

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT  
COMMERCIAL DIVISION  
2005/COM/COM/00025**

**IN THE MATTER OF** Section 280 of the Companies Act Chapter 308 of  
the Statute Law of the Commonwealth of The Bahamas

**and**

**IN THE MATTER OF** Colina Financial Group Ltd. and affiliated  
Companies

**and**

**IN THE MATTER OF** Section 6 of the Arbitration Act Chapter 180 of the  
Statute Law of the Commonwealth of The Bahamas

**Between**

**JAMES A CAMPBELL  
Plaintiff**

**and**

**EMANUEL ALEXIOU  
First Defendant**

**ANTHONY FERGUSON  
Second Defendant**

**and**

**AF HOLDINGS LIMITED  
(formerly COLINA FINANCIAL GROUP LTD)  
Third Defendant**

**BEFORE:** His Lordship The Honourable  
Mr Justice K Neville Adderley

**APPEARANCES:** Mr Philip Davis, Ms Thea Paul with him,  
for the Plaintiff  
  
Mr Colin Callender, for the first defendant  
Mr John Wilson, Ms Sharmon Ingraham with him,  
for the Second Defendant

**23 April 2009**

**D E C I S I O N**

**Adderley J**

The court's assistance is being sought by the defendants in the appointment of an arbitrator to determine the market value of the interest of PJ Enterprises Ltd (the plaintiff's interest) in the third defendant as of 30 June 2005 as declared by the Privy Council in ***Emanuel Alexiou and Anthony Ferguson v James A Campbell*** Privy Council Appeal No. 63 of 2006 given 26 February 2007 ("the Privy Council Case").

2. The procedure for the appointment of the arbitrator is set forth in the Consent Order of Small J, made herein on 25 July 2005 ("the Consent Order"). It reads as follows:

"3 In the event the Experts are unable to agree the question of the fair market value, the matter of fair market value shall be referred to a single arbitrator agreed to by Counsel for the parties whose decision shall be final and binding on the parties."

3. The Experts were unable to agree the question of the fair market value and it fell to counsel to agree on a single arbitrator to do so. Counsel have been unable to concur in the appointment of a single arbitrator. There is no express alternative power in the Consent Order for counsel to agree to a mechanism for the appointment of an arbitrator if, in the event which has happened, they were unable to agree on an appointment. Counsel for the defendants contends that such a power should be implied. In light of section 6 of the Arbitration Act, Chapter 180 Statute Laws of The Bahamas ("the Act") there is no business necessity for such implication.

4. The application before me by Notice of Motion filed 19 September 2008 by the defendants is under section 6 of the Act. The relevant portion of section 6 reads as follows:

"6. In any of the following cases –  
(a) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;...

any party may serve the other parties ... with a written notice to appoint an arbitrator...

If the appointment is not made within seven clear days after the service of the notice, the court of a judge may, on application by the party who gave the notice, appoint an arbitrator, ...who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.”

5. It is not disputed that prior to this application the defendants had complied by serving notice on the plaintiff pursuant to section 6 on 27 August 2008.

6. It is submitted on behalf of the defendants that correspondence between counsel for the parties had led to an agreement between them to request the Chairman of the Institute of Chartered Accountants of England and Wales (“the Chairman”) to nominate a single arbitrator. The plaintiff contends that such correspondence was by way of negotiations only which lay dormant for over a year between December 2006 and June 2008 and were only revived at that time after counsel for the plaintiff by letter dated 29 May 2008 raised the prospect of going to court to resolve the matter. He further contends that even if the negotiations reached the status of an agreement, the agreement was frustrated by the defendants invoking the court’s default powers under section 6 of the Act.

7. The application of the defendants is to have the court make an order that the Chairman be invited to nominate a single arbitrator or alternatively that the court appoint directly Mr Mike Thornton or alternatively Mr Will Davies both of the accounting firm of Grant Thornton, London England.

8. The applicable evidential principles are referred to in the Privy Council Case. (***Prenn v Simmonds*** [1971] 1 WLR 1381 (HL(E)) as approved and explained in ***ICS Ltd v West Bromwich BS*** [1988] 1 WLR (HL(E)).

9. As I see it under clause 3 of the Consent Agreement, there was a submission within the meaning of the Act by the parties to a single arbitrator. Counsel for the parties could not agree and so an application was made under

section 6(a) of the Act for the court to make the appointment. If there had been an agreement as submitted by the defendants, the appropriate application should have been to rectify the Consent Order. In that case as stated by Lord Hoffmann in ***ICS Ltd v West Bromwich BS*** at 913 letter B evidence of previous negotiations and the parties' declarations of subjective intention would have been admissible. Instead an application was made under section 6 of the Arbitration Act. No argument was advanced or authority referenced that the court may delegate its powers under that Act or under some other authority to appoint an arbitrator. In my view, to make an order authorizing the Chairman to appoint an arbitrator where, as in this case, reference has been made under section 6 would amount to delegation. For this reason the court should exercise its power to directly appoint an arbitrator.

10. Pursuant to the above-mentioned jurisdiction and after noting the qualifications of the various candidates submitted by both parties, reviewing submissions for and against each nominee, and having regard *inter alia* to the procedure outlined in the Act for the conduct of arbitration proceedings, I exercise my discretion to appoint Mr Simon Townend of New Providence as the single arbitrator.

11. I will not usurp the powers of the arbitrator by making any order apportioning the responsibility for the costs of the arbitration between the parties because this power is given to the arbitrator in section (i) of the schedule to the Act.

12. Each party shall bear their respective costs of this application.

13. All parties have liberty to apply.

Dated the 30th day of April 2009

K Neville Adderley,  
Justice