike out the claim, did not say that no work had been done. Its defence is that the submission for compensation was made after the time specified by the contract. It would not be embarrassed by an amendment which seeks payment for the work that has been done. The learned judge properly exercised his discretion in allowing the amendment. It is consistent with the overarching principle applied by Harrison JA in **The Jamaica Railway Corporation v Mark Azan**, namely, that the amendment would cause no injustice to either side.

[29] The fact that Batts J struck out the claim that was based on the contract, did not prevent him from allowing an amendment using the pleadings supporting that claim; the principle set out in **The Jamaica Railway Corporation v Mark Azan** remained

applicable. As Harrison JA stated at paragraph 29 of **The Jamaica Railway Corporation v Mark Azan**:

> "(iii) A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as give rise to a cause of action already pleaded.

[30] Further, it cannot be said that the proposed amendments have no prospect of success. It is noted that in Hudson's Building and Engineering Contracts, relied on by Sandals, the learned authors stated that a claim for compensation on a *quantum meruit* basis may be used as an alternative to a claim for damages. They said at pages 62-63:

> "Very importantly, *quantum meruit* is also available as an alternative remedy to damages to a party who has done work before accepting a fundamental breach by the other as discharging the contract. This may be of great practical importance in building cases, since if the contract rates turn out to have been highly uneconomical a builder who is in a position to prove a fundamental breach by the employer and thus to treat the contract as at an end may find reasonable remuneration for the work done by him a considerably more valuable remedy than damages...."

[31] In light of the foregoing, it must be found that this ground of appeal should fail.

**Ground 2**

**The Learned Judge wrongly exercised his discretion by permitting [NLDL] to amend its statement of case to allege sums due on a quantum meruit basis in the absence of:**

- **a. a written application;**
- **b. an order dispensing with the requirement that the application be made in writing;**
- **c. grounds on which the application to amend to claim *quantum meruit* was being pursued; and**
- **d. any evidence to support such a claim.**

[32] Sandals contended that NLDL failed to comply with rule 11.6 of the CPR that requires applications for amendments to statements of case to be made in writing. Mr Spencer submitted that although the learned judge allowed the application to be heard orally, this did not excuse NLDL from the obligation to comply with the provisions of rules 11.7 to 11.9 of the CPR. If NLDL wanted to avoid the obligation of these rules, he submitted, an application ought to have been made under rule 26.1(8) of the CPR. As such, the submissions continued, NLDL failed to comply with the rules in pursuing its oral application and therefore the order allowing amendment ought not to have been made.

[33] NLDL, in response, accepted that the application was not made in the prescribed written form. However, it contended, rule 11.6 of the CPR provides for the court to hear oral applications and therefore it was not obligatory for it to have made an application in writing to dispense with the requirement for the proposed application to be in writing.

[34] Mr Brown submitted that despite the fact that the application was not made in the format set out in rule 11.7, there was, nonetheless, an application to amend, which was set out in writing. Learned counsel referred to the affidavit of Mr Lloyd Daley, in which permission was sought to amend the statement of case. Mr Brown pointed out that Mr Daley's affidavit also exhibited the proposed amendments to the particulars of claim.

[35] In considering these submissions it must be noted that rule 11.6 of the CPR states that the general rule concerning applications is that they must be made in writing, but oral applications are permitted in certain cases. It states:

> "11.6 (1) **The general rule** is that an application must be in writing.
>
> (2) An application may be made orally if -
>
> (a) this is permitted by a rule or practice direction; or
>
> (b) the court dispenses with the requirement for the application to be made in writing."
> (Emphasis supplied)

It is important to note that the court may dispense with the general rule.

[36] Rule 11.7 stipulates the contents of an application which is allowed by rule 11.6. It also stipulates the time for service of notice of the application and what should be done if the application is filed without notice.

