IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G 139 of 2017
LACV0082/2017

BETWEEN:

MAGDALYN BURLINGTON

Plaintiff

AND

BUTTERFIELD BANK (CAYMAN) LTD

Defendant

AND

McALPINE LIMITED

Proposed Third Party

HEARD AT THE SAME TIME WITH:

CAUSE NO. G 236 of 2018
LACV0082/2017

BETWEEN:

MAGDALYN BURLINGTON

Plaintiff

AND

McALPINE LIMITED

Defendant

CHAMBERS

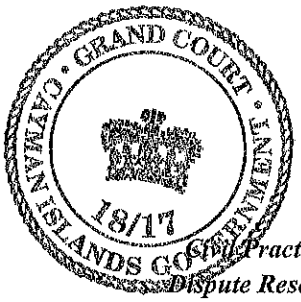
Appearances: Mr. L. Aiolfi of Priestleys for the Plaintiff
Mr. K. Cox of HSM Chambers for the Defendant
Mr. I. Huskisson and Mr. B. Patel of Travers Thorp Alberga for the Proposed Third Party

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **13 March 2019**

Draft Judgment Circulated: **16 August 2019**

Judgment Delivered: **26 August 2019**



HEADNOTE

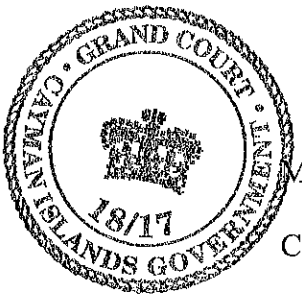
Civil Practice and Procedure – Application by Defendant for Leave to Issue Third Party Notice - Whether the Dispute Resolution Procedure and Arbitration Clause Applicable – Application by Plaintiff to add proposed third party as a Defendant instead.

RULING

Introduction

1. There are three applications before me. The application which is first in time is the Summons filed on 13 July 2018 by the Defendant Butterfield Bank (Cayman) Limited (**"Butterfield"**). This Summons was on notice, seeking the Court's leave to issue a third party notice on McAlpine Limited (**"McAlpine"**), (**"the Third Party Summons"**). The second is an application by the Plaintiff (**"Ms. Burlington"**), pursuant to Order 20, Rule 5, of the ***Grand Court Rules (1995 Revision)*** (***"the GCR"***), whereby she seeks leave to add McAlpine as a defendant. This Summons was filed on 24 August 2018. Mr. Aiolfi, who appeared on behalf of Ms. Burlington, submitted that her claim against McAlpine is within the limitation period. Counsel indicates that, alternatively, if the Court finds that there is a limitation issue which may bar the addition of McAlpine as a second defendant, then by Originating Summons dated 12 December 2018 in Cause No. 236 of 2018, (which is the third application), Ms. Burlington requests that the Court exercise its discretion to disapply the relevant limitation period in order to permit the addition of McAlpine as Second Defendant.

2. When the Third Party Summons first came on for hearing before me on 27 August, 2018, McAlpine's attorneys appeared, having been given notice by Butterfield's attorneys, and indicated that they were opposing the application. The Third Party Summons was adjourned, and was set down for hearing *inter partes* and to be heard at the same time as



Ms. Burlington's application of 24 August 2018. Ms. Burlington subsequently filed in Cause No. 236 of 2018, the third application.

Background

3. Ms. Burlington's claim arises from an accident at Butterfield's premises on 2 September 2014. She was employed by Butterfield as an analyst. Since December 2018, Ms. Burlington has ceased being an employee of Butterfield.

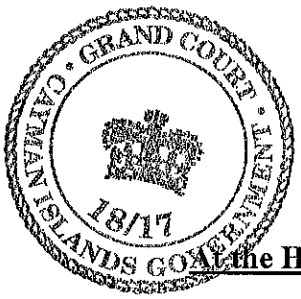
4. Ms. Burlington avers, that whilst she was descending a staircase between the ground and basement levels of Butterfield's car park (**"the Staircase"**), she slipped and fell and suffered severe injury to her ankle and back.

