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THE NEED FOR CONSTRUCTION COURT IN NIGERIA : A CASE STUDY OF UK AND MALAYSIA

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ABSTRACT

This paper discusses the delay in construction disputes and the need for construction courts for speedy resolution. The inadvertent delay occasioned in court on construction dispute cases has resulted in loss of time, cost and quality of projects. This has also resulted into loss of jobs, unemployment, bankruptcy, and loss of lives and property. This has accounted for series of unnecessary adjournments of construction cases in courts. It is pertinent that construction contracts are awarded with specificity in relation to time of completion. Hence, when issues that need to be tackled arise, there is the need for a special court with specialist in construction to address the problem without causing undue delay which usually resulted in abandonment of projects. This paper therefore advocates for the establishment of construction court for prompt dispensation of construction cases to enable fast delivery of projects and quality performance of contractors.

INTRODUCTION

The establishment of construction court was borne out of the emergence of statutory adjudication which is aimed at resolving the protracted cases of construction disputes, delayed payment and non-payment. It is meant to bring adjudicated cases to an end and cases of delays and defects facing

construction projects expeditiously.¹ With the establishment of this court, the construction stakeholders in the construction industry are having their cases attended to by judges with specialist knowledge and experience in construction cases. The court serves the industry effectively well because of the caliber of judges involved and cases of delay in the completion project will be a thing of the past. The establishment of this court has definitely transformed the attitude of all the players in the construction businesses in the country.² The establishment of these courts has made Malaysia one of the few countries in the world that has a specialised court for construction. The first to establish a Construction Court is the United Kingdom which is known as "the Technology and Construction Court (or TCC)."³

THE IMPACT OF CONSTRUCTION COURTS ON PROJECT

The impact of the established construction courts is highly felt with the enactment of CIPAA 2014⁴ which came into operation on 14th April, 2014 in Malaysia, when all construction dispute cases were transferred to this court for determinations. There has not been any report of undue delay since its inception. It would be highly desirable if the law makers in Nigeria can look into this and enact necessary laws to establish construction courts.

The Construction Court is a branch of the High Court of Malaya and has unlimited monetary jurisdiction as well as jurisdiction to grant equitable reliefs such as specific performance. This is a development that has gone a long way to correct all anomalies arising out of the judgment or recommendations obtained from other non-litigated processes used in construction industry for dispute resolution.

Issues relating to construction can be reviewed through construction court promptly than in any other conventional courts. Its judgment is however subject to appeal at the Court of Appeal and Federal Court, depending on the parties' satisfaction. CIPPA, 2012 makes it mandatory that Construction courts are well constituted with specialists who are versed in construction projects and have the technical know how to deal with any issue relating to the industry. This has made the courts gained tremendous popularity which has assisted the courts to increase the number of cases filed. This is due to

¹FadilahYusof, "CIPAA 2102 which came into Force alongside the Launch of Two Construction Courts in Malaysia", (2014), 1. <www.federalgazette.agc.gov.my>Viewed on 21 January, 2015.

² Ibid.

³ Note 1 at 2.

⁴CIPPA (Construction Industry Payment and Adjudication Act 2012) which came into force on 14th April, 2014 in Malaysia.

its reputed prompt disposal of cases with less cost.⁵ For instance, the case of *WRP Asia Pacific SdnBhd v NS BluescopeLysaght Malaysia SdnBhd* was filed and hearing started in June, 2015 while judgement was given in October, 2015.⁶ Also the case of *UDA Holdings Bhd v Bisraya Construction SdnBhd & Anor* and another case which began in June, 2014 and determined in December, 2014 among others.

This study therefore recommends same to the Nigerian construction industry as one of the bills to be sponsored to the National House of Assembly for approval for hearing and determination of construction disputes.

EMERGENCE OF TECHNOLOGY AND CONSTRUCTION COURT IN UK

In the UK, the practice, procedure and judicial experience of Technology and Construction Court has been upheld to the extent that many of international dispute cases of contract are referred to the Court.⁷ The technology and construction court was established to meet the exigencies in the field of technology and construction. It caters for issues involving technicalities with particular reference to construction industry and IT industry. It hears and determines cases on traditional building, adjudication enforcement, engineering and technology disputes, professional negligence claims, claims by or against local authorities concerning the development of land, dilapidations claims, nuisance claims, fire claims, IT disputes (relating to both hardware and software) and challenges to arbitrators' decisions in respect of any of the above matters.⁸

There has been an increase in the number of disputes requiring technical approach coming to the court due to the experience of the judges in the subject matters. The cases of personal injury arising from complex engineering operations and claims arising from public procurement with number of cases involving complex electronic technology cases are commonly seen. Cases are heard and determined by specialist judges in London and at the Centres throughout England and Wales. The court is empowered to impose cost sanction where parties fail to comply with the requirements. This was demonstrated in the case of *Paul Thomas Construction limited v Damian Hyland* by Jackie Power, JC.⁹ Although, judges encourage parties to go for mediation, however there are still cases

⁵ Arifin bin Zakaria, In the Seat: The Right Honourable Tun Arifin Zakaria (Chief Justice of Malaysia)", *KLRCA Newsletter*, April –June Edition, no.4 (2014).

⁶ *WRP Asia Pacific SdnBhd v NS BluescopeLysaght Malaysia SdnBhd* [2015] MLJU 1125; the case of *UDA Holdings Bhd v Bisraya Construction SdnBhd & Anor* and another case [2015] 11 MLJ 499.

⁷ Annual Report of the Technology and Construction Court, 2011-2012.

