16-8-10

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 606 of 2009

BETWEEN:

TOM JONES INTERNATIONAL LIMITED

Plaintiff

AND:

THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS AS THE REPRESENTATIVE OF THE CAYMAN ISLANDS GOVERNMENT (THE MINISTRY OF EDUCATION TRAINING & EMPLOYMENT)

Defendant

Coram: The Hon. Mr. Justice Henderson

Appearances: Mr. Michael Black Q.C. instructed by Broadhurst LLC appeared for the Plaintiff

Mr. Simon Lofthouse Q.C. instructed by Conyers Dill & Pearman appeared for the Defendant

Heard: 19th May 2010

JUDGMENT

1. The Defendant, the Attorney General of the Cayman Islands, applies for an order striking out or dismissing the Writ of Summons on the ground that the action is

frivolous, vexatious and an abuse of the process of the Court. In the alternative, and for essentially the same reasons, the Attorney General says he is entitled to summary judgment. The Plaintiff, Tom Jones International Limited ("TJI"), has its own application before me to stay proceedings on the Defendant's counterclaim.

Issues

2. The Attorney General has formulated 5 issues which he describes in this way:

(a) Can the Plaintiff expressly plead without prejudice discussions (being "certificates" 15A and 17A) as the basis for its claim?

(b) Does the case as pleaded give rise to a cause of action for payment under the contracts?

(c) In any event, can these proceedings be issued 21 days after the pleaded date it is alleged the right to payment arises?

(d) Is clause 4.4.1 of the contracts a condition precedent to litigation?

(e) Further, or alternatively, on a proper construction do the pleaded "certificates", on their face, comprise certificates as required under the contracts between the parties?

Pleading

3. The statement of claim is brief and to the point. It alleges that the parties entered into 2 agreements for the construction of 2 high schools in the Cayman Islands.

These agreements describe a detailed certification procedure under which TJI is to receive payment.

4. Two certificates numbered 15A and 17A were issued on October 20th, 2009 in the amounts of CI$2,114,242.65 and CI$833,575.89 respectively. Under the agreements, the Cayman Islands Government ("CIG") was required to pay these sums by November 19th, 2009. It failed to do so. The claim is for payment on both certificates and for interest on the amounts owing.

The Contracts

5. The two contracts, for the construction of the new John Gray High School and the Clifton Hunter High School, are in similar form. They each embody much of the standard form of agreement between an owner and a contractor drafted by the American Institute of Architects (document A101-1997).

6. The contracts provide for an initial mobilization payment of CI$6 million. That sum is to be credited to CIG at the rate of 10% per month commencing 10 months prior to substantial completion.

7. The payment process starts with an application for payment which is submitted by the contractor (TJI) to the quantity surveyor (who is Mr. Steven Abbott of BCQS). The quantity surveyor is then obliged to evaluate the application and certify the amount due to the contractor (General Conditions ("GC"), clause

4.2.5). A certificate for payment is issued by the quantity surveyor to the architect (Omar McLean and Danny Owens of OA & D Architects) within 7 days of the receipt of the contractor's application: GC, clause 9.4.1. The architect, within 7 days after receipt of the certificate, must either authorize the certificate for payment *"for such amount as the quantity surveyor determines is properly due"* or notify the parties of the architect's reasons for withholding authorization in whole or in part: GC, clause 9.4.2.

8. The issuance of a certificate by a quantity surveyor constitutes a representation by it to the owner and to the architect *"that the work has progressed to the point indicated and that, to the best of the quantity surveyor's knowledge, information and belief, the quantity of the work is in accordance with the requirements of the contract documents"*. Moreover, a certificate constitutes a representation that the contractor is entitled to payment: GC, clause 9.4.3.

9. The authorization of a certificate by the architect constitutes a representation by it to the owner that *"to the best of the architect's knowledge, information and belief, the quality of the work is in accordance with the contract documents"*: GC, clause 9.4.4.

10. Once the architect had authorized a certificate, CIG is obliged to pay TJI within 30 days: GC, clause 9.6.1.

11. The contracts are governed by the law of the Cayman Islands: GC, clause 13.1.1.

Contractual remedies

12. The contractual documents make extensive provision for dispute resolution. A *"claim"* by either party arising out of or relating to the contracts must be initiated within 21 days after the event given rise to the claim or within 21 days after the claimant first recognizes its right to claim. Claims not made within this tight time limit are deemed to have been waived: GC, clauses 4.3.1 and 4.3.2.

