JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 43/2005

PROCEDURAL APPEAL

BETWEEN:	**HOUSE OF BLUES LTD.** **EVAN WILLIAMS**	**APPELLANTS**
AND:	**SECRET PARADISE RESORT LTD.**	**RESPONDENT**

Written Submissions by Gordon Robinson and Miss Minett Palmer instructed by Palmer and Walters for the appellants.

Written Submissions by Miss Hilary Phillips, Q.C., and Kevin Williams instructed by Grant, Stewart, Phillips and Co. for the respondent.

September 21, 2005

PANTON, J.A.

The Dispute

On April 1, 2005, Reid, J. ordered a stay of proceedings in Suit No. C.L. 2001/H 137: **House of Blues Ltd.** and **Evan Williams** (t/a Design Collaborative) **v Secret Paradise Resort Ltd.** In making this order, the learned senior puisne judge advised the parties that he would put his reasons in writing. Those reasons have not been placed with the record so far.

The application for a stay was stated in the summons as being pursuant to section 5 of the Arbitration Act, and pursuant to the agreements in writing dated June 28, 2001, between the parties.

The affidavit in support of the summons was by Yoshabelle Emmanuel, the instructing attorney-at-law for the respondent and copies of two written agreements between the appellants and the respondent were exhibited. The relevant clauses were 13.10 of the first agreement and 33 of the second agreement. The affidavit alleges that the suit filed herein derogates from the agreement by the parties to settle disputes herein by way of arbitration. There is no need to delve into the circumstances that form the subject matter of the suit. However, the two clauses in the agreements are important.

One agreement described as a "business investment agreement" is between **Secret Paradise Resort Ltd.** (the respondent) and **House of Blues Ltd.** (the first appellant). Section 13.10 of that agreement states:

> "Controlling Law. This agreement shall be governed by and construed pursuant to the laws of Jamaica. Any disputes arising out (of) this agreement shall be resolved by private arbitration in Kingston, Jamaica."

The other agreement is headed "Hotel Site Lease And Operation Agreement". It is made between the respondent **Secret Paradise Resort Ltd.** and the first appellant **House of Blues Ltd.**

Paragraph 33 thereof states:

> "Applicable Law. This agreement shall be governed by the laws of Jamaica, and any disputes shall be handled exclusively by private arbitration in Kingston, Jamaica . . ."

Procedural appeal

An appeal was filed on April 8, 2005, by House of Blues Ltd. and Evan Williams. They seek an order varying or setting aside the order of Reid, J. They ask that an order be substituted which would refuse the application for a stay in respect of both appellants or in respect of Evan Williams alone.

This is a procedural appeal. It is provided for in Rule 2.4 of the Court of Appeal Rules 2002. These Rules define such an appeal as one "from a decision of the court below which does not directly decide the substantive issues in a claim." There are some exceptions which do not include the matter under consideration.

In keeping with Rule 2.4 (3), this appeal is being considered on paper by a single judge of the Court of Appeal. The parties have made written submissions and these have been considered along with the authorities to which reference has been made.

The submissions in brief

The appellants contend that so far as the second appellant is concerned, there was no arrangement for the arbitration of disputes. They also say that the provision for arbitration was not aimed at ousting the jurisdiction of the Supreme Court, but to ensure that any dispute arising during the performance of the contracts would not result in delaying the project, but could be settled while the project continued.

The appellants stress the following factors:

(i) the respondent has repudiated the contracts and now seeks to rely upon a term in the said contracts; and

(ii) there is no statement of the issue to go before the arbitrator.

The respondent submits that there is no attempt to oust the jurisdiction of the Supreme Court. Further, the respondent submits that the appellants' submissions so far as the validity of the arbitration agreement is concerned are misconceived, as the agreement to arbitrate survives the determined contract.

The Arbitration Act

Section 5 of the Arbitration Act provides that if a party to a submission commences any legal proceedings in the Court against any other party to the submission in respect of any matter agreed to be referred, any party to the legal proceedings may apply for a stay of these proceedings. The application is to be made before the delivery of any pleadings, or the taking of any other steps by the party applying.

The Court, at the hearing of that application, may order a stay of the proceedings if the Court is satisfied that there is no sufficient reason why the matter should not be referred in keeping with the submission.

