

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 0091/2009

BETWEEN:

ASHTROM ANGUILLA LTD

Claimant/Respondent

and

FLAG LUXURY PROPERTIES (ANGUILLA) LLC

First Defendant/Applicant

and

TEMENOS DEVELOPMENT INC

Second Defendant/Applicant

Appearances:

Mr. Ravi Bahadursingh for the First and Second Defendants/Applicants

Mr. Nyarumba Nota and Mr. Colin Meade for the Claimant/Respondent

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2010: November 30th

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DECISION

[1] **BLENMAN, J:** This is an application by Flag Luxury Properties (Anguilla) LLC (Flag) and Temenos Development Inc (TDI) to stay claim filed by Ashtrom Anguilla Ltd (Ashtrom) against them. They also seek to have the court strike out the relevant paragraph of Ashtrom's, statement of claim in relation to the allegation of Unjust Enrichment.

- [2] The applications are strenuously opposed by Ashtrom who urge the court not to stay its claim nor to strike out the Unjust Enrichment aspect of its claim.

Issues

- [3] The issues that arise for the court to resolve are:
- (a) Whether the court should stay the claims that are brought by Ashtrom against Flag and TDI
 - (b) Whether the court should strike out Ashtrom's claim for Unjust Enrichment against Flag.

Background

- [4] Ashtrom is a company incorporated under the Laws of Anguilla, with its registered office situate in Anguilla. It is a contractor involved in the construction of works and buildings.
- [5] Flag is a Delaware incorporated company which is registered in Anguilla with its registered office in Anguilla. It has leased lands in Anguilla.
- [6] Flag had a mixed used development project which consists of a Golf Course and Residential Development. The development was designed to include a luxury class hotel with related facilities and amenities together with Estate Homes, Villas and Ocean Front Residences. Flag and TDI are alleged to have interlinked relationships insofar as the construction project is concerned. It is alleged by Ashtrom that Flag is the mind and management of TDI.

[7] TDI is a company that is incorporated under the Laws of Anguilla with its registered office situate in Anguilla. It is also a developer responsible for the construction, marketing and sale of Estate Homes in Anguilla.

[8] The claim and applications concern three contracts.

Manor Contract

[9] In relation to the first contract, Ashtrom complains that on the 10th day of October 2010, as employer, Flag engaged the services of Ashtrom (The Manor contract) to construct certain buildings. The contract price was US\$24,897,792.00. The percentage of retention was ten percent. Clause 60.1 – 60.3 of the contract Agreement provide for the method of payment. The contract was amended and the contract sum was increased to US\$46,716,413.

[10] Ashtrom says that it commenced construction works on the Manor Project and received monthly payments by way of wire transfers. Flag requested that the payments be allocated to the 29 Villas and Sky Villas contracts.

[11] Ashtrom says that it completed substantial works and Flag's engineer signed the Interim Payment Certificate for the period up to 31st August 2008 less retainage of US\$29,751,672. Ashtrom says that it received US\$24,392,565 from Flag leaving a balance of US\$5,047,542. Despite the Engineer's Certification, this latter sum remains unpaid. As a result, Ashtrom ceased work on the project in August 2008 and still has not received the outstanding payments of \$5,047,542.00 together with a retention sum of US\$1,604,357.90.

[12] Ashtrom has filed a claim against Flag and seeks to be compensated for the sums allegedly outstanding.

The 29 Villas

- [13] In relation to the second contract, Ashtrom says that it entered into an agreement with TDI to construct certain works at Temenos (the 29 Villas). The contract price was US\$76,943,403.00.
- [14] Ashtrom says around 30th October 2006, it commenced work on the project and submitted its monthly statements. It received various sum as payment for the work it did. However, TDI has outstanding monies in the sum of US\$13,783,739.50 which it has refused or failed to pay Ashtrom.
- [15] The contract sum was increased by US\$53,845,843.70 to US\$130,792,248.78; the total sum owed was US\$32,383,739. Clause 60.1 – 60.3 stipulates the method of payment. In accordance with their Agreement, Flag's Engineer has certified the payment. Ashtrom says that TDI has refused to pay it (Ashtrom) the retention sum of US\$4,674,907.30.
- [16] Ashtrom seeks to recover the above sums that are allegedly outstanding.