[37] The next rule of importance is rule 20.4 of the CPR. It allows for applications to be made at a case management conference to amend statements of case. Rule 20.4 states:

> "20.4 (1) An application for permission to amend a statement of case may be made at the case management conference.
>
> (2) Statements of case may only be amended after a case management conference with the permission of the court.
>
> (3) Where the court gives permission to amend a statement of case it may give directions as to -

(a) amendments to any other statement of case; and

(b) the service of any amended statement of case."

[38] As part of the requirement to manage the case, a judge is required by the CPR to identify at an early stage the issues involved (rule 25.1(b)), and to "take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective" (rule 26.1(2)(v)). The exercise of the powers granted by these rules falls within the judge's discretion. Orders which may be made at a case management conference may also be made at a pre-trial review (rule 38.3 of the CPR). It is those powers which the learned judge in this case exercised in granting NLDL permission to amend its statement of case.

[39] It cannot be ignored that the learned judge did have Mr Daley's affidavit before him as part of the material for his consideration. The affidavit was filed on 3 February 2016. The date of service, is not, however, recorded.

[40] Sandals' submissions on this ground ignore these case management powers that the learned judge had, and which he exercised, at the pre-trial review. The learned judge exercised his discretion upon hearing an oral application to amend the particulars of claim. This court is hesitant to interfere with the learned judge's decision in this regard. It would only do so if the exercise of his discretion was based on a misunderstanding or misapplication of the law or the evidence. That hesitance is based

on the principle that was carefully explained by Morrison JA (as he then was) in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1.

[41] The further point that must be made is that a part of Sandals' submission seems to suggest that an application to dispense with the requirement of a written application should itself be in writing. The submission, if it is properly understood, cannot be accepted. It is inconceivable that where, at say, a case management conference or a pre-trial review, counsel sees the need to make an application, that he should be precluded from so doing because he is required to make a written application to dispense with the requirement to make his application in writing. The proposition is untenable.

[42] Based on the submissions of Sandals and NLDL on this ground, there is insufficient basis on which to interfere with the learned judge's decision. This ground also fails.

**Ground 3**

**In refusing the stay of the claim for breach of contract, the Learned Judge failed to take into account the written agreement of the parties to arbitrate all disputes which arose in connection with the construction contract, particularly where no evidence was led by [NLDL] to explain its failure to resolve all disputes and differences by arbitration.**

[43] The essence of Sandals' submission is that NLDL should have proceeded to arbitration before resorting to court action. It bases its position on the fact that the written agreement provided for all differences and disputes in relation to the contract to be resolved by arbitration. Sandals submits that its application to stay the proceedings

was not made pursuant to the provisions of the Arbitration Act (the Act) but under the inherent jurisdiction of the court, by which the court has the power to stay proceedings commenced in breach of an agreement to arbitrate.

[44] Mr Spencer submitted that the court always seeks to hold parties to their agreement. In this case, that agreement, he submitted, was to attempt to resolve any dispute between Sandals and NLDL by way of submission to arbitration. He relied on, as authority for his submissions, the cases of **William Clarke v The Bank of Nova Scotia Jamaica Limited** [2012] JMCA Civ 8, **Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others** [1993] 1 All ER 664, **Racecourse Betting Control Board v Secretary of State for Air** [1944] Ch 114; [1944] 1 All ER 60 and **Ford v Clarksons Holidays Ltd** [1971] 3 All ER 454.

[45] Mr Spencer submitted that in filing the claim, NLDL acted in breach of the agreement to arbitrate and therefore the stay of proceedings should have been granted. He argued that the learned judge failed to give sufficient weight to the fact that:

a. the parties agreed to resolve their disputes by reference to arbitration;
b. no evidence was given by NLDL why it had acted in breach of that agreement to arbitrate by filing its claim against Sandals;

c. the contract was a building contract in respect of which disputes are customarily resolved by arbitration instead of litigation;

d. NLDL gave no evidence of any prejudice that it would suffer, should the matter be referred to arbitration.