13. A claim is initiated by notice to the architect and to the opposite party. An initial decision by the architect is a condition precedent to mediation, arbitration or litigation: GC clause 4.4.1. After the architect's decision, a claim is subject to arbitration but the parties have expressed a joint commitment (in clause 4.6.1 of the GC) to attempt to resolve the dispute through mediation.

14. If the CIG fails to pay TJI within the expected 30 day period, after an additional grace period of 7 days, TJI is at liberty to serve a notice stating that it will stop work until payment of the amount owing has been received. The actual termination of work can take place 7 days after delivery of the notice: GC, clause 9.7.1.

Chronology

15. TJI made it clear to CIG from the start that it was not willing or able to finance the construction of the two projects.

16. CIG prepared two cash flow schedules setting out the anticipated payments necessary under the agreements. It is CIG's position that these were incorporated into the contracts.

17. Disputes over payment began almost immediately. For present purposes, the details are unimportant. In general, TJI complains of late payments on a number of occasions. Seven day notices announcing imminent work stoppages were issued several times. The Government's view is that some of the applications for payment contained inflated claims and were not adequately documented. It was necessary to request additional information which necessarily caused delay.

18. TJI, alarmed that CIG might not have the financial ability to honour its contract obligations, demanded evidence of an ability to pay (documentation to which it was entitled under the terms of the contracts). CIG provided what it considered to be adequate reassurance but TJI was not mollified.

19. CIG arranged some short term bridge financing on a loan which was due September 30th, 2009. In a letter dated September 21st, 2009 CIG asserted that TJI had received payment for all of the items for which the bridging loan had

been accessed. It advised TGI that, as a result, TJI owed a credit to CIG in the amount of $5,354,086. This letter was sent three days after TJI had delivered a 7 day work stoppage notice because of non payment. Clearly, the relationship between the parties was deteriorating by this time and the completion of the two projects had become endangered.

20. By late September, 2009 work had stopped at the John Gray site and was proceeding on a reduced scale at the Clifton Hunter site. CIG considers these actions to be in breach of contract.

21. In early September, 2009 CIG engaged Mr. David Benoit of Benoit Construction Management Services to assist the Government with resolving the disputes. Mr. Benoit and CIG officials met with two principals of TJI on October 5th, 2009. Mary Rodriguez, Chief Officer of the Ministry of Education, Training and Employment of CIG and a participant in the meeting, says that *"as a result of"* the discussion, she instructed CIG attorneys *"to assist Mr. Benoit to prepare a draft interim funding agreement.....which contained a form of settlement proposal"*. The proposal was that CIG would provide *"additional"* funding immediately and that TJI would resume construction of the projects. The additional funding was to be made on certain terms contained in the interim funding agreement, was to be in the approximate amount of CI$5,000,000, and would be provided for in two interim certificates numbered 15A and 17A.

22. Ms. Rodriguez instructed Mr. Benoit to negotiate the terms of this interim agreement with TJI. Apparently, a draft agreement was not completed until October 20th, 2009. It was provided on that date by Mr. Benoit to the controller and to the senior estimator of TJI. It was sent under cover of a letter marked *"without prejudice and subject to contract"*.

23. Mrs. Rodriguez, in her affidavit, presents the following description of what happened next:

Applications for Payment

5.15 As negotiations continued and doubtless in anticipation of the successful conclusion of the Interim Funding Agreement, the Plaintiff proceeded to issue two "Applications for Payment" expressly for the purpose of formally requesting payment of the Interim Funding Amount. The Applications for Payment were supported by substantiating data which confirmed that the Plaintiff required $2,947,818.54 ("the Interim Funding Amount") (page 264).

5.16 The last Certificates for Payment issued by the Plaintiff under the Contracts and paid by the Government under the Contracts were numbered "15" for the John Gray Project and "17" for the Clifton Hunter Project. The new Applications for Payment reflecting the proposed Interim Payment Amount were therefore numbered "15A" for the John Gray Project and "17A" for the Clifton Hunter Project. The "A" attached to each certificate indicated that the payments certified were extraordinary payments.