Section 2 of the said Act defines a submission as a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not.

The Judge's decision

Reid, J., in keeping with section 5 of the Arbitration Act, was empowered to stay the proceedings if he was satisfied that there was no sufficient reason for not referring the matter in keeping with the "submission." In the absence of a statement of his reasons for his judgment, it has to be inferred that he saw no impediment.

A party may only be bound by a reference of a "submission" if that party was a party to the "submission". In the instant matter, the two agreements that have been exhibited do not show the **second appellant** as being a party to either. On the face of it, therefore, the second appellant is entitled to have his suit proceed in the normal way. Given the situation, I am satisfied that Reid, J., was in error when he ordered a stay of proceedings so far as the second appellant is concerned.

The result is that the agreements between the respondent and the first appellant are subject to arbitration whereas those, which are oral, between the respondent and the second appellant are not so subject. This creates an undesirable state of affairs, which is recognized by the attorneys-at-law for the parties.

The appellants have submitted that any enforcement of the arbitration clause would mean that a part of the dispute would be arbitrated, while another part would be litigated; and, the Court will not permit this as the result could be inconsistent findings, and a plurality of proceedings.

The respondent accepts the position of the appellants that the actions are inextricably bound, and submits that all matters should be dealt with by the arbitration proceedings.

Halifax Overseas v. Rasno Export

The case **Halifax Overseas Freighters Ltd. v Rasno Export and Others** ("The Pine Hill") [1958] 2 Lloyd's Rep. 146 a case at first instance, is of importance in this matter. There, a baltime charter-party was entered into by charterers and shipowners. An arbitration clause was included in the charter-party. Bills of lading were issued by the charterers, but there was no arbitration clause in the bills of lading. The shipowners commenced suit against the holders of the bills of lading, and the charterers. The latter applied to stay the proceedings against them so that the dispute between them and the shipowners might be referred to arbitration. McNair, J. exercised his discretion and concluded that the action should **not** be stayed at the instance of the charterers.

McNair, J., reasoned thus:

> (A) "It is quite right, and clearly established by authority, that a party . . . who seeks to establish the obligation of an arbitration clause . . . has cast upon himself an onus, and it may be a heavy onus, of putting before the Court compelling reasons why he should not be held to his contract. The question here is whether there are sufficient compelling reasons why the plaintiffs should not be held to their contract to arbitrate." (page 151).
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> (B) ". . . I think this is a case where, inevitably, in the disputes between the time charterers and the shipowners complicated, difficult questions

> of law may arise some of which may arise in the action between the shipowner and the bills of lading holders. If the matter goes to arbitration as between the shipowners and the time charterers I think there is a high degree of probability that these same questions of law would come up to the Court on a special case. Again, one might get questions of law, determined in the direct action between the shipowners and the bills of lading holders, being determined, presumably by another Judge at first instance, when the award came before him on a special case stated by the arbitrators...
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> Furthermore, I think that there is force in the point made by Mr. Donaldson, on behalf of the shipowners, that time and expense and costs would be saved to a very substantial degree by insisting that the whole of these disputes between the shipowners and the bills of lading holders, and between the shipowners and the time charterers should be disposed of in one set of proceedings. That set of proceedings must be proceedings in Court. The bills of lading holders are not subject to arbitration." (also at page 151)

(C) "I think that a serious risk would be run that our whole judicial procedure, at any rate in relation to this claim, would be brought into disrepute if, as I have indicated is a serious possibility, you get conflicting questions of fact decided by two different tribunals, quite apart from the other matters which I have mentioned." (page 152)

Decision

In the situation as I understand it, there can be no benefit to anyone if two sets of proceedings are permitted. As already indicated, the second appellant is not bound by either arbitration clause. However, the two contracts

are linked. In order to prevent a multiplicity of proceedings which would result in confusion, the waste of valuable judicial time, and increased costs to the parties, I am satisfied that the stay ordered by Reid, J., has to be removed. This procedural appeal is accordingly allowed and the appellants are to have their costs.

ORDER

1. The Order of Reid, J., made on April 1, 2005, is set aside.

2. The application for a stay of the proceedings in the Supreme Court is refused.

3. The costs of the proceedings in respect of the application in the Supreme Court and the appeal to the Court of Appeal are to be borne by the respondent, such costs to be agreed or taxed.