[46] NLDL, on the other hand, pointed out that the letters of intent signed by the parties do not refer to the Standard Form Building Contract Private Edition. Instead, item "d" of the first page of Sandals' letter dated 21 February 2008 refers to the terms of agreement as being in "*short form draft*/form" (page 25 of the record of appeal). Additionally, NLDL argued that, in filing a defence and participating in the mediation, Sandals had taken a step, which prevented it from relying on the provisions of the Act.

[47] Mr Brown cited **Turner and Goudy v McConnell and another** [1985] 1 WLR 898 in support of his submissions that Sandals having filed a defence, traversing the issues raised on NLDL's statement of case, should not, on the eve of the trial of the claim, be granted a stay of proceedings based on the Act. According to learned counsel, the steps taken by Sandals "nullifies the jurisdiction of the court to grant a stay".

[48] In respect of this ground, it is noted that section 5 of the Act outlines the requirements that a defendant would have to satisfy before it can properly apply for a stay of execution of proceedings based on that section. The section stipulates, among other things, that the defendant should not have previously taken a step in the

proceedings. The rationale behind the principle is that, once a step is taken in the proceedings, the party taking that step has submitted to the jurisdiction of the court. The section states:

> "5. 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 other steps in the proceedings**, apply to the Court to stay the proceedings, and the 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." (Emphasis supplied)

[49] The statement that Sandals had taken a step in the proceedings cannot be contradicted. The filing of its defence constituted a recognized step. Mr Spencer does not attempt to contradict that assertion. That being the case, the statute and the decided cases all support NLDL's position on this point.

[50] In **Turner and Goudy v McConnell and another**, the English Court of Appeal decided that:

> "the defendants had taken a step in the proceedings by filing an affidavit showing cause why summary judgment should not be entered against them and by appearing before the master thereby causing judgment to be deferred by an adjournment; and that, therefore, **it was too late to apply under section 4 of the *Arbitration Act 1950*** [the equivalent of section 5 of the Jamaican Arbitration Act] **for**

> **the action to be stayed so that the arbitration clause could be invoked**…" (see the headnote) (Emphasis supplied)

[51] In that case, the defendants to a claim filed an affidavit opposing the plaintiff's application for summary judgment. The defendants later filed an application for a stay of the proceedings on the basis of an arbitration clause contained in the building contract that was signed by the parties. Dillon LJ, in considering the question of whether the defendants could be granted a stay of proceedings, stated the position very clearly. He said that once the defendant had taken a step, that defendant was barred from applying for the dispute to be referred to arbitration. He said at page 901:

> "It was decided quite clearly in *Parker, Gaines & Co. Ltd. v. Turpin* [1918] 1 K.B. 358 that **a defendant is precluded from applying for arbitration if he takes a step in the action before applying for arbitration**, even though at the time he took that step in the action he did not realise that there was an arbitration clause, and so did not realise that there was any possibility of applying for a stay of the proceedings." (Emphasis supplied)

[52] Later on that same page, the learned judge of appeal emphasised the point:

> "It is also clearly established by authority binding on this court that if the defendant opposes an application for summary judgment and fails in his opposition, **it is then too late for him to apply for a stay**. That was decided in *Pitchers Ltd. v. Plaza (Queensbury) Ltd.* [1940] 1 All E.R. 151. In his judgment Slesser L.J. said, at p. 154:
>
> > 'I entertain myself no doubt whatever that they took a step in the action when they appeared before the master and asked for leave (to quote their affidavit) to defend the action… In truth and in fact, however, a step in the action was taken when the summons to sign final judgment was answered by affidavit, and no application was made to stay the action on the

> ground of the arbitration clause.'" (Emphasis supplied)

[53] That statement of the law has been accepted in this jurisdiction. In **Mark Sommerville v Ronald David Coke and Ethlyn Coke** (1989) 26 JLR 550, Forte JA, as he then was, examined the provisions of section 5 of the Arbitration Act and pointed out that it precluded an application for a stay of court proceedings if the defendant had taken a step in those proceedings. After citing section 5, he said at page 554D:

> "It is obvious, in perusing this section that the whole purpose of its provisions is to enable a party to respond to the claim by entering an appearance, but taking no further step in the action before applying to the Court for a stay of proceedings so that the matter in dispute can be dealt with in Arbitration, as provided for in the agreement between the parties…."