5.17 The Applications for Payment were received by the Quantity Surveyor who then generated, in draft form, "Payment Certificate 15A" ("Certificate 15A") in the amount of CI$2,114,242.65 and "Payment Certificate 17A" ("Certificate "17A") in the amount of CI$833,575.89 (collectively, "the Certificates") on 20 October 2009. That same afternoon, the Certificates, marked as "draft" and "interim" were signed by the Quantity Surveyor and then circulated in person by Mr. Benoit to the Architect and to the Government for signing. This signing process, which took place all in a matter of couple of hours, was therefore different to the process required for the certification and authorisation of applications for payment under

Article 9, which provides for certification and authorisation to take place over a number of days, and reflected the extraordinary nature of the proposed interim payment".

The evidence of Mr. Benoit supports that of Mrs. Rodriguez.

24. Mr. Hunter Jones, Managing Director of TJI, provides a markedly different narrative. He says in his affidavit evidence that:

> *24. On or about October 5, 2009, my father, Tom Jones, and I attended a meeting with representatives of CIG. The meeting was called at my request for the purposes of addressing the on-going issues of late payment and non-payment of certificates and the failure to certify and/or pay certified Advance Payments.*
>
> *25. As a result of the meeting CIG put forward Mr. David Benoit as their new representative and we were informed that he was going to meet with us to resolve the payment problems we were having. The introduction of Mr. Benoit to represent the CIG really seemed like a breath of fresh air and we believed CIG was finally going to put someone in charge who could make decisions and sensibly approach the difficulties TJI had been having with payment.*
>
> *26. I believe it was later that same day that Mr. Benoit came to our offices and we took him through the various documents showing the funds TJI had spent on the project and the problems we were having getting payment of amounts certified as owing and obtaining certification for Advance Payments. Mr. Benoit was immediately receptive of TJI's concerns and confirmed that he understood that something needed to be done immediately to ensure payment to TJI for funds expended by TJI on the projects.*
>
> *27. Over the next few days the discussions with Mr. Benoit resulted in him informing us that he was going to make a recommendation that TJI receive an immediate payment, which would include payments to subcontractors. The amount of the payment was then confirmed in a meeting between Mr. Benoit, the representative of the Mechanical Electrical and Plumbing subcontractor, Mr. Alan Roffey and my father. I was informed that at that meeting, Mr. Benoit made it clear that TJI could expect payment of CI$3,000,000.00 immediately and a further CI$1,500,000.00 (which was to be passed along to Mr. Roffey's company Caribbean Mechanical (High Schools 2008) Ltd. "CMHSL")) no later*

than 18 October 2009. In light of the promise of payment put forward by Mr. Benoit, TJI then instructed Mr. Roffey's company, CMHSL, to remobilize on the John Gray worksite and to get back to work. The understanding of the parties reached at the meeting was confirmed in the subsequent emails exchanged between TJI and CMHSL (pages 71-78).

28. *At or about the same time that Mr. Benoit met with TJI and CMHSL and it was agreed that further payments could be certified, BCQS issued certificates 15 and 17. There were numerous issues with these certificates that do not need to be addressed in this affidavit but it is relevant that these certificates did not provide for the payments that had been agreed between TJI and Mr. Benoit as CIG's representative (pages 49, 79).*

29. *Given that certificates 15 and 17 had just been issued there was initially a question as to whether they should be reissued to include the amounts that Mr. Benoit had undertaken on behalf of CIG that TJI should be paid. In order to avoid further complicating the certification process, the decision was made to issue interim certificates, being certificates 15A and 17A, which would be issued prior to certificates 16 and 18. This procedure of using Interim Certificates where it was found that further payment to TJI was required prior to the issuance of the normally scheduled certificate was not a new concept and had previously been used to issue certificate 8A.*

30. *Were it not for the agreement between the parties that certificates 15A and 17A would be issued, which effectively corrected some of the deficiencies in certificates 15 and 17, TJI would not have instructed CMHSL to remobilize its workforce and continue work on the John Gray project.*

. . . . . .