The Sky Villas

- [17] The third contract is in relation to The Sky Villas. This is a contract which Ashtrom says it entered into with TDI.
- [18] Ashtrom says that Flag engaged (its) Ashtrom services to construct certain works for a contract sum of US\$59, 844,076.00. Clause 60.1 – 60.3 provides for the method of payment.
- [19] Ashtrom says that it commenced work on the project around 10th August 2007 and received payments towards the work it completed for Flag and/or TDI. However, it says that Flag owes it the sum of US\$6,216,228. Flag's Engineer has certified the

payments, yet Flag and/or TDI have failed to make the payments. Despite its (Ashtrom's) request of Flag and/or TDI they have failed to liquidate their indebtedness.

[20] In addition, Ashtrom says that Flag and/or TDI owe it the sum of US\$105, 792 as the retention sum for work Ashtrom has completed. Ashtrom, in its statement of claim seeks to recover the sums that are allegedly outstanding on the alleged basis of Flag's and or TDI's breach of contract.

[21] In the alternative and in respect of the 29 Villa contract and The Sky Villa contract, Ashtrom says that if Flag and TDI are not one and the same, Ashtrom claims against Flag the sum of US\$31,432,566.20 as Unjust Enrichment, in relation to The Sky Villa contracts and 29 Villas contracts for the works allegedly done for Flag's benefits.

[22] It is appropriate to state that each of the three contracts contain a very detail Arbitration Clause in the form of 67(1).

[23] Flag and TDI have applied to the court to have Ashtrom's claim stayed. They allege that in accordance with the contracts, which they entered, the parties are obliged to submit their dispute to arbitration.

[24] Flag has also asked the court to strike out Ashtrom's claim based on Unjust Enrichment.

[25] Flag and TDI have caused affidavits to be filed in support of their applications. Ashtrom has filed Affidavits in Support of its claim and ask the court not to strike out its claim.

Applicants/Defendants Submissions

- [26] Learned Counsel Mr. Ravi Bahadursingh stated that Flag and/or TDI disputes the claims by Ashtrom on the basis of the works are not to the extent of the amount claimed and/or in compliance with the specifications and drawings and other terms of the said contract.

Existence of Dispute

- [27] Learned Counsel Mr. Bahadursingh said that The Arbitration Agreement which is to be found in each of the relevant contracts refers "*any dispute of any kind whatsoever*" to resolution by arbitration. Flag and TDI have not admitted the claims by Ashtrom. It would therefore appear axiomatic that a dispute subsists between the parties as a matter of ordinary interpretation. In any event, insofar as neither Flag nor TDI admits to the sums claimed by Ashtrom as being due and payable, a dispute has unequivocally arisen between the parties. In the landmark case of *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 WLR 726, 753, Henry L.J. concurred with the trial judge that:

"...until the defendant admits that a sum is due and payable there is a dispute within the meaning of the arbitration clause. Even in such a case I can see an argument for saying that a claimant would be entitled to an award if the respondent then refused to pay...."

- [28] The learned judge appeared to not only accept that a dispute arises until such time as the defendant admits that a sum is due and payable, but goes further to suggest that mere non-payment of a sum (whether or not such sum is, in itself, in dispute) is sufficient grounds to give rise to a dispute.
- [29] Swinton Thomas L.J. (at page 761) concurred with the general circumstance in which a dispute arises and held:

"In my view... there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable."

[30] Mr. Bahadursingh stated that it is unassailable that neither Flag nor TDI has ever admitted that the amounts claimed by Ashtrom are owed and/or payable. *A fortiori*, by letter dated 2nd September 2009, Flag and TDI each expressly refuted Ashtrom's claims, as set forth in the Claim Form and Statement of Claim. Learned Counsel Mr. Bahadursingh submitted that the claims by Ashtrom constitute and/or relate to a dispute within the meaning of the Arbitration Agreement set forth in the respective contracts.

[31] Mr. Bahadursingh stated that with regard to claims against Flag for amounts owed under the 29 Villas contract and The Sky Villas contract, Flag disputes being a party to those contracts.

Stay

[32] Mr. Bahadursingh urged the court to stay the claims brought by Ashtrom against Flag and TDI. Learned Counsel Mr. Bahadursingh stated that there is a dispute between the parties in respect of a matter which under the Agreement is to be referred to arbitration. Mr. Bahadursingh said that Flag and TDI are entitled, as a matter of law, to a stay of legal proceedings pending the hearing and determination of arbitration proceedings or earlier resolution thereof.

