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National Court of Papua New Guinea

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Curtain Bros Papua New Guinea Ltd v Paga Hill Development Co (PNG) Ltd [2019] PGNC 251; N8054 (15 August 2019)

[N8054](#)

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

WS 1124 OF 2017

BETWEEN:
CURTAIN BROS PAPUA NEW
GUINEA LIMITED
Plaintiff

AND:
PAGA HILL DEVELOPMENT
COMPANY (PNG) LIMITED
First Defendant

AND:
ANDAYAP NO. 5 LIMITED
Second Defendant

Waigani: Hartshorn J
2019: 15th August

Application for a stay of proceedings and referral to arbitration

Counsel:

Mr. M.M. Varitimos QC and Mr. G. Purvey, for the Plaintiff
Mr. I.R. Shepherd, for the Defendants

15th August, 2019

1. **HARTSHORN J:** This is a decision on a contested application for a stay of proceedings and a referral to arbitration.

Background

2. The parties entered into an agreement dated 10th December 2014 (**Paga Hill Contract**) pursuant to which the plaintiff was to perform, certain reclamation, excavation and road construction works (**Works**). The plaintiff pleads amongst others, that:
 - a. it undertook the Works;
 - b. it was agreed between the parties that the value of the work undertaken by the plaintiff was K10 million, but that the plaintiff would accept an immediate payment of K6 million in settlement of the plaintiff's claims;
 - c. the defendants only paid K100,000 to the plaintiff;
 - d. the defendants owe the plaintiff K9.9 million.
3. Clause 15 of the Paga Hill Contract is as follows:

“15. In respect of a minor dispute, Parties may arbitrate on terms in accordance with the Arbitration Rules of the National Court of Justice of Papua New Guinea.”

4. Pursuant to s. 4(1) and (2) *Arbitration Act*, the defendants now apply for a stay and for the parties to be referred to arbitration in accordance with clause 15 of the Paga Hill Contract.

Section 4 Arbitration Act

5. Section 4 *Arbitration Act* is as follows:

“4. Power to stay proceedings where there is submission.

(1) If a party to a submission, or a person claiming through or under him, commences legal proceedings in any court against another party to the submission, or a person claiming through or under him, in respect of a matter agreed to be referred, any party to the proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings.

(2) If the court to which application is made under Subsection (1) 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 for the proper conduct of the arbitration, it may make an order staying the proceedings.”

6. Section 1 *Arbitration Act* defines “submission”, unless the contrary intention appears as:

“means a written agreement to submit present or future differences to arbitration, whether or not an arbitrator is named in the submission.”

Consideration

7. Clause 15 of the Paga Hill Contract refers to, “a minor dispute”. There is no definition of, “a minor dispute”. There is no evidence given by any of the parties as to whether the claim of the plaintiff in the statement of claim is a minor dispute. In the evidence of Mr. Liria filed on behalf of the defendants, reference is made to there being, “a provision in respect of a minor dispute” but it is not deposed that the claim between the parties is a minor dispute. Mr. Liria deposes that in his opinion the dispute concerns only the value of the Work performed by the plaintiff. Earlier in his affidavit however, Mr. Liria deposes as to the “matters” in dispute.
8. In the statement of claim, it is pleaded that the plaintiff performed the Works, that it was agreed that the value of the works performed by the plaintiff was K10 million but that the defendants paid K100,000.
9. It may be concluded in my view, that the dispute concerns K9.9 million, which is not an insignificant sum and concerns over 95% of the claimed agreed value of the work performed by the plaintiff. Given the value and percentage possibly in dispute in the context of the plaintiff’s claim and claimed agreed value, it is unlikely to be concluded without more, that the dispute is minor. There is no evidence on behalf of the defendants to the effect that the dispute is minor. In the absence of such evidence from the defendants who are the applicants for the orders sought, I am not satisfied that the dispute between the parties is a matter that can be described as, “... a **matter agreed to be referred, ...**” as those words appear in s. 4(1) *Arbitration Act* as the dispute between the parties has not been properly and sufficiently shown to be a minor dispute.
10. As it has not been shown that the dispute between the parties falls within clause 15 of the Paga Hill Contract, one of the pre-conditions in s.4(1) *Arbitration Act* which requires to be satisfied for the court to have jurisdiction to grant a stay under s. 4(1) *Arbitration Act*, pursuant to which the defendants apply, has not been satisfied.
11. Further, s.4(2) *Arbitration Act* refers to the court being satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission. Clause 15 Paga Hill Contract refers to, “**on terms in accordance with the Arbitration Rules of the National Court of Justice of Papua New Guinea.**” To be referred in accordance with the submission, the matter should be referred, “on terms in accordance with the Arbitration Rules of the National Court of Justice of Papua New Guinea.” There are however, no such Rules so entitled. There are *National Court Rules* that deal with Arbitration contained in Division 8 of Order 14 *National Court Rules*. Pursuant to Order 14 Rule 61, Division 8 relates to proceedings after an order is made under s. 13 [Arbitration Act 1951](#). Here, there is no evidence that an order has been made under s. 13 and the defendants did not submit that such an order had been made.
12. Consequently, there is a sufficient reason why the matter should not be referred in accordance with the submission. That reason is that there are no Rules as referred to in the submission, in accordance with which the matter may be referred. So even if all of the pre-conditions under s.4(1) [Arbitration Act](#) which must be satisfied for the court to have jurisdiction to grant a stay had been satisfied, which they have not, there is a sufficient reason why the matter should not be referred in accordance with the submission.
13. I am satisfied therefore that the defendants have not satisfactorily made out their case for the relief which they seek. Given this, it is not necessary to consider the other submissions of counsel.

Orders

14. It is ordered that:

- a. The notice of motion of the first and second defendants filed 15th December 2017 is dismissed;
- b. The first and second defendants shall pay the plaintiff's costs of and incidental to the said notice of motion;
- c. Time is abridged to the time of settlement by the Registrar, which shall take place forthwith.

Young & Williams Lawyers: *Lawyers for the Plaintiff*

Ashurst Lawyers: *Lawyers for the Defendants*

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