The Issuance of the Certificates

33. *Mr. Moran was then informed that it would be necessary for him meet with Mr. Benoit and BCQS to agree the two interim certificates which would be issued under the Contracts (15A and 17A). Mr. Moran made arrangements with Mr. Benoit and Mr. Abbott (of BCQS) to meet to agree the certificates on October 20, 2009. They agreed that TJI would be repaid the monies expended by it in connection with the project under Certificates 15A and 17A. In order to signify their agreement with respect to the amount of the interim certificates Mr. Benoit and Mr. Moran then signed documents marked "draft interim certificates". The document was marked draft as Mr. Benoit and Mr. Moran had no authority to issue certificates themselves, only BCQS could do that (pages 100 – 221, Exhibit : "AB2" page 4).*

34. Subsequent to that meeting Mr. Abbott of BCQS issued the certificates and sent them on to TJI and the Architect for authorization. BCQS did not mark the certificates as draft. In order to signify that CIG and TJI were in agreement with the amount of the certificate BCQS attached the documents signed by Mr. Moran and Mr. Benoit to the certificates. The Architect authorized the certificates shortly thereafter.

35. Upon receipt of the certificates, Mr. Moran sent me an email confirming that the certificates had been issued and would be "paid with immediate effect" (page 138).

Introduction of Side Agreement

36. Later the same day Mr. Benoit sent an email to Mr. Moran to which he attached a document that he referred to as the "interim agreement". It was this agreement that Mr. Benoit would later insist that the certificates were conditional upon. Up until this communication CIG had not made any suggestion that the payment of certificates 15A and 17A would be conditional upon anything and could not do so as those certificates had already been issued and authorized under the ordinary provisions of the Contracts (page 141).

37. It is correct that at some stage Mr. Benoit mentioned that he would be preparing a "side agreement"; however, the promised payments as recorded in certificates 15A and 17A were to be made immediately and were not intended to be included in any side agreement which was to address the parties positions with advance payments in the future and would necessarily require further negotiations between the parties".

25. No settlement agreement was ever reached.

26. The position of TJI, as expressed by Mr. Hunter and quoted above, is that certificates 15A and 17A were validly issued by the quantity surveyor and approved by the architect, were not intended to be conditional upon an interim agreement, and must be honoured by CIG. The position of CIG is that these certificates were created in the course of a good faith attempt to negotiate a settlement of pending or threatened litigation and are therefore privileged and

that, in any event, they cannot be viewed as effective and binding because the contemplated interim agreement has never been signed.

(A) Can the Plaintiff expressly plead without prejudice discussions (being "certificates" 15Aand 17A) as the basis for its claim?

27. Each of the impugned certificates appears, on its face, to embody Mr. Abbott's opinion of the amount due and payable to TJI. His covering letter for certificate 15A of October 20th, 2009 to CIG reads in part:

"Based upon our valuation of work complete to date, we recommend payment of CI$2,114,244.65".

28. Certificate 17A was accompanied by a covering letter containing similar language except for the amount. Neither covering letter contains any hint that Mr. Abbott intended his delivery of the certificates to be a part of an ongoing negotiation or that he intended them to be treated as without prejudice communications.

29. The certificates themselves contained, on page 2 below the signatures of Mr. Abbott and the architect, the words *"draft "interim certificate"*.

30. Each certificate contains a signature signifying the architect's approval. The architect, also, is fulfilling a contractually defined role and expressing his opinion of the value of the work done. Again, there is no indication on the certificate that

the architect intended his approval to be conditional or a step in an ongoing negotiation.

31. Neither Mr. Abbott nor anyone on behalf of the architect has giving evidence in this proceeding.

32. Each of the two certificates is also signed by Mr. Benoit on behalf of CIG and by Mr. Moran on behalf of TJI. Mr. Benoit's signature is accompanied by another signature of a Ministry of Education official. Beside these two signatures appears the phrase *"subject to agreement being signed"*.

33. There is no contractual requirement for the signatures of anyone representing CIG (or, for that matter, TJI). A certificate is complete when it has been prepared and signed by the quantity surveyor and approved by the architect.

34. Written or oral communications made for the purpose of a sincere attempt to compromise a dispute are not ordinarily admissible in evidence at the instance of either party. The Rule is based partly on an implied agreement between the parties and partly on public policy considerations: *Phipson on Evidence*, 17th Edition, paragraph 24 – 18 *et seq.* The implied agreement rationale is not entirely satisfactory because even a first, unsolicited, communication suggesting a settlement will be protected by the privilege: *ibid*, paragraph 24 – 19.