[54] In **Douglas Wright t/a Douglas Wright Associates v The Bank of Nova Scotia Jamaica Limited** (1994) 31 JLR 351, Courtenay Orr J cited **Turner and Goudy v McConnell and another** with approval, albeit for the principle that an application for stay of proceedings must be made timeously. The learned judge also accepted that in making an application for a stay of proceedings pursuant to section 5, the applicant is obliged to prove, among other things, that the "application is made after the applicant has entered an appearance but before he has delivered any pleading or taken any other steps in the proceedings" (page 355B).

[55] The statutory provision, and the authorities treating with it, invalidate Mr Spencer's submission that there is a method of invoking the inherent jurisdiction of the court, to somehow, avoid the obstacle that section 5 poses to Sandals. The cases cited

by Mr Spencer do not assist Sandals. **Channel Tunnel Group Ltd v Balfour Beatty Ltd** confirms that the court has an inherent power to stay proceedings. Lord Mustill, in his judgment spoke to the two grounds by which the respondents submitted that a stay could have been granted. He said at page 677:

> "There are two ways in which the respondents seek to uphold the grant of a stay. First, on the ground that the dispute is between parties 'to an arbitration agreement to which this section applies', and that the dispute between them is 'in respect of any matter agreed to be referred', within the meaning of s 1 of the 1975 Act, so that the court is obliged to stay the action. Secondly, because this is an appropriate case in which to exercise the inherent power of the court to stay proceedings brought before it in breach of an agreement to decide disputes in some other way...."

The learned Law Lord explained that whereas section 1 of the Arbitration Act 1975 mandated a stay in the circumstances to which it referred, the inherent power would be exercised in the discretion of the court or judge. He said:

> " ...I am satisfied that [the exercise of the inherent power] is the correct route, and that the court not only possesses a discretion to grant a stay in such cases such as the present, but also that this is a remedy which ought to be exercised in the present case."

[56] **Channel Tunnel** is, however, distinguishable from the present case on two bases. The first is that the legislative format that was applicable in that case was different from that which applies in this jurisdiction. Section 1 of the Arbitration Act 1975, to which Lord Mustill referred, applied "to any arbitration agreement which is not a domestic arbitration agreement" (section 1(2)). The section specifically excluded arbitration agreements which would be similar to that in the present case. There is no equivalent to section 1 of the English Act, in the Arbitration Act of this country.

[57] The second reason that the case is distinguishable is that the defendant in that case applied for the stay of proceedings before it took any other step. No complaint could therefore have been validly made that it had failed to satisfy the requiremwnts established by the legislation.

[58] It is true, as Mr Spencer submitted, that **Ford v Clarksons Holidays Ltd** is authority for the proposition that where parties agree to refer their disputes to arbitration, the court leans in favour of holding them to that agreement. Where one of those parties files a claim, and the other applies to the court to order that the dispute be referred to arbitration, the court is required to assess which forum, the court or arbitration, is more appropriate for the parties. In this country, the court will only embark on that assessment, however, if the applicant has satisfied the requirements of section 5 of the Arbitration Act, the primary one for these purposes, being the making of the application before taking any other step in the proceedings. **Ford v Clarksons Holidays**, therefore does not assist Sandals' efforts in respect of this ground.

[59] **Racecourse Betting Control Board v Secretary of State for Air** also does not assist Sandals. That case was not an application for a stay of proceedings. It was an application to set aside an award by a tribunal. In fact, MacKinnon LJ, in his judgment in that case, opined that section 4 of the Arbitration Act 1889 of England (which is the equivalent section to section 5 of the Jamaican Act) did not apply to that case. It is true that his Lordship stressed the principle of holding parties to their bargains, concerning the jurisdiction for the resolution for their disputes, but as

mentioned before, Sandals has not cleared the hurdle that allows that principle to be applied to this case.