[33] Mr. Bahadursingh said that it is an admitted fact that the Manor contract was executed as between Ashtrom and Flag. It is also an admitted fact that the 29 Villas contract and The Sky Villas contract were executed as between Ashtrom and TDI.

[34] Mr. Bahadursingh maintained that each of the Manor contract, 29 Villas contract and Sky Villas contract contain an Arbitration Agreement whereby the parties are obligated to refer any disputes to arbitration.

[35] Mr. Bahadursingh Learned Counsel said that Flag's and TDI's applications for a Stay of Proceedings, is made pursuant to **s.9 of the Arbitration Act 1996 (U.K.)** as received by the Anguilla Arbitration Act (c. A105). Section 1 of the Anguilla Arbitration Act provides:

Arbitration Act (UK) to apply to Anguilla

The Arbitration Act (14 Geo.6 c. 27) (UK) as amended from time to time shall be, and the same is hereby declared to be henceforth, in force in Anguilla, and all the provisions of the Act, so far as the same are applicable, shall *mutatis mutandis* apply to all proceedings relating to arbitration within Anguilla.

[36] The Arbitration Act 1996 (U.K.) contains the amendments to the Arbitration Act 1950 (14 Geo. 6 c. 27) (UK) (also cited as the Arbitration Act 1950) and repeals Part 1 of the Arbitration Act 1950. (See Schedule 4 to the Act). Section 9(1) of the Arbitration Act permits a party to an Arbitration Agreement to make an application to stay legal proceedings. Section 9(4) of the Act directs that the court shall grant a stay upon such application. The only grounds upon which such stay may be declined are to be found in s. 9(4) of the Act, to wit:

- a. The Arbitration Agreement is null and void;
- b. Inoperative; or
- c. Incapable of being performed.

[37] Mr. Bahadursingh said that none of grounds are applicable to the claims in this section. In the absence of such grounds, the court is mandated to stay proceedings regarding any dispute in connection with or arising out of the relevant contract and between the parties to the relevant Arbitration Agreement.

Flag and TDI accordingly seek a stay of the claims pursuant to s.9 (1) of the Act (by way of s. 1 of the Anguilla Arbitration Act (c. A105).

- [38] Mr. Bahadursingh Learned Counsel said in addition to the court's statutory powers to grant a stay pursuant to s. 9 of the Act, the court also maintains an inherent jurisdiction to stay proceedings where it is appropriate to do so. See **Part 26.1(2)(q) CPR 2000**. See also *Channel Group v Balfour Betty Ltd H.L. (E.)* [1993] 334, 352.

Election to sue Flag for breach of contract

- [39] Insofar as Ashtrom alleges that Flag is a party to the 29 Villas contract and The Sky Villas contract, even though this is denied, the Arbitration Agreements in the said contracts would be equally applicable to such claims against Flag. Notwithstanding that Flag denies being a party to the 29 Villas contract and the Sky Villas contract, Flag is willing to submit to arbitration with regard to these claims without prejudice to any of its defences to such claims (including any defence relating to whether or not it is a party to said contracts.)
- [40] Mr. Bahadursingh posited that insofar as Ashtrom has elected to proceed against Flag in relation of the 29 Villas contract and Sky Villas contract, Ashtrom ought to be (and ought properly to have expected to be) equally bound by the Arbitration Agreements contained in said contracts. Accordingly, Mr. Bahadursingh submitted that the court, in exercising its inherent jurisdiction in a manner analogous with the application of s. 9 of the Act, ought properly to stay these claims pending a determination of all the said claims by the arbitral tribunal.
- [41] Mr. Bahadursingh said that the resolution of any disputes between the various parties by arbitration was certainly within the expectation of the parties at the date of execution of the relevant Contracts. Insofar as the parties now have the

opportunity to utilize their chosen medium of dispute resolution, the grant of a stay of all claims pending arbitration would encourage and facilitate the use of this method of alternative dispute resolution in a manner consistent with **Part 25.1(h) CPR 2000**.

- [42] In the absence of such a stay, the parties would be exposed to inconsistent judgments resulting from any arbitral award and the spectre of double recovery in the event that Ashtrom is successful at arbitration. This result would, Mr. Bahadursingh submitted, undermine the Overriding Objective of the CPR 2000.