5. A Writ of Summons was issued 25 August 2017, asserting that Butterfield was negligent and/or in breach of statutory duty.

6. Butterfield has denied liability, in a Defence dated 25 September 2017.

7. After the close of pleadings, disclosure took place during November and December 2017 and during that time, Ms. Burlington obtained an expert report from AMR (consulting engineers) (**"AMR"**) in relation to the Staircase. The Report, dated 13 September 2017, made findings that the Staircase was defective in that it was not constructed in accordance with the 1999 Cayman Islands Building Code (**"the CIBC"**).

8. In response, Butterfield instructed its own expert, who generally confirmed the conclusions of AMR that there were material defects in the construction of the Staircase.



At the Hearing

9. Mr. Huskisson, who appeared for McAlpine, applied to cross-examine Ms. Burlington in relation to the limitation period issue and did so briefly.

Ms. Burlington's application to add McAlpine as a Defendant

10. Ms. Burlington's application to add McAlpine as a Defendant comes after the application by Butterfield to make McAlpine a third party. If McAlpine were to be made a Defendant, that would not prevent Butterfield from claiming an indemnity and/or contribution from McAlpine - see Order 16, Rule 8 of the ***GCR***.

11. However, I have to consider in principle, before dealing with the merits of any of the three applications, whether it is more appropriate (assuming that the grounds for granting any of the three applications are made out), for McAlpine to be added as a third party or as a defendant. McAlpine cannot be both, (as I understand it), at least not in these circumstances of a law suit, involving solely Ms. Burlington and Butterfield.

12. On behalf of Ms. Burlington, Mr. Aiolfi argues that Butterfield and McAlpine each owe Ms. Burlington a duty of care. It was submitted, that Butterfield is saying, and can say by way of defence, that it relied upon competent independent contractors, and that there has been no concession made by Butterfield that if McAlpine is liable, Butterfield is also liable. It was therefore submitted that Ms. Burlington will be at risk of having recourse to no defendant if McAlpine is not added.

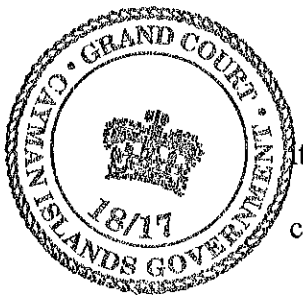
13. Mr. Huskisson, on the other hand, submits that Ms. Burlington's application is a redundant application, i.e. that Ms. Burlington does not need to bring any claim against McAlpine. Reference was made to the Statement of Claim, paragraph 5(h), which states as follows:

> *"5. The Accident was caused or contributed to by the negligence and/or breach of statutory duty of the Defendant, their servant or their agents.*
>
> ***PARTICULARS***
>
> ...
>
> *(h) The Defendant failed to comply with its statutory duty pursuant to section 60(d) of the Labour Law (2011 Revision)."*

14. Reference was made to section 60(d) of the ***Labour Law***, which provides as follows:

> *"Safety*
>
> *60. For the purpose of ensuring the safety of persons employed or performing any duty therein, the operator of every workplace shall ensure that -*
>
> ...
>
> *(a) any and all buildings comprised in the workplace and all parts thereof are of sound construction and properly maintained."*

15. Reference was also made to the proposed amendments to the Defence. It was submitted that it is clear that Butterfield is not seeking to say, and nor could it say, that it has a defence if the Staircase is defective; Butterfield is seeking indemnity or contribution from McAlpine. Mr. Huskisson argued that, in light of section 60(d), and other legal principles, Butterfield will not have a defence if the Staircase is found to be defective or



t is found that McAlpine was at fault, and Ms. Burlington proves that this caused or contributed to the accident.

16. Counsel further argues that Ms. Burlington suffers no prejudice by only having a claim against her employer. Butterfield, is a substantial bank, he proffers, and would have no difficulty paying what compensation is adjudged as due to her.