35. The primary concern of the Rule is to exclude from evidence admissions against interest made by one of the parties in the course of negotiation. The purpose in doing so is to foster settlement negotiations; the Rule promotes a frank exchange of positions with a minimum of posturing. Unlike other forms of privilege, the without prejudice privilege can only be waived with the consent of both parties: *ibid*, paragraph 24 – 20. The public policy concern also protects communications in the course of a negotiation from being disclosed to third parties on a compulsory basis: *Rush & Tomkins Ltd. v. GLC* [1989] 1 AC 1280 AT 1299.

36. The mere fact that a letter or document is headed "without prejudice" is not determinative of its status and, conversely, the omission of those words from the document is not fatal to a claim for privilege: see *Dixons Stores Group v. Thames Television* [1993] 1 All ER 349 at 351.

37. The rule no longer applies, as it once did, only to circumstances where litigation is pending or has been threatened. The modern scope of the rule is broader. The without prejudice rule applies to communications in the course of a dispute where litigation is contemplated or might reasonably have been contemplated if the negotiations were to fail: *Framlington Group Limited v. Barnetson* [2007] EWCA 502 at paras 22-34 (CA).

38. Although admissions against interest are the sorts of communications which most evidently deserve protection as a means of inducing settlements, it would create

huge practical difficulties to offer the protection only to statements which are admissions. In practice, the rule prevents the use in evidence of all communications (written or oral) which are part of the continuum of negotiations between the parties: *see Unilever Plc v The Procter & Gamble Co.* [2001] 1 All ER 783 at 791 (CA).

39. The rule is intended to protect communications between the parties to the dispute. Where the originator of a communication is an agent of a party and is participating in negotiations on behalf of the party his communications, also, will be protected. The rule has no application to communications to or from independent third parties. There is no suggestion to the contrary in the authorities cited to me.

40. The first author of each of the two impugned certificates, Mr. Stephen Abbott of BCQS International, was acting in fulfillment of a role assigned to him by the terms of the contracts. By those contracts, the parties conferred upon Mr. Abbott and BCQS a degree of independence which prevents them from being viewed, for present purposes, as an agent of either side to the dispute. I am satisfied that the without prejudice privilege cannot apply to communications to or from Mr. Abbott or BCQS.

41. The representatives of the architect are in effect co-authors of the two impugned certificates. Again, they were acting in fulfillment of a role assigned to them by

the terms of the contracts and were required to reach their opinion independently. That is sufficient to demonstrate that the firm of architects cannot be viewed as the agent of either party for the purpose of a claim for privilege over the certificates.

42. Moreover, it is at least arguable that the certificates are not "communications" at all. The without prejudice privilege will apply to written and oral communications and may also be applied, in appropriate circumstances, to what the law of evidence considers to be "verbal acts." This question was not addressed in argument so I will refrain from further comment on it.

(B) Does the case as pleaded give rise to a cause of action for payment under the contracts?

43. Clause 9.7.1 of the contracts reads in part:

> ... *"If the owner does not pay the contractor within seven days after the date established in the contract documents the amount authorized by the architect ... then the contractor may upon seven additional days written notice to the owner, quantity surveyor and architect, stop the work until payment of the amount owing has been received. ..."*

44. CIG argues that a work stoppage is the only remedy enjoyed by the contractor for non-payment of an amount authorized by a certificate. In effect, CIG argues that the parties have agreed to oust the jurisdiction of the Grand Court. The skeleton argument cites no authorities in support of this proposition other than the terms of the contract documents themselves.

45. It would have been open to the parties to agree that all disputes of whatever nature having a connection with their contractual relationship are to be resolved through arbitration and mediation without resort to the courts. They did not do so. Indeed, some of the language in the contracts demonstrates an intention to the contrary. The following clauses are pertinent:

> *13.1.2 Location of proceedings. In any suit or action or appeal therefrom to rescind, enforce or interpret this Contract or any term or provision thereof, any such proceedings shall be held in the place where the Project is located or such other place mutually agree by the parties.*
>
> ...
>
> *13.4 RIGHTS AND REMEDIES*
> *13.4.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.* (underlining added)

46. I am satisfied that the case as pleaded does give rise to a cause of action for payment of the two impugned certificates. The express terms of the agreements show that such an action was intended by the parties, when they executed the Contract Documents, to be available in the event of non-payment of a Certificate.

