REPUBLIC OF TRINIDAD AND TOBAGO

In the High Court of Justice

Claim No. CV2017 – 01397

Between

KALL CO. LIMITED

Claimant

AND

EDUCATION FACILITIES COMPANY LIMITED

Defendant

Appearances:

Claimant: Jagdeo Singh and Kiel Taklalsingh instructed by Karina Singh

Defendant: Keith Scotland, Jacqueline Chang and Asha Watkins-Montserin instructed by Keisha Kydd-Hannibal

Before The Honorable Mr. Justice Devindra Rampersad

Dated the 10th day of January 2018

RULING ON APPLICATION FOR STAY

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Introduction

1. The court has before it an application for a stay of proceedings made by the defendant pursuant to section 7 of the Arbitration Act Chap. 5:01 (the Act) and the applicable rules of the CPR[1]. The defendant seeks a stay to facilitate the arbitration process contemplated by the various contracts entered into with the claimant upon a dispute arising between the parties. The application is objected to by the claimant.

2. By their submissions, both parties accepted that it is within this court's jurisdiction to grant the stay requested and further that the decision is at the discretion of the court to be exercised after the conditions and threshold requirements as set out in ***LJ Williams Limited v Zim Integrated Shipping Services & Anor*** CA CIV P059/14 were considered.

3. The court considered the dicta of Mendonça JA in the case of ***LJ Williams*** and also the submissions of both parties. The court shared the concerns of attorney for the claimant in relation to the defendant's failure to engage in pre-action protocols, which might suggest an unwillingness to engage in negotiations and, by extension, arbitration. The court also took note of the apparent failure of the defendant to address, whether substantively or at all, the dispute between the parties and the claimant's apparent entitlement to payment based on the interim payment and completion certificates.

4. There is no dispute as to whether or not the threshold requirements have been, or is capable of being met. The court is however of the opinion that the defendant's application falls short of meeting the two conditions set out in section 7 of the Act. More specifically, the court is not satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement.

Background

5. This matter concerns a claim for breach of contract in which it is asserted that the defendant has failed to pay the claimant the total debt of Twenty Two Million, Nine Hundred and Fifty Three Thousand, One Hundred and Sixty Four Dollars and Fifty Two Cents ($22,953,164.52). According to the claimant that sum is due to it pursuant to 14 contracts entered into with the defendant for the provision of

[1] Part 9.6, 9.7 and 26.1(w) of the Civil Proceeding Rules 1998

construction services, pest eradication and the maintenance of 14 educational facilities. These works were allegedly concluded between the period 2011 to 2015 and despite the interim payment certificates and/or completion certificates issued by the defendant and/or its agents in relation to same, the claimant's corresponding invoices remain unpaid.

6. On 27 May 2016, the claimant's attorney at law wrote a pre-action protocol letter to the defendant to settle the outstanding debts. It was set out in the statement of case dated and filed on 21 April 2017 that up until that date, there had been no response to the letter nor any payment.

7. There is no dispute that the 14 contracts incorporated the terms and conditions of either (i) the FIDIC[2] Red Book; (ii) the FIDIC Short Form of Contract; or (iii) the FIDIC Yellow Book that all have arbitration clauses upon which the defendant seeks to rely.

8. The defendant filed its appearance on 4 May 2017 and has not taken any other steps in the matter other than the application now being considered and filed 22 May 2017.

The Application for the Stay of the Proceedings

9. The defendant filed an application for an order pursuant to section 7 of the Act and pursuant to Parts 9.6, 9.7, 26.1 (f) and 26.1 (w) of the CPR for an order staying the proceedings pursuant to:

    9.1. The court's inherent jurisdiction or, alternatively,

    9.2. Section 7 of the Act insofar as the claim concerns a dispute or difference that, pursuant to clause 20.6 of the FIDIC Red Book and FIDIC Yellow Book and pursuant to clause 15.3 of the FIDIC Short Form of Contract, shall be finally settled by arbitration.

10. The application also sought an order pursuant to Part 9.7 of the CPR declaring that the court has no jurisdiction or should not exercise any jurisdiction which it may have until the determination of the adjudication and, if necessary the arbitration proceedings.