Strike Out

- [43] Next, Mr. Bahadursingh submitted that, in any event, the attempt by Ashtrom to formulate any claim based on Unjust Enrichment is misguided and does not disclose any reasonable grounds for bringing such a claim. Learned Counsel Mr. Bahadursingh stated that Part 26.3 CPR 2000 permits the court to strike out a statement of case or any part thereof on, *inter alia*, the following grounds:

- a. There has been a failure to comply with a rule of the court;
- b. The statements of case, or any part thereof, do not disclose any reasonable ground for bringing the claim; and/or
- c. The statements of case or any part thereof, is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings.

- [44] Mr. Bahadursingh said that the Claim Form, as filed by Flag on the 17th August 2009, singularly omits any reference to any claim based on, or any remedy relating to, Unjust Enrichment – the substantive claims being based on monies owed under the three (3) contracts up to 31st August 2008. By reason of the express contractual relationship between Flag and TDI regarding the development of the

Estate Home lots, it is clear that Flag has not obtained any benefit from the Works erected upon such lots pursuant to the 29 Villas contract and the Sky Villas contract. The Works are properly the property of TDI and/or the 3rd party Purchasers of the Estate Homes.

- [45] In *Caribbean Development (Antigua) Limited v Electronic Technology International (Antigua) Ltd* Gordon JA – in rejecting a claim based on Unjust Enrichment equated the term “unjust” with the Canadian terminology of “an absence of a juristic reason” which the learned judge adopted as follows (at para. 17):

“There are now two stages to the juristic reason inquiry. At the first stage, a claimant...must show that there is no juristic reason within the established categories that would deny it recovery. The established categories are the existence of a contract, disposition of law, donatives intent and “other valid common law, equitable or statutory obligation...On proving that none of these limited categorical reasons exist to deny recovery, the plaintiff...will have made out a prima facie case of unjust enrichment. It will have demonstrated “a positive reason for reversing the defendant’s enrichment...”

- [46] Mr. Bahadursingh posited that if the Works were supplied under contractual obligation to Flag (as alleged by Ashtrom), no claim would lie in Unjust Enrichment as against Flag. The House of Lords recognized this point in *Pan Ocean Shipping Ltd v Credit Corp Ltd* [1994] 1 WLR 161, 164.

“...between ship owner and charter, there is a contractual regime which legislates for the recovery of overpaid hire. It follows that, as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate.”

[47] In summary, any claims relating to the Works supplied under the 29 Villas contract and Sky Villas contract may only be directed to the counter party to those contracts (whether such counter party be TDI or, as alleged by the Claimant, Flag itself). To do otherwise, Mr. Bahadursingh submitted, would mean that “a horse and cart could be driven through the ordinary law of contract.” (See *Caribbean Development (Antigua) Limited v Electronic Technology International (Antigua) Ltd* at paragraph 20).

[48] By reason of the foregoing, Mr. Bahadursingh submitted that any attempt by Ashtrom to formulate claims based on Unjust Enrichment is fatally flawed – by Ashtrom’s own admissions on its pleadings, and ought properly to be struck out from these proceedings insofar as the statements of case:

- a. Does not disclose any reasonable ground for bringing such claims; and/or
- b. Is an abuse of the process of the court and/or is likely to obstruct the just disposal of the proceedings with regard to such claims.

[See **Part 26.3(b)** and **(c)** of **CPR 2000**]

[49] In the event that claims Unjust Enrichment are not struck out, Mr. Bahadursingh submitted that the court should, in the alternative, stay such claims.

[50] Learned Counsel Mr. Bahadursingh advocated that in those circumstances, the claims for Unjust Enrichment should be stayed on the following bases:

- a. Based on Ashtrom’s allegation that Flag is a party to the 29 Villas contract and Sky Villas contract (which is denied by Flag), any other

(non contractual) claims arising out of or related to the said contracts would be subject to the Arbitration Agreements set out therein; and/or

- b. Insofar as Ashtroms advances concurrent claims against Flag and TDI for breach of contract, the court ought properly to exercise its inherent discretion to stay all claims pending the final hearing and determination of arbitration proceedings relating to claims (a) through (c) and/or (d) and (e).

[51] Reinforcing his alternative argument that the claim for Unjust Enrichment is subject to Arbitration, Mr. Bahadursingh said that Ashtrom in its pleadings expressly acknowledges that TDI is the counterparty to the 29 Villas contract and the Sky Villas contract. Ashtrom *also* appears to allege that Flag is also a party to the 29 Villas contract and the Sky Villas contract to the extent the Flag is liable for breach of contract in relation to said contracts. See paragraphs 3 and 5 of the Claim Form. See also paragraphs 4(f), 23(b), 43 and 60 of the Statement of Claim.