17. It was also pointed out that Butterfield's contribution claim is not out of time, as a contribution claim can be made up to 2 years from the date any judgment is entered against Butterfield - section 12 of the ***Limitation Law (1996 Revision)***.

18. Mr. Huskisson rounded off this aspect of his submissions by asserting that, on the other hand, if Ms. Burlington's application is granted, McAlpine would have to incur significant costs in defending an unmeritorious and unnecessary claim against it, in which Ms. Burlington is completely immune to an adverse costs order because she is legally aided. Reference was made to ***Lye v Marks & Spencer plc*** Official Transcripts (1980-1989) The Times 15 February 1988.

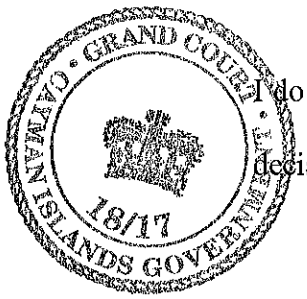
19. In my view, Mr. Huskisson's argument is correct, that Butterfield has not sought, and is not seeking in its proposed Amended Defence, to claim a defence even if McAlpine's faulty work on the Staircase was found to be a cause of the accident. Nor indeed, can it seek to do so. As occupier and employer, Butterfield would be liable, but entitled to seek, if it can, (and subject to the arguments discussed below), an indemnity or contribution from McAlpine. I also am of the view that Ms. Burlington's inability to pay McAlpine's

costs would have been a factor in considering whether to disapply the relevant limitation period (see paragraph 21 below). As explained by Lloyd LJ in ***Lye v Marks & Spencer plc***, in the 9th - 14th paragraphs of the judgment (the copy of the judgment that I have is a LexisNexis version, with no numbered paragraphs), it is not so much that Ms. Burlington is legal-aided, but rather that she would lack the ability to pay McAlpine's costs.

20. Whether the circumstance being considered is the issue of whether to disapply the limitation period (as in ***Lye v Marks & Spencer***), and as is the case in one of Ms. Burlington's alternative applications, or whether the circumstance being considered is whether, (assuming both applications have a sound foundation), to add McAlpine as a defendant or as a third party, in my judgment, the inability of Ms. Burlington to pay McAlpine's costs would be a relevant factor. Lloyd LJ in the 9th paragraph of ***Lye v Marks & Spencer*** frames the issue this way:

> *"One of the circumstances of the present case is that, if the action goes ahead and the defendants succeed in their defence on the merits, they are unlikely to be able to recover their costs from the plaintiff. That is not because the plaintiff is legally-aided, but because she has not the means to pay the defendants' costs. The question is whether that is a factor which must be left out of account in assessing prejudice to the defendants. The answer must surely be 'No'."*

21. Since the hearing and after I had reserved my decision, Mr Aiolfi, on 16 July, advised that Ms. Burlington is no longer the recipient of legal aid for these matters. While I am of the view that regard should be had to a party's lack of ability to pay another party's costs,



I do not intend to go into this matter further. In any event, it makes no difference to my decisions herein.

22. Although I heard all three applications together, it is for these reasons that I considered it appropriate to deal with The Third Party Summons, which is in any event the earliest filed, first. If granted, Ms. Burlington's two application stand to be dismissed.

THE THIRD PARTY SUMMONS

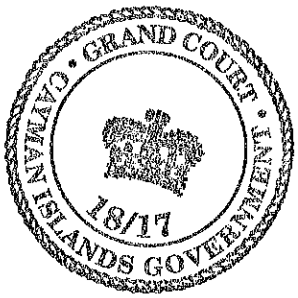
McAlpine's Arguments

23. McAlpine agrees that it was engaged by Butterfield to design and build the Staircase.

24. The relevant Agreement (**"the Agreement"**) is dated 31 July 2006. However, the Agreement contains an arbitration clause, which Mr. Huskisson argues prescribes a clear process for the resolution of any disputes (including claims in tort), as a condition precedent to Butterfield's entitlement to bring any claims. It was submitted that both the arbitration clause and the condition precedent preclude Butterfield from pursuing its intended claims against McAlpine in these proceedings.