[2] International Federation of Consulting Engineers (commonly known as FIDIC, acronym for its French name Fédération Internationale Des Ingénieurs-Conseils) contract templates

11. An affidavit of the defendant's Acting Corporate Secretary, Annesa Rahim, was filed in support.

12. The affidavit confirmed the 14 contracts that are the subject of the statement of case. Ms. Rahim **failed to identify in her affidavit what, if any, dispute there is between the claimant and the defendant other than the claim for payment**.

13. After describing the provisions of clauses 20 of the FIDIC Red Book and FIDIC Yellow Book and clause 15 of the FIDIC Short Form of Contract, Ms. Rahim went on to conclude that:

> "17. The Defendant was, at all material times inclusive of the time that the matter herein was commenced, and remains ready and willing to do all things necessary to the conduct of the adjudication in accordance with Clause (20) and the Rules of Adjudication as aforesaid and, in the event that a notice of dissatisfaction is given, the Defendant remains ready and willing to do all things necessary for the proper conduct of the Arbitration in accordance with the International Chamber of Commerce and/or UNCITRAL Arbitration Rules.
>
> 18. There is no sufficient reason why the matter should not be referred to dispute resolution and/or adjudication and if a notice of dissatisfaction is given in respect of the decision of the adjudicator, to arbitration in accordance with the FIDIC Red Book and FIDIC Yellow Book and/or the FIDIC Short Form of Contract as is applicable to the respective contracts."

14. Ms. Rahim also went on to make the following statement without providing any foundation for her expertise in relation to the same:

> "19. The public interest is in giving effect to dispute resolution clauses which require the parties to engage in the simple, fast and inexpensive procedure for adjudication before engaging in arbitration, and in preference to litigation, is in favour of holding the parties to the contractually agreed method for the resolution of disputes arising out of the agreement."

15. Despite the plea in the statement of case with respect to the pre-action protocol letter, Ms. Rahim gave absolutely no explanation whatsoever for the delay in responding to the claimant up to the time of her affidavit, which is almost one year later.

16. No affidavit in response was filed by the claimant.

17. Section 7 of the Act provides:

> "If any party to an arbitration agreement… commences any legal proceedings in the Court against any other party to the arbitration agreement… in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

18. To assist the court in coming to an interpretation and application of the section to the facts of this case, the parties relied on certain common cases and the claimant on one other.

CA P059/14 LJ Williams v Zim Integrated Shipping Services

19. The brief facts of this case are as follows. The Court of Appeal was there considering an appeal against the grant of the first respondent's application for a stay of the appellant's counterclaim. The appellant alleged the wrongful termination of a joint venture agreement as well as certain breaches by the first respondent of duties, including fiduciary duties, alleged to be owed to it under and by virtue of the joint venture agreement. Clause 15.2 of the joint venture agreement stipulated that all disputes were to be referred and finally settled by arbitration. An application was thus made, pursuant to the joint venture agreement, section 7 of the Act and the court's inherent jurisdiction, to have the counterclaim stayed. In response the appellant argued that: (i) there was delay in the making of the application for the stay which was fatal to it; (ii) the first respondent did not show that it was, at the commencement of the counterclaim, and remained ready and willing to do all things necessary to the proper conduct of the arbitration; and (iii) the referral of the matter to arbitration would result in multiple actions with a risk of inconsistent decisions.

20. In explaining the court's jurisdiction to stay proceedings in favour of arbitration, Mendonça JA noted that it was a discretionary power and stated at paragraphs 19 and 20:

> "19. In order for the Court therefore to exercise its discretionary power it must be satisfied of the two conditions set out in "the plain and unambiguous language of section 7" namely, (1) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with agreement and (2) that the person seeking the stay was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.
>
> 20. However before the Court may exercise its discretion to grant a stay there are certain mandatory or threshold requirements prescribed in the section. In the plain wording of the section these are: 1. there must be a concluded agreement to arbitrate; 2. the legal proceedings which are sought to be stayed must have been commenced by a party to the arbitration agreement or a person claiming through or under that party; 3. the legal proceedings must have been commenced against another party to the arbitration agreement or any person claiming through or under that person; 4. the legal proceedings must be in respect of any matter agreed to be referred to arbitration; and 5. the application for the stay must be made at any time after appearance but before delivery of pleadings or the taking of any other step in the proceedings."

21. His Lordship commented further that the authorities provided by the appellant in that matter did not indicate that mere delay or delay without more is a sufficient ground to refuse an application for a stay under section 7 of the Act. It was acknowledged that delay or circumstances might lead to an inference that the applicant for a stay was not ready and willing to do all things necessary to the proper conduct of the arbitration. However, his Lordship opined that it is open to a judge to accept the applicant's unchallenged evidence to the contrary notwithstanding the possible inference that could be drawn from the circumstances.