[52] If, as Ashtrom says, Flag is a party to the 29 Villas contract and The Sky Villas contract, any claim based on Unjust Enrichment would necessarily fall within the wide ambit of the Arbitration Agreements therein as being *"in connection with, or arising out of, the contract"*. In *Premium Nafta Products Ltd Et Ors v Fili Shipping Company Limited Et Ors* [2007] UKHL 40 the House of Lords held (at para.13):

"...the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption..."

Submissions of Claimant/Respondent

Stay

- [53] Learned Counsel Mr. Nyarumba Nota stated that the application for a Stay of Proceedings pending Arbitration is governed by section 9 of the Arbitration Act 1996 of the United Kingdom which was extended to apply to Anguilla by the Arbitration Act Chapter A 106 of Anguilla. Section 9 (4) of the Act provides that on an application under this section, the court shall grant a stay unless satisfied that the Arbitration Agreement is null, void, inoperative, or incapable of being performed.
- [54] Learned Counsel Mr. Nota said that clause 67(1) of the Arbitration Agreements, in respect of the three contracts namely the Manor contract, the 29 Villas contract and the Sky Villas contract, is inoperative as the three contracts provide that:

"If any dispute arises between the Employer and the Contractor in connection with or arising out of, the Contract"(s), or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the contract(s) including any dispute as to any opinion, instruction, determination of the contract(s) including any dispute as to any opinion, instruction, determination certificate or valuation of the Engineer, the matter in dispute shall in the first place be referred in writing to the Engineer with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty fourth day after which the day on which he received such reference the Engineer shall give notice of his intention to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause."

[55] No reference of any dispute in respect of the claim filed has been made to the Engineer of the Project Mr. Geoffrey Blake to date. Further, the Engineer, Mr. Blake is no longer employed by the Defendants and no reference in respect of a dispute can be made to him at this stage.

[56] Further the Agreements provide:-

"If either the Employer of the Contractor be dissatisfied with any decision of the Engineer or if Engineer fails to give notice of his decision on or before the eighty fourth day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired as the case may be given notice to the other party with a copy for information to the Engineer of his intention to commence arbitration as hereinafter provided, as to the manner in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided as to such dispute and, subject to sub clause 67.4 no arbitration in respect thereto maybe commenced unless such notice is given."

[57] Learned Counsel Mr. Nota submitted the proper notice has not been given to the Engineer to commence arbitration pursuant to the three contracts and further such notice cannot be given at this stage as there is no Engineer for the projects to give such notice to. Mr. Nota argued therefore that the Arbitration Agreement in the three contracts is inoperable pursuant to Section 9 (4) of the Arbitration Act 1996 of the United Kingdom. The court is therefore restrained in exercising its discretion to grant a Stay of the Proceedings in this case.

[58] In support of his contention, Mr. Nota referred the Court to ***Victor International Corporation Victor BVI Limited and Spanish Town Development Company***

Limited et al British Virgin Islands Claim No. BVIHCV 2007/0293 Justice Hariprasad Charles said at page 12.

“Indubitably, each arbitration clause must be interpreted or constructed to determine whether there is a condition precedent to arbitration or not. It appears to me from the line of legal authorities that were cited by both Queen’s Counsel that to be condition precedent, the preliminary step must be expressed in clear mandatory terms. If not it is not a condition precedent.”

[59] Learned Counsel Mr. Nota submitted that in the case at bar the preliminary steps outlined above are expressed in mandatory terms and all have clear expressed time limits prescribed. Mr. Nota said that these preliminary steps are condition precedents to the right to arbitrate in this instance. These terms cannot be complied with at this stage for the reason outlined above. Mr. Nota posited that the court ought not to exercise its discretion to grant a stay of proceedings pending arbitration but allow the matter to proceed in this court.

[60] Next, Mr. Nota submitted that all three contracts are based on the Interim Certificates of payment issued by the Engineer in respect of the Manor contract, the 29 Villas contract and Sky Villas contract. The Interim Certificates have been signed by the Engineer on behalf of Flag and/or TDI and there is no real dispute as the payments due to Ashtrom. In the respect of the Manor contract, the 29 Villas contract and the Sky Villas contract. Mr. Nota posited that Flag and TDI have no real or arguable defence to the Claim and are simply trying to delay or avoid payment of the sums due to Ashtrom for work done, pursuant to the three contracts, and for as long as possible. He referred the court to *Halki Shipping Corporation V Sopex Oils Ltd* [1997] EWCA Civ 3062 in which Lord Justice Hirst at page 13 addressed the issue as to whether a dispute is being raised at all and whether the parties should be required to arbitrate.