25. Reference was made to Article A.4.1 of the Agreement, which provides as follows:

> *"**Article A.4 DISPUTE RESOLUTION***
>
> *§**A.4.1 CLAIMS AND DISPUTES***
>
> *§**A.4.1.1** Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Design-Build Contract terms, payment of money, extension of time or other relief with respect to the terms of the Design-Build Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Design-Builder arising out of or relating to the Design-Build Contract.*



Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim."

26. Mr. Huskisson also referred to Articles 6.2 and 6.3 of the Agreement, which provide as follows:

> *"**ARTICLE 6 DISPUTE RESOLUTION***
>
> ...
>
> *§6.2 If the parties do not resolve their dispute through mediation pursuant to Section A.4.3 of Exhibit A, Terms and Conditions, the method of binding dispute resolution shall be the following:*
>
> > *(If the parties do not select a method of binding dispute resolution, then the method of binding dispute resolution shall be by litigation in a court of competent jurisdiction)*
>
> *[X] Arbitration pursuant to Section A.4.4 of Exhibit A, Terms and Conditions*
>
> *[ ] Litigation in a court of competent jurisdiction*
>
> *[ ] Other (Specify)*
>
> *§6.3 **ARBITRATION***
>
> > *§6.3.1 If Arbitration is selected by the parties as the method of binding dispute resolution, then any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to arbitration as provided in Section A.4.4 of Exhibit A, Terms and Conditions."*

27. McAlpine relied on the decision of Gross J, in the English High Court in ***ET Plus SA v Welter*** [2005], paragraphs 42 and 44, where the issues were discussed as follows:

> *"42. Contractual clauses are not of course to be construed in a vacuum. Cl. 24 is an arbitration clause. As a matter of English law, there is in this context a presumption in favour of "one-stop adjudication". In other words, the Court should be slow to attribute to reasonable commercial parties "... an intention that there should in any foreseeable eventuality be two sets of proceedings" between the same parties: see Continental Bank*

v Aeakos [1994] 1 WLR 588, esp. at p.593, together with the authorities there cited; see too the attractive new work by David Joseph QC, Jurisdiction and Arbitration Agreements and their Enforcement (Sweet & Maxwell 2005) (hereafter "Joseph"), at pp.110 and following. Effectively, such "presumptions" merely apply what is taken to be the intention of a reasonable businessman. It follows that the context serves to reinforce the view of the scope of the clause to which, as indicated, I am inclined to come to on the language alone; namely, as between ET Plus and Eurotunnel, there should not be one set of proceedings for contractual claims regarding non-performance of the contract and a second set of proceedings for tortious claims regarding non-performance of the contract.

....

44. *It is not to be forgotten that, as is undisputed, by virtue of cll. 23 and 24 of the contract, the scope of cl. 24 must be determined as a matter of French law. In this regard, first, there has been no suggestion that French law would view the scope of the arbitration clause differently or more restrictively than English Law. Secondly, though too much should not be made of it, I derive some reassurance from the following extracts from the well-known French law text on international arbitration, Fouchard, Gaillard, Goldman on International Arbitration, (hereafter "Fouchard").*

> *"...524. There is nothing to prevent the referral of extra-contractual issues to arbitration. There is no doubt that disputes of a tortious nature are arbitrable..."*

From a purely procedural standpoint, the arbitrators will have jurisdiction over claims in tort and for quasi-contract provided that the terms of the arbitration agreement are wide enough for it to be established that the parties intended such claims to be resolved through arbitration. That will be the case, for instance, where the clause refers to all disputes arising 'during the performance of the present contract or 'in connection with the present contract."

(Counsel's emphasis)

28. It was further submitted that there is a contractually agreed process which applies as condition precedent to the bringing of any claim, as follows:

a. The party initiating the claim must serve written notice within 21 days of the event that gives rise to such claim. No such notice was given by Butterfield at any stage.