22. Further, the court found that the mere fact that there may be a multiplicity of proceedings and hence the risk of inconsistent findings was not by itself sufficient to grant a stay. In the circumstances sufficient reason had not been shown by the appellant why the dispute between the parties as reflected in the counterclaim should not be decided in arbitration.

23. In this matter the claimant commenced legal proceedings on 28 January, 2014 seeking, inter alia, the sum of $1,817,642.84 for works performed and services rendered by the claimant pursuant to a contract entered into between the parties. The defendant entered an appearance on 24 March, 2014 and filed for a stay of proceedings pursuant to section 7 of the Act on 11 April, 2014. The defendant contended that by virtue ofclauses 20.6 and 20.8 of FIDIC 1999, which formed part of the written agreement made between the parties, it was agreed that all disputes arising from the contract would be submitted to the Dispute Resolution Board and then to arbitration. The claimant however countered that those sections did not apply primarily because no Dispute Resolution Board had ever been appointed. It was suggested that there was sufficient reason why the matter should not be referred in accordance with the arbitration agreement as it concerned primarily a matter of law. The claimant also argued that the defendant had not established that it was at the time when the proceedings were commenced, and still remained, ready and willing to do all things necessary to the proper conduct of the arbitration having regard to its failure to respond to the claimant's pre-action letter.

24. The court granted the defendant's application for a stay of proceedings under section 7 of the Act. That case is somewhat distinguishable from the instant as the main objection to the application was a challenge to the jurisdiction of the Arbitrator based on the issues raised in that case. However, Mohammed J was required to deal with the issue of the defendant's readiness and willingness to commit to arbitration proceedings. His Lordship acknowledged the inadequacies of the defendant's pre-action conduct, by failing to respond to the claimant, but commented that an omission to respond (silence or inaction) in and of itself is not sufficient to ground a finding of unwillingness to arbitrate. In this way a distinction was drawn between the circumstances in that case and that which existed in the case of ***Satyanan Sharma and Chandrica Sharma v. Christina Adit and Vashti Mohammed*** CV2012-04258. At paragraph 38 his Lordship commented:

> "Having read Satyanan Sharma, I am of the view that the Gobin J's decision eventually turned on the positive steps taken by the Defendant which were at odds with any willingness or readiness to invoke the arbitration clause. While Gobin J. did indeed find their failure to respond to the claimant's pre-action letter to indicate their willingness or readiness to invoke the arbitration significant and said that "had they been so ready and willing I would have expected a response to that effect" this factor in and of itself did not appear to lead her to the conclusion that the Applicants were not ready and willing to engage in arbitration. Rather her conclusion stemmed,

> as the Defendant rightly pointed out, from the Defendants' institution of summary proceedings in the Chaguanas Magistrates' Court for possession of the premises almost four weeks after the pre-action letter was sent and the addendum to the Notice to Quit which stated that " ….High Court proceedings will be commenced against you for damage."

25. Having found that no positive steps were taken to draw the conclusion that they were not ready and willing at the time that proceedings were commenced to engage in arbitration, the defendant's application was granted. In that matter the pre-action protocol letter was served 8 December 2013 and the matter was initiated 28 January 2014. The defendant's inaction spanned less than two months in that case.

CV 2015-03486 Climate Control v C.G Construction Services Limited

26. In this case, Kokaram J commented on the quality of evidence that ought to be laid before the court upon such an application being made.

27. That case concerned both an application to set aside a judgment in default of appearance and one for a stay of the proceedings in a situation where it was found that there was no evidence of an agreement between the parties to arbitrate their dispute. In that case the dispute settlement procedure regulated disputes between the "Employer", a third party, and the "Contractor", being the defendant. It did not regulate disputes between the "Contractor" and "Sub Contractor", that being the claimant. In that way the defendant was unable to prove a readiness to arbitrate as required by section 7 of the Act. Unlike the case at hand, it was not a matter in which the relevant parties were before the court so that it was necessary to provide documentary evidence that the defendant had actively engaged or was engaging the dispute process itself with the Employer to support assertions of a readiness to arbitrate.