[61] Further in *Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and Others* [1993] 1 All ER 664 Lord Mustill said at page 680.

"In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the Court under RSC Ord 14 to give summary judgment in favour of the plaintiff where the defendant has no arguable defence. If the plaintiff to an action which the defendant has applied to stay can show that there is no defence to the claim, the court is enabled at one and the same time to refuse the Defendant a stay and to give final judgment for the plaintiff. This jurisdiction, unique so far as I am aware to the law of England, has proved to be very useful in practice, especially in times when interest rates are high, for protecting creditors with valid claims from being forced into an unfavourable settlement by the prospect that they will have to wait until the end or an arbitration in order to collect their money. I believe however that care should be taken not to confuse a situation in which the Defendant disputes the claim on grounds which the plaintiff is very likely indeed to overcome with the situation in which the Defendant is no really raising a dispute at all."

[62] Mr. Nota submitted that in any event in this case it would be more convenient, just and economical to have this matter decided by this court as opposed to Arbitration to avoid a multiplicity of proceedings especially since Arbitration would be unlikely to yield a different result as Ashtrom is very likely to succeed on the Claim. See *Ocean Conversion Limited v The Attorney General of the Virgin Islands Territory of the Virgin Islands* HCVAP 2007/030 unreported.

[63] Learned Counsel Mr. Nota asked the court not to grant a stay of Ashtrom's claim. There simply is no dispute between the parties. The sums claimed by Ashtrom were certified by the defendants' Engineer who is no longer in their employ. Mr. Nota said that the sums are clearly due and owing to Ashtrom. Further, Mr. Nota

pointed the court to the fact that the project closed since in August 2008 and Ashtrom has failed to receive the monies that are clearly owed to it, is significant.

Unjust Enrichment

- [64] Mr. Nota urged the court not to strike out Ashtrom's claim for Unjust Enrichment once it is properly pleaded. He said that case management has not been concluded and Ashtrom can still amend its claim.

Court's Analysis and Findings

- [65] The court has perused the pleadings and the affidavits that are filed in this matter. The court has also given deliberate consideration to the very helpful submissions of all Learned Counsel.
- [66] For the sake of convenience, the court proposes to address the issues raised in relation to both Flag and TDI. The first matter the court has to address is whether there are disputes between the parties. These are preliminary matters but are nevertheless very important matters.
- [67] On the face of the pleadings the parties to the Manor contract appear to be Ashtrom and Flag; the parties to the 29 Villas contract and Sky Villas contract appear to be Ashtrom and TDI. It is indisputable that all of the contracts contain an Arbitration Agreement in the form of clause 67(1) of the respective contracts under the heading Settlement of Dispute. It is also beyond argument that Ashtrom has made a claim against Flag and TDI, pursuant to their respective contracts for monies due and owing and the claims have not been honoured. In relation to the Manor contract, Ashtrom claims against Flag; whereas in relation to the 29 Villas contract and The Sky Villas contract, the claim is against TDI with the alternative claim against Flag.

- [68] The court does not accept Ashtrom's position that there is no dispute in reference to the claims for monies owed to Ashtrom for work done pursuant to the Manor contract, 29 Villas contract and Sky Villas contract. The debts were certified by the Engineer, for the project, on behalf of Flag and TDI and they have not been paid. It is indisputable that both Flag and TDI owe monies to Ashtrom based on the Certificates of Payment issued by the Engineer. These monies are allegedly outstanding for in excess of one year. It is therefore clear to the court that insofar as both Flag and TDI, at the very least, have failed to effect the payments, there is a dispute in relation to those payments. See *Halki Shipping Corporation v Sopex Oils Ltd* *ibid*.
- [69] If any further support is needed for the court's conclusion that there is a dispute between the parties, it is to be found in the clause 69(1) (a) of the agreement under Default of Employer. Indeed clause 69(1) (a) of the agreement provides that in the event of the Employer failing to pay the Contractor the amount due under any certificate of the Engineer within 28 days after the expiry of the time stated in clause 60.10 contract shall be entitled to terminate his employment under the Contract by giving notice to the Employer with a copy to the Engineer.
- [70] The court reiterates the fact that there is no argument that Ashtrom has terminated its employment under the contract due to the fact that even though the defendants' Engineer has signed the Certificates of Payment, the defendants are yet to effect payment.
- [71] Accordingly, there is doubt that there is a dispute between the parties in relation to the payment of the sums that were certified by the defendants' Engineer from the mere fact that Flag and or TDI have failed to effect the payments. This is so in spite of the requests that have been made of them for in excess of a year.
- [72] This finding brings into sharp focus clause 67(1) of the contracts in relation to the Manor contract, The 29 Villas contract and The Sky Villas contract.