[60] It should be pointed out that **William Clarke v The Bank of Nova Scotia Jamaica Limited** [2012] JMCA Civ 8, as cited by Mr Spencer, was a procedural appeal that was decided by a single judge of this court. A panel of this court, constituted of five judges, ruled that the single judge did not have the jurisdiction to have ruled on the appeal (see **William Clarke v The Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9. The single judge's decision was overturned on that basis. The procedural appeal was later heard by the court, which gave its decision in **William Clarke v The Bank of Nova Scotia Jamaica Limited** [2014] JMCA Civ 5 (No 3).

[61] In **William Clarke v The Bank of Nova Scotia Jamaica Limited** (No 3), the bank applied to strike out Mr Clarke's claim against it. The application was made on the basis that the parties had agreed that disputes between them in relation to the result of an earlier arbitration ruling, would be referred to a particular person for resolution. The bank's application was made before it had filed any pleadings or taken any step in the litigation. The judge at first instance struck out the claim.

[62] In the appeal from that decision, this court decided that a striking out was inappropriate. It then considered whether the claim should be stayed. No point was taken that the bank was barred from making an application under section 5 of the Arbitration Act. The analysis by Harris JA, in delivering the judgment of the court, could

not assist Sandals in this case, as there was no issue as to whether the bank had complied with section 5.

[63] At this stage, therefore, the resolution of the issue as to whether Batts J fell into error in refusing to stay the proceedings to facilitate a reference to arbitration, lies in the analysis of the material that was placed before him. In light of the fact that Sandals had not satisfied the requirements outlined in section 5 of the Arbitration Act, Batts J was obliged to say that Sandals was not entitled to apply for, much more to be granted, a stay of the proceedings. His decision on this point cannot be faulted. This ground should also fail.

**Summary and Conclusion**

[64] Sandals' appeal was based on three distinct planks. It complained, firstly, that the learned judge erred in granting NLDL permission to amend its pleadings after the limitation period had expired. Secondly, it contended that the learned judge was wrong to have entertained the application to amend the pleadings when that application had not been made in writing, and the application to dispense with a written application had, also not been made in writing. Thirdly, it argued that the learned judge erred in refusing to stay the proceedings in order that the parties should proceed to arbitration, as their contract had stipulated.

[65] All three decisions made by the learned judge fell within his discretion in the exercise of his case management powers and his inherent power as a judge to control the court's process. In none of these complaints has Sandals succeeded in showing that

the learned judge improperly exercised his discretion. An analysis of the relevant law with regard to each point demonstrates that he made no error of law in any of the issues. There was no demonstration of any misapprehension or misapplication of any of the relevant facts in the case. Accordingly, this court should not interfere with any of those decisions. In light of the foregoing, the appeal should be dismissed with costs to the respondent to be taxed if not agreed.

**SINCLAIR-HAYNES JA**

[66] I have read in draft the judgment of my brother Brooks JA. I agree with his reasoning and conclusion. I however wish to comment on the issue of the arbitration agreement.

[67] I am firmly of the view that parties who have agreed to arbitrate ought not to be allowed to renege on their agreement and I fully endorse the view expressed by Bramwell B in **Wickham v Harding** (1859) 28 LJ EX 215 at page 271, that:

> "... a bargain is a bargain, and the parties ought to abide by it, unless a clear reason appears for not doing so..."

[68] By virtue of section 5 of the Arbitration Act, however, the applicant, having filed a defence in the matter, is barred from applying to stay the proceedings. In the circumstances I must agree with Brooks JA that the appeal ought to be dismissed.

**F WILLIAMS JA**

[69] I too have read the draft judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing further to add.

**BROOKS JA**

**ORDER**

(1) Appeal dismissed.

(2) Costs to the respondent to be taxed if not agreed.