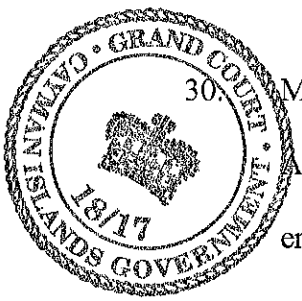
b. Any claim must then be referred (under A.4.2.1.) to the "*Neutral*" identified in Article 6.1, and the Neutral's decision is a condition precedent to mediation.

c. After the neutral's initial decision, any claim is subject to mediation as a condition precedent to arbitration under A.4.3.1.

d. If mediation does not resolve the dispute, the parties then proceed with arbitration as per Article 6.1 and in accordance with the process set out in A.4.4.

29. Mr. Huskisson argued that the language of the clauses makes the three tiers of the dispute resolution process conditional upon one another. In other words, that it is a condition precedent to mediation that the first step is a Neutral determination, and a condition precedent to arbitration that mediation is the next step. Reference was made to the decision of Teare J in ***Emirates Trading Agency LLC v Prime Mineral Exports Private Limited*** [2014] EWHC 2104 (Comm), where the Judge held that he was:

> *"...not bound by authority to hold that a dispute resolution clause in an existing and enforceable contract which requires the parties to seek to resolve a dispute by friendly discussions in good faith and within a limited period of time before the dispute may be referred to arbitration is unenforceable. In* [his] *judgment such an agreement is enforceable."*



30. Mr. Huskisson asserts that none of the required steps have been taken by Butterfield. Accordingly, that, even if there was no arbitration clause, Butterfield would not be entitled to bring any claims against McAlpine without first complying with these conditions precedent to its ability to pursue claims. It was Counsel's submission that, as is the case with the arbitration clause, it would be wholly artificial, and defeat the commercial purpose of the agreed dispute resolution clause for one party to ignore its terms on the basis that its effects were limited to direct contractual and not tortious claims.

31. In conclusion on this application, McAlpine contend that the Court should not grant Butterfield leave to bring a claim which the Court would be bound to stay under section 9 of the ***Arbitration Law (2012 Revision)***. It seeks costs against Butterfield in the event that the relief sought in the Third Party Summons is refused.

Butterfield's Arguments

32. Mr. Cox, who appeared for Butterfield, from the outset indicated that Butterfield does not take issue with the fact that the Agreement contains provisions for the determination of relevant claims by way of a dispute resolution procedure, including arbitration.

33. However, Butterfield takes the position that the scope of any binding dispute resolution process, is limited to disputes that arise during construction. It was argued that in the instant "claim", the underlying cause of action brought by Ms. Burlington is post-construction (as is the claim by Butterfield for indemnity and/or contribution), and arises from a latent defect in the construction of the stairs. (Counsel's emphasis)

34. In essence, Butterfield makes two submissions:

(a) That it did not knowingly and intentionally waive its right to judicial resolution of post-contract disputes; and

(b) That the contract terms for dispute resolution (including arbitration) pertain only to disputes that arose during construction.

35. Mr. Cox referred to the fact that the Agreement is in the form of the A141-2004 Standard Form of Agreement between an Owner and Design-Builder, issued by the American Institute of Architects - Article 8.1.1.

36. Further, the view was proffered that A141 is designed with modifications in mind and creates a structure and process for establishing responsibilities for the project, as well as a way of enforcing the agreement between the parties.

37. It was submitted that the scope of any agreement to arbitrate, is to be determined by reference to its precise wording, and construed according to its language and in the light of the circumstances in which it was made. Reference was made to the judgment of Coleman J in ***Lobb Partnership Limited v Aintree Racecourse Co. Ltd.*** [2000] C.L.C. 431 in support of that proposition.

38. Butterfield agrees with McAlpine that there are three tiers to the Dispute Resolution Process, each being conditional upon one another. It was submitted that:

(a) There must be an initial referral of any relevant claim to a "*Neutral*", in the circumstance where a Neutral has been identified under Article 6.1. (In the Agreement, a Neutral was identified as Maurice Stoppi of Stoppi Cairney Bloomfield.)