[73] Clause 67(1) of the contract provides for a procedure for settling disputes. This procedure is prescribed on the availability of an Engineer to whom the dispute must first be referred. The comprehensive procedure that the contract provides for settling disputes of the type in the case at Bar provides for the matter to be referred to arbitration. See clause 67(1) of the contract. On Ashtrom's evidence, there is the contention that the defendants' Engineer, Mr. Blake has not been available since 2008 and that no Engineer has been appointed in his place. There is no possibility of referring the dispute to the Engineer. Mr. Kanavos who is the President of Flag deposes that although Mr. Blake is expressly named in the contracts as the Engineer he understands that Mr. Manning has been assigned as the Engineer by both Flag and TDI in relation to their respective contracts. Mr. Roner Arava who is the Country Manager of Ashtrom says that the procedure for settling disputes as outlined in clause 67(1) is no longer available to the parties since the work on the project ceased since August 2008 and that the Engineer for the project, Mr. Geoffrey Blake is no longer employed by Flag or TDI.

[74] The court is more inclined to accept that this latter position represents a correct reflection of the situation. This is particularly so in view of the fact that Mr. Manning who deposed to an affidavit on behalf of TDI has not even mentioned that he is the Engineer assigned by TDI. The court is not prepared to accord significant weight to Mr. Kanavos statement that his *"understanding is that Mr. Manning has now been assigned by both Flag and TDI in relation to their respective Contracts"*. Being mindful of the fact that this evidence has not been tested in cross-examination, the court finds it very curious, to say the least, that Mr. Manning in his affidavit in reply did not state that he was appointed the Engineer in place of Mr. Blake. One would have expected that insofar as this is a live issue that Mr. Manning would have at least sought to meet that issue head on in the affidavit which he swore on behalf of TDI.

- [75] The court is inclined to the view that in relation to the contractual dispute between Ashtrom and TDI there is no Engineer to whom the matter could be reviewed. Similarly, the court has great reluctance in accepting that Mr. Manning is the Engineer for the contract between Flag and Ashtrom. The court says this being very aware that it is in no position to make any findings of fact since the evidence has not been tested. It appears, however, that the position taken by Flag may not correctly reflect the state of affairs.
- [76] This gives rise to the need for the court to examine whether in view of these circumstances the Arbitration Agreements are operative. It is clear that section 9 of the Arbitration Act provides that a party to an Arbitration Agreement is entitled to apply to the court for a stay of proceedings. The court also accepts that CPR 2000 also clothes the court with the jurisdiction to stay a claim in an appropriate case.
- [77] Section 9(4) of the Arbitration Act stipulates that the court shall stay the claim upon such an application unless the Arbitration Agreement is in operative or incapable of being performed
- [78] The overriding position of the law is that contracting parties ought to be held to their bargain. In the absence of very strong reason to the contrary effect will always be given to the choice that the parties have made in their agreement. Where the parties have agreed to a specific method of resolution, the court will hold the parties to that agreement. Any application for a stay of proceedings is likely to succeed unless there are sufficient grounds for the court's refusal.
- [79] Learned Counsel Mr. Nota urged the court not to grant the stay. He says that the Arbitration Agreement is inoperative insofar that there is no Engineer to refer any dispute since Mr. Blake who was the Engineer employed by the defendants is no longer in their employ. The court has no reason, on the face of the affidavits to reject Ashtrom's evidence that it had not been in contact with any of Flag's personnel, despite its best efforts in that regard.

[80] The court finds the argument advocated by Mr. Nota very attractive and is persuaded by it. In view of the lack of Engineer to whom any dispute could be referred as required by clause 67(1) of the contract, the court is driven to the ineluctable conclusion that the Arbitration Agreement in each of the contracts is either inoperative or incapable of being performed. Accordingly, the case at Bar is clearly to be contrasted with that of the *Channel Tunnel Group v Balfour Beatty* *ibid*. The court is not of the considered view that this is an appropriate case for it to exercise its jurisdiction to stay the claims brought by Ashtrom against Flag and TDI.