(C) In any event, can these proceedings be issued twenty-one days after the pleaded date it is alleged the right to payment arises?

47. Clause 4.3.2 of the contracts imposes a time limitation on the bringing of "Claims":

> *"Time Limits on Claims. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party. Any and all Claims not made within the said time limits are barred, waived, released and discharged."*

48. The CIG says that this clause imposes a condition precedent to litigation. An action on the contract must be brought within 21 days and is prohibited after that. In effect, the parties have agreed to waive the much longer limitation period imposed by law on actions for breach of contract. Such conditions precedent are not uncommon: see, for example, *Homburg Houtimport BV v. Agrosin Private Ltd.* [2003] 2 WLR 711, per Lord Steyn; and *Eagle Star Insurance Co Limited v. Cresswell* [2004] 2 All ER Comm, 244 at para 20.

49. The question for me is whether an action based upon non-payment of a certificate is a "Claim" within the terms of the contracts. Clause 4.3.1 contains this definition:

> *"Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by formal written notice and identified as a Claim under this definition. The responsibility to substantiate Claims shall rest with the party making the Claim."*

50. Read in isolation, this clause tends to support CIG's argument. When the provisions of the contracts as a whole are considered, the word assumes a different and narrower meaning. In addition to the "payment of money", a very

broad phrase, a number of more specific types of "Claim" are mentioned. These include "adjustment or interpretation of contract terms" (clause 4.3.1), claims for concealed or unknown conditions (clause 4.3.4), claims for addition cost (clause 4.3.5), and claims for additional time to do the work (clause 4.3.7). Clause 7.3.7 addresses the contractor's obligation to assist the quantity surveyor in assessing the quantity of work completed. The clause refers to items "installed as part of the work, including any change order, construction change directive, minor change, Claim or Claims."

51. Most claims must be submitted to the architect for decision; that is a condition precedent to mediation, arbitration or litigation on a claim. The architect is expected to review claims "with the assistance of the quantity surveyor" (clause 4.4.2) and, if he finds himself "unable to resolve" the claim, may advise the parties that it would be "inappropriate" for him to do so (*ibid*). After this process has run its course, mediation and arbitration are permissible (see clauses 4.5 and 4.6).

52. This process makes no sense in the case of a claim for payment under a certificate. The certificate has already been created by the quantity surveyor and approved by the architect. Each has expressed his considered opinion that the amount claimed is due and owing. Clearly, there is no utility in referring a dispute of this nature back to the architect and expecting him to consult the quantity surveyor. Moreover, clause 4.3.3 requires the contractor to proceed with

the work and requires the owner to continue to make payments "in accordance with the Contract Documents" while the claims is being resolved. This clause cannot be reconciled with the notion that a claim for payment of a duly executed certificate is a "Claim" within the meaning of clause 4.3.1

53. *Bruner and O'Connor on Construction Law*, an authoritative American text which has a lot to say about the standard form of contract under consideration here, states (at paragraph 5:174) that failure by the owner to make payment upon a certificate is a breach of contract. There is no suggestion in the text that the breach should be treated as a "Claim" and referred to the architect for determination.

54. I am satisfied that once a certificate has been duly executed by the quantity surveyor and architect and delivered to the parties, the entitlement of the contractor to payment of the certificate amount is not a claim within the meaning of clause 4.3.1 and is not caught by the limitation period in clause 4.3.2.

(D) Is clause 4.4.1 of the contracts a condition precedent to litigation?

55. The condition precedent in clause 4.4.1 applies only to "Claims" within the definition quoted previously. For the reasons given above, my answer to this question is "no".

(E) Further, or alternatively, on a proper construction do the pleaded "certificates", on their face, comprise certificates as required under the contracts between the parties?

56. To be validly issued, a "Certificate for Payment" must be signed by the quantity surveyor and delivered by him to the architect. The document manifests the quantity surveyor's considered opinion that the amount stated is due and owing to the contractor. The certificate must also be signed by the architect and delivered by him to the contractor and to the owner. Again, it represents the architect's considered opinion that the amount certified should be paid.