(b) The Neutral's initial decision is subject to each party's right to pursue mediation.

(c) If mediation does not resolve the dispute, the parties then proceed to arbitration.

39. Reference was made to Article A.4.2.1, which states as follows:

> *"If the parties have identified a Neutral in Section 6.1 of the Agreement or elsewhere in the Design-Build Documents, then Claims, excluding those arising under Sections A.10.3 through A.10.5* [having to do with hazardous materials], *shall be referred initially to the neutral for decision...."*

40. Mr. Cox referred to the remainder of the words in Article 4.2.1., and placed emphasis, as follows:

> *"An initial decision by the Neutral shall be required as a condition precedent to mediation of all Claims between the Owner and Design-Builder arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Neutral with no decision having been rendered by the Neutral."*

41. Counsel referred to Article A.4.2.3 , and in further support of his point as to the subject matter addressed by the Dispute Resolution Process being concerned with disputes arising during construction, placed emphasis as follows:

"The initial decision pursuant to Sections A.4.2.1 and A.4.2.2 shall be in writing, shall state the reasons therefore [sic] *and shall notify the parties of any change in the Contract Sum or Contract Time or both."*

42. Reference was also made to Section A.4.3 which governs Mediation, and to A.4.4, which governs arbitrations.

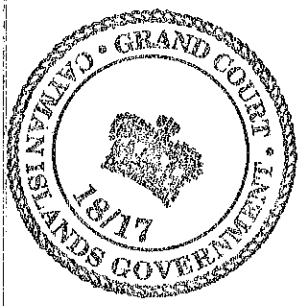
43. Additionally, reference was made to the definition of a "Claim" contained in A.4.1.1 and set out in paragraph 24 above.

44. It was submitted that, even though the definition of a claim could therefore be *"parsed"* to say *"Any Claim arising out of or related to the Contract shall be subject to the dispute resolution process"*, the clear language of A.4.2.1. dispels the notion that the dispute resolution procedure applies to post-construction defects discovered years after final completion of the design-build project.

45. It was posited that the term *"arising prior to the date final payment is due"* illustrates that *"Claims"* plainly do not concern post-construction disputes.

46. Counsel asserts that this analysis is fortified by reference to A.9.10.4, which states that *"the making of final payment shall constitute a waiver of Claims by the Owner except those Claims...arising out of the Design-Build Documents... and unsettled."*

47. Consequently, the argument continues, once the project was completed and final payment had been made, the Neutral did not have jurisdiction to be concerned with any fresh claim



post construction. Accordingly, it was submitted that it follows therefore, that as a decision of a Neutral was a condition precedent to mediation (and thereafter arbitration), the dispute resolution process cannot be taken to apply to post-construction claims.

48. Further, the Neutral, acting as arbiter, is given authority to change the contract price or time frame in concluding a dispute, which authority would only be applicable to claims made before the completion of construction and payment.

49. Reference was made by Mr. Cox to A.4.1.2 which indicates that a Claim 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 the later."*

50. It was opined that therefore the dispute resolution clauses allow for an expedited process for any disputes which may arise during the construction process, so as to ensure that the construction is completed in a proper and timely manner. Once construction has been completed, the Contract has achieved its purpose, and its terms are no longer binding on any future dispute.

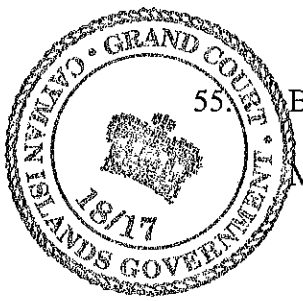
51. It was further argued that all of the dispute resolution procedures were, to use Mr. Cox's expression, "on the clock"; 21 days to submit the Claim to the Neutral - 30 days to mediate - and then 30 days to arbitrate. Therefore, the strict time limits expressed in the Agreement were intended to prevent a construction issue from stymying the entire project.