Unjust Enrichment

[81] For the sake of completeness, the court is not persuaded that the alternative claim of the Unjust Enrichment which Ashtrom has filed against Flag in relation to the 29 Villas contract and The Sky Villas contract is unsustainable.

[82] In any event, there is pleaded material through which Ashtrom contends that there is a special relationship between TDI and Flag through which Flag is alleged to have managed or controlled the affairs of TDI. The court is not of the view that the claim for Unjust Enrichment is not properly pleaded.

[83] The court will therefore be very slow to strike out Ashtrom's alternative claim for Unjust Enrichment against Flag. It is correct that there is nothing to prevent Flag from providing the requisite evidence in its witness statement to substantiate its claim. See Barrow JA in *Eastern Caribbean Flour Mills Ltd v ken Boyea* Civil Appeal No.12 of 2000.

[84] In addition, insofar as Ashtrom is free to amend its claim to remedy any alleged defects since the first case management conference has not been held, it would seem a bit precipitous to strikeout its claim against Flag for Unjust Enrichment.

The remedy of striking out is one that the court should exercise only in very clear case. The court is of the respectful view that the case at Bar is not an appropriate one for the court to exercise this jurisdiction.

[85] This brings the court now to consider whether this is an appropriate case in which to grant a stay of the claim for Unjust Enrichment. The court has no doubt that Arbitration proceedings cannot provide the equitable remedy that Ashtrom seeks in relation to its claim against Flag for Unjust Enrichment.

[86] The court accepts Mr. Nota statement that it is just convenient and economical for the matter to be continued in the court. The court pays attention to the fact that Ashtrom's claim includes a claim for Unjust Enrichment which an Arbitrator would not have jurisdiction to grant. Accordingly the court finds great support for its conclusion in HCVAP 2007/030 *Ocean Conversion Limited v The Attorney General of Virgins Islands*. In that case, His Lordship Hon. Rawlins CJ held in dismissing the appeal that the judge properly exercised her discretion when she found that the issues, which relate to Ocean Conversion's entitlement to an equitable or restitutionary right and compensation were not properly within the scope of arbitration under the agreement. Rawlins CJ further held that the judge properly exercised her discretion when she refused to grant the stay on the ground that it would be more just convenient and economical for the dispute to be determined by the court.

[87] The court is of the view that this is an appropriate forum for those equitable claims to be ventilated and, in any event as stated earlier, the equitable reliefs which Ashtrom seeks would not be available if the matter were to be decided at arbitration. Accordingly, the court does not accede to Flag and or TDI's request to either stay or strike out Ashtrom's claim for Unjust Enrichment.

[88] In the alternative, the applicants have sought leave from the court to file their defence within 14 days of the court's order. The court is of the considered view

that insofar as there has been no objection to this application and taking into consideration the totality of circumstances; it is right that leave be granted to both Flag and TDI to file and serve their defence within 21 days of this order. The matter will thereafter be listed by the court office for case management.

Costs

[89] The parties have quite helpfully agreed to costs in the sum of US\$6,250.00.

Conclusion

[90] In view of the premises, Flag Luxury Properties (Anguilla) LLC and Temenos Development Inc application to stay the claim brought by Ashtrom Anguilla Ltd is dismissed.

[91] Flag Luxury Properties (Anguilla) LLC's application to dismiss Ashtrom Anguilla Ltd's claim for Unjust Enrichment is dismissed.

[92] Leave is hereby granted to Flag Luxury Properties (Anguilla) LLC and Temenos Development Inc to file and serve their defence within 21 days of this Order.

[93] The court makes the following orders:

(a) It is hereby ordered that Flag Luxury Properties (Anguilla) LLC and Temenos Development Inc application to stay Ashtrom Anguilla Ltd's claims is dismissed.

(b) Costs are agreed in the sum of US\$6,250.00.

(c) Flag application to strikeout or to stay Ashtrom's claim for Unjust Enrichment is refused.

(d) Flag and TDI are ordered to file and serve their defence within 21 days of this Order.

(e) The claim is thereafter to be listed for case management by the court office.

[94] The court gratefully acknowledges the assistance of all Learned Counsel.

Louise Esther Blenman
Resident High Court Judge,
Anguilla