28. His Lordship examined the affidavit evidence in support of the application and commented at paragraphs 24 and 25:

> "The first difficulty in this evidence is the absence of any documentary evidence to demonstrate a willingness to invoke the settlement process. Second the first step in the settlement process is the referral of the dispute to the Engineer before any question of arbitration arises. <u>This has not been done as between the Defendant and the Employer</u>. ……..
>
> Against these facts the Defendant's application to stay the proceedings or to set aside judgment would be doomed to fail."

29. It was earlier observed, at paragraphs 10 and 12, that:

> "It is also noted that in its grounds of its application, the Defendant contended that the Claimant failed to invoke the settlement process under the FIDIC but is silent as to the Defendant's own willingness or action in invoking this settlement process itself before these proceedings were launched by the Claimant……
>
> Turning to the affidavit, in support of the application, it can be characterised as making bald assertions, lacking in the type of detail necessary to convince a Court that it is just to exercise its inherent or statutory jurisdiction to stay the proceedings or set aside judgment. In my view the facts presented do no more than attempt to delay the payment of the Claimant's invoice."

CV2012-04258 Satyanan Sharma and Anor v Christiana Adit and Anor

30. The defendants, the landlord, applied to have these proceedings stayed for a period of six months pursuant to section 7 of the Act and clause 5 (3) of the tenancy agreement which contained an arbitration clause. The claimants, the tenants, sought damages for breach of the covenant of quiet enjoyment and nuisance together with several injunctions. At paragraph 5 Gobin J observed:

> "5. It is well established that whether or not the Court exercises its power to stay the proceedings is entirely a matter of discretion (Russel on Arbitration 18th Edn p.154). **The burden is on the claimants to show cause why effect should not be given to the agreement to submit to arbitration, and on the defendants to show they were ready and willing to do everything necessary for the proper conduct of the arbitration.**" [emphasis added]

31. The application was refused primarily because of the defendants' conduct which demonstrated an unwillingness to go to arbitration despite boldly asserting that they were willing so to do. There was no evidence of the defendant responding to the claimant's pre-action letter to indicate their willingness or readiness to invoke the arbitration clause. Further, the defendants instituted summary proceedings in the Chaguanas Magistrates Court for possession of the premises almost four weeks after the pre-action letter was sent. The court also noted that the relief claimed were primarily injunctive and held that the main and necessary reliefs claimed would be wholly beyond the powers of an arbitrator.

32. Reference was also made to this case by the claimant's attorney .

33. In that case the claimant allegedly entered into nine contracts with the defendant to supply security services at various facilities. Eight (8) of the contracts were done in writing and one (1) was done orally. The defendant failed to compensate the claimant for the security services provided under each of the nine contracts. Prior to the institution of the claims (which were consolidated), the claimant issued and delivered pre-action protocol letters.

34. The defendant applied for a stay pursuant to section 7 of the Act and contended, inter alia, that: (i) there was a binding agreement to resolve all disputes by means other than through litigation; (ii) the subject matter of the actions was a dispute touching or relating to any matter arising under the Contracts; and (iii) the defendant was and remained ready and willing to do all things necessary to conduct arbitration. The claimant objected to the stay and asserted, among other things, that there was no dispute within the meaning of the arbitration agreement and further that the defendant was not willing to arbitrate.

35. Rahim J found that there was a concluded written agreement to arbitrate in relation eight of the disputed contracts and went on to rule in favour of the application for a stay to enable arbitration. In so doing the learned judge agreed with the defendant's submission that the **non-payment of an amount which is not admitted** constitutes a dispute within the meaning of an arbitration agreement and within section 7 of the Act. The court placed reliance on the dicta ***in Halki Shipping Corp v Sopex Oils Ltd*** [1998] 2 All ER 23 at page 741 which states as follows;

> "Again by the light of nature, it seems to me that s 1(1) is not limited either in content or in subject matter, that if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say, "I don't agree." If, on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the 16 arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation."

36. In this case, both a pre-action letter and mediation letter was sent to the defendant therein, however, in distinction to the case at bar, the defendant responded with a request for more time to which the claimant refused. At paragraph 52 of his judgment Rahim J reasoned as follows:

> "The court does not agree with the submissions of the Claimant on this issue. It is pellucid that the arbitration clause contained in the agreement is exercisable at the option of either party so that the attempt of the Claimant to ascertain from the Defendant whether it was willing to enter into mediation or arbitration is wholly irrelevant and unnecessary. The ADR process under the agreement is triggered by either party electing to go to mediation so that what was required of the Claimant was the issuance of a Notice that it was exercising its entitlement to go to mediation if they so chose. The mediation proposal letter in no way suggested that the Claimant had in fact triggered the arbitration clause and its argument by implication at this stage that it had done so is wholly unmeritorious and is in the court's view an attempt to unfairly saddle the Defendant with refusal to arbitrate."