52. Reference was also made to A.3.17.1 of the Agreement, which is headed *"INDEMNIFICATION"*. It provides as follows:

> *"A.3.17* ***INDEMNIFICATION***
>
> *A.3.17.1. To the fullest extent permitted by law, the Design-Builder shall indemnify and hold harmless the Owner, Owner's consultants, and agents and employees or any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death or to injury or destruction of tangible property other than the Work itself, but only to the extent caused by the negligent acts or omissions of the Design-Builder, Architect, a Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section A.3.17."*

53. It was Mr. Cox's submission that this Clause A.3.17 applies in this instance. He submitted that an indemnity can still constitute a "Claim". Thus, if it had been sought during the construction process, it would have to be brought within the dispute resolution procedure. However, once the indemnity is sought outside the period of construction, then the dispute resolution procedure set out in the Agreement is not applicable.

54. It was submitted that, accordingly, the language used in the Agreement does not establish that Butterfield waived its right to litigation for a claim that was discovered many years after construction was complete.



55. Butterfield therefore invite the Court to grant leave for it to issue a Third Party Notice to McAlpine and to make an order for costs in its favour against McAlpine.

Discussion and Analysis

56. A.13.1.1 indicates that the Agreement is governed by the law of the place where the project is located, which is the Cayman Islands.

57. In my judgment, the scope of any agreement to arbitrate, is to be determined by reference to its precise wording, and construed according to its language, contextually, and in the light of the circumstances in which it was made.

58. In my view, it is clear that the dispute resolution procedure set out in the Agreement is limited to disputes that arise during construction. This is made plain by A.4.2.1, particularly the words *"arising prior to the date final payment is due"*.

59. A.4.1 provides that *"The term "Claim" also includes other disputes and matters in question between the Owner and Design-Builder arising out of or relating to the Design-Build Contract."* (My emphasis). This could, without close examination, at first blush, suggest that all claims are subject to the dispute resolution procedure. However, when the language of the entire Agreement is looked at closely, and in its full context, and having regard in particular to the clear language of A.4.2.1., it is plain that the dispute resolution procedure does not apply to post-construction defects discovered years after final completion of the design-build project.

60. I accept Mr. Cox's submission that this view is fortified by the language of A.4.2.3 and A.9.10.4, respectively referred to in paragraphs 40 and 45 above. I am of the view that A.4.1.3. also supports this position. That Article, which is headed *"Continuing Performance"*, provides as follows:

> *"Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section A.9.7.1 and Article A.14,* (neither of which are relevant to the issues here), *the Design-Builder shall proceed diligently with performance of the Design-Build Contract and the Owner shall continue to make payments in accordance with the Design-Build Documents."*
> (My emphasis)

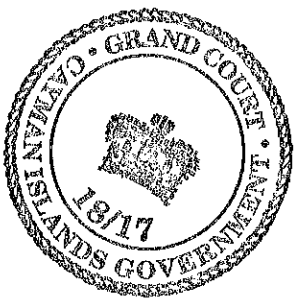
61. The decision in ***ET Plus SA v Welter***, relied upon by McAlpine is distinguishable, because the terms of the dispute resolution procedures, including the arbitration clause, are not wide enough to encompass the circumstances and claim in the instant case.

62. In my judgment, the indemnity expressly offered by McAlpine to Butterfield under A.3.17.1 does apply to the instant case. I also accept Mr. Cox's submission that, whilst a claim under the indemnity would still have been a "Claim" if it had been brought within the period of the construction process, once the indemnity is claimed out-with the period of construction, the dispute resolution procedure set out in the Agreement is not applicable.

63. In my view, having regard to all of the circumstances of this case, it is appropriate to grant the Defendant Butterfield leave to issue a Third Party Notice against McAlpine.

Costs are awarded to Butterfield against McAlpine on the standard basis, to be taxed if not agreed.

64. The Summons and Originating Summons filed by the Plaintiff Ms. Burlington are dismissed, with no order as to costs.



The Hon. Justice Ingrid Mangatal
Judge of the Grand Court