⁸ Section 1.1.2 of the Annual Report of Technology and Construction Court 2011-2012 by Judiciary of England and Wales.

⁹ *Paul Thomas Construction limited v Damian Hyland*

where disputes involved need to be resolved through the decision of the court which mediation cannot resolve effectively. The procedure in the TCC¹⁰ are governed by the CPR¹¹ and the supplementary Practice Directions. CPR Part 60 and its associated Practice Direction deals specifically with the practice and procedure of the court.¹² The TCC also has available ADR processes of Early Neutral Evaluation and the Court Settlement Process to assist parties to resolve disputes. These are now dealt with extensively in the Second Revision to the Second Edition of the TCC Guide.

POWERS OF CONSTRUCTION COURT

Construction court deals mainly with litigation of dispute arising from construction contract which include building, engineering disputes, professional negligence claims as enforcement of adjudication decision as well as challenges to arbitrators' decisions.¹³ It also have power to hear cases of allegations of Lawyer's negligence in connection with planning, property, constitution and other technical disputes arising from construction. It has unlimited monetary jurisdiction (as provided under the CPR) as established by *Linklaters Business Services v Sir Robert McAlpine Ltd and ors* [2010] EWHC 2931 (TCC), where judicial clarification on the limitation in construction claim (tort of negligence) was made. The establishment of this court will serve the construction industry in Nigeria effectively because cases of construction disputes can quickly be dispensed with due to the composition and the qualifications of the judges manning the court.

IMPACT OF THE COURT ON CONSTRUCTION PROJECT

There have been tremendous impact of the court on construction cases from the report given by the Centre for Commercial Law Studies¹⁴ For instance, cases of *J Murphy & Sons Ltd v W Maher and Sons Ltd*¹⁵ and

¹⁰TCC

¹¹CPR

¹² See section 1.2 of the TCC Guide.

¹³ Nicholas Gould, 47.

¹⁴ Centre for Commercial Law Studies, School of International Arbitration, Queen Mary, University of London, Competitiveness of fees charged for Commercial Court Services: An overview of selected jurisdictions, December 2013 <<https://consult.justice.gov.uk/digital-communications/court-feesproposals-for-reform>> 3.

¹⁵ *J Murphy & Sons Ltd v W Maher and Sons Ltd* [2016] EWHC 1148 (TCC) (23 May 2016).

Carillion Construction Ltd v Woods Bagot Europe Ltd &Ors¹⁶ among others were heard and decided within a very short time by TCC. This has really assisted in the completion of many projects which ought to have been abandoned but because parties get satisfactory judgments at cheaper cost.¹⁷

THE NEED FOR A CONSTRUCTION COURT IN NIGERIA

Construction court has changed the construction landscape where it is being used such as UK and Malaysia. The length of hearing and determination of construction in court is no longer protracted unlike before. This is evident in the number of cases which has been heard in the construction court in Malaysia shortly after its commission.¹⁸ There is no doubt about the need to a specialist court for revisiting cases of construction which are long due for hearing and determination for effective administration of justice system. This court should be named as "National Construction Dispute Court"¹⁹ The establishment of a National Construction Court (NCC) will be a milestone in the history of construction industry in Nigeria. For instance, cases of construction disputes awaiting appeal need not to go to Court of Appeal except in few cases since the National Construction Court will be handled by the judges who are specialists in the field of construction. This court will hear all the cases of construction projects handling both at the Federal and State levels and will share the same jurisdiction vested on both the Federal High Court and State High Court as provided in the 1999 Constitution of the Federal Republic of Nigeria.²⁰ This Court should be regulated by the Civil Procedure Rules (CPR) which guide the High Courts in Nigeria. The general practice is that cases of construction disputes are allocated to High Court who are experts in construction knowledge without prejudice. Only parties to construction related matters shall be entertained in this court for now because of the need to clear the payment problem that are likely to arise as a result of the abandoned projects.

This court will be guided by the Civil Procedure Rule (CPR) along with Practice Directions (PD) as used in the High Courts with a special reference to construction cases for effective management of proceedings in the

¹⁶*Carillion Construction Ltd v Woods Bagot Europe Ltd &Ors* [2016] EWHC 905 (TCC) (28 April 2016)

¹⁷ *Ibid.*

¹⁸ The total number of cases (including construction cases) disposed of in the High Courts of Malaysia, in 2014 were 104,428 out of 150,153 civil cases pending in 2013.

¹⁹ This Court should be constituted such that its jurisdiction covers all cases of construction emanating from the industry across Nigeria.

²⁰ See Section 6 (5) (J) and (K) of 1999 Constitution of the Federal Republic of Nigeria.

Nigerian Legal system. The court will also entertain appeals from construction arbitration and litigation in order to fast track the administration of justice in construction cases. The proposed rules and procedures for guiding the court will be modeled after the Malaysian Construction Court.

CONCLUSION

It is a settled law that justice delayed is justice denied. Delay has marred many of the construction projects and this has resulted into many projects being abandoned. Findings from studies carried out shows that many of the construction practitioners had lost so much money into litigation cases thereby becoming bankrupt to their financiers. It has been observed that many of the judges sitting on construction dispute cases are not conversant and lack the nitty-gritty of construction knowledge thereby causing delay and postponement in the administration of justice system in Nigeria. There is an urgent need to reorientate and retrain our judges and lawyers who are willing and prepared to participate in the resolution of construction disputes. This is to enable Nigerian construction industry be in tandem with the international practice and to fight against delay bedeviling the prompt project deliver in Nigeria. Hence, the need for urgent adoption of construction court in Nigeria for effective dispensation in the administration of construction dispute cases in Nigeria.

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