57. I see no reason why a certificate could not be created in draft form for use during a negotiation. It may be that these certificates, notwithstanding the signatures of the quantity surveyor and of the architect upon them, were not intended by the authors to evidence an entitlement to payment of the certificate amounts. The issuance of the certificates may have been conditional, as is suggested by the word "draft" which appears on each of them. Ultimately, this is a question of intent. Did the quantity surveyor and the architect intend to issue certificates without equivocation or reservation, or did they intend to create two draft documents which might prove useful in the negotiation process?

58. That is not a question which can be answered on the present state of the evidence. Neither the quantity surveyor nor the architect has sworn an affidavit for use on this application. I cannot strike the pleading or dismiss the action on the ground that the action is frivolous, vexatious, or an abuse of the process of the Court

unless it is plain and obvious that CIG is entitled to such a remedy. I cannot grant summary judgment to CIG unless I am convinced that TJI's defence has no real prospect of success: *In Re Omni Securities Limited (3)* 1998 CILR 275. In the present context, it is impossible to reach either conclusion without considering the evidence of the two men who created the certificates. The evidence of CIG may well establish that it viewed the two draft certificates as no more than bargaining chips or incentives to reach a settlement but its opinion is neither determinative nor particularly weighty. Certainly, no CIG representative was under any obligation to sign the certificates and no reservation endorsed on the certificates by CIG can be said to affect their validity or TJI's entitlement to payment.

59. For these reasons, the applications to strike or dismiss the writ of summons and for summary judgment are dismissed.

The Counterclaim

60. TJI seeks an order staying CIG's counterclaim. The counterclaim, in its entirety, reads as follows:

> *"11. CIG repeats paragraphs 1 to 9 inclusive of the Defence.*
>
> *12. CIG has numerous claims against TJI including but not limited to the sums due to CIG from TJI as a result of the termination of the Agreements.*
>
> *13. As a result of CIG's lawful exercise of its rights of termination under clause 14.2 of the Agreements, no further sums are due to TJI until the Work is finished. For the avoidance*

of doubt it is denied that any monies would be due but for the provisions of clause 14.2.

14. Given the nature and scope of the issues raised by the proposed Counterclaim, CIG will seek directions as necessary after conclusion of the application to strike out or summary judgment. In circumstances where CIG is presently unaware of the extent of TJI's realizable assets, it is not proportionate to incur the potentially irrecoverable costs of a detailed Counterclaim pending resolution of the outstanding applications.

15. To the extent CIG proceeds with the Counterclaim after resolution of the applications, CIG also claims interest, pursuant to the Judicature Law (1995 Revision) at such rate and for such period as the Court thinks fit.

AND CIG BY THIS COUNTERCLAIM SEEKS:

(i) Monies due under the agreement.

(ii) Further or in the alternative, damages.

(iii) Interest as aforesaid.

(iv) All and any necessary further orders and directions.

(v) Costs."

61. The woeful lack of particularity in this counterclaim is forensically embarrassing and renders it vulnerable to a strike out application. The application before me now is for a stay of the counterclaim on the ground that the issues it raises are separate and distinct from the question of payment under the two certificates and are subject to arbitration by the terms of the contracts.

62. In the circumstances, it seems reasonable to assume that CIG's wholly unspecified "numerous claims" against TJI are, indeed, distinct from the relatively narrow issue surrounding the creation of the certificates. In addition, and in the absence of particularization of the claims, I will infer that they are "Claims" of the sort contemplated by the arbitration clauses in the contracts. The result is that they are claims brought in breach of an agreement to arbitrate. There is no objection to staying such a claim in favour of arbitration notwithstanding that another, distinct claim will be dealt with in litigation: *R.M. Douglas Construction Ltd. v. Welsh Health Technical Services* (1985) 31 BLR 88, 98. Section 6 of the *Arbitration Law* provides me with jurisdiction to grant to TJI a stay of proceedings on the counterclaim, which I now do.

Costs

63. TJI has been wholly successful on the various applications before me and is entitled to its costs on the standard basis.

Dated this 16th day of August, 2010

Henderson, J.

Henderson, J.
Judge of the Grand Court