37. Later at paragraph 56 His Lordship commented:

> "In relation to fairness, it is fair and just that the claim be stayed for the parties to explore ADR for the following reasons;
>
> i. Although the Claimant had the opportunity to trigger the arbitration clause it failed so to do. This applies equally to the Defendant.
>
> ii. In the interest of the both parties, the court ought to give effect to the commercial bargain made by the parties at the time they entered into the contract. That commercial bargain encompassed the voluntary submission to an ADR process at the behest of either party so long as a dispute between them remains unresolved. This bargain would have been negotiated between them as contracting parties on equal footing.
>
> iii. The opportunity to avail the ADR process is consistent with the philosophy encapsulated by the CPR to give parties the opportunity to settle matters before proceeding to litigation which will amongst other things result in consumption of the court's resources for matters which may otherwise have likely been settled thereby depriving other litigants of the opportunity to have their matters heard sooner rather than later. It is therefore in the public interest that the arbitration clause be given full effect and the stay be granted for that purpose."

38. As observed in ***Climate Control*** both parties may be equally responsible for initiating the ADR processes provided for in the agreement between the parties unless it states otherwise.

Additional Authorities

39. The court also considered the following additional authorities that either relied on the cases raised by the parties or were referred to in the authorities they submitted.

40. An application was made by the 4th ancillary defendant to stay the claim of the defendant/ancillary claimant. There was no evidence of the respondent engaging the applicant in either pre-action protocol or the ADR procedure provided for by the relevant agreement. There was also no evidence of the applicant having any notice of a dispute and so the court was inclined to believe the applicant's assertion that it was ready and willing to arbitrate. That notwithstanding, the respondent was able to demonstrate sufficient reason why the matter should not be referred to arbitration in accordance with the agreement which outweighed the consideration or any strong public interest that parties ought to be held to their bargains to resolve issues by alternative methods before turning to the courts for a resolution.

41. Aside from the court's jurisdiction under section 7 of the Act, Rahim J also considered the court's inherent jurisdiction to grant such a stay.[3] His Lordship was of the opinion that the court should have regard to the relevant issues under the following additional headings inclusive of the matters already considered under the exercise of the discretion pursuant to the Act - delay, fairness, prejudice, convenience, public interest and the overriding objective of the CPR to deal with cases justly. His Lordship also considered the policy behind granting such a stay and stated:

> "52. The court understands this argument to be founded on two principles. Firstly, there appears to be a public interest element espoused by the actions of the courts in ensuring that parties to commercial contracts who have reached an agreed method of dealing with disputes by way of ADR not be permitted to resile from that which they have agreed to and achieved by way of bargain unless of course there is good reason for so doing and the courts will strive so far as is possible to give effect to that principle. Secondly, this argument encompasses a component of fairness, in that it would be unfair to permit EMBD to resile from its agreement and circumvent the ADR process.
>
> 53. This court accepts that as a matter of principle, the dicta set out in the Channel Tunnel case reflects in large measure the approach that the courts will apply in the usual course of events. However, as with most cases, **whether the principle is applied in any given case is dependent on several factors which may be both generally applicable to the given case or specifically applicable depending on the facts and circumstances of**

[3] In LJ Williams Mendonca JA commented that it should be considered under the statutory authority

that case. In so saying the court observes that the dicta of Lord Mustill must be taken in the context of the claim in the Channel Tunnel case. In that case, it was argued that the process of mediation and arbitration on the whole would have been a slower than recourse to the court. The competing factors to be weighed by the court in making its determination would no doubt have been remarkably different to the facts of the present case. The court is of the view that the considerations in the present case being different to those in the Channel Tunnel case, to apply the dicta without recourse to the other principles set out above would be to do an injustice to EMBD. While it is in the public interest that parties to commercial agreements abide by that which they have agreed it is also in the interest of the public that matters which touch and concern like issues be heard together for the reasons set out above in this decision but also particularly in the case where failure to so do may result in demonstrable injustice to a party. The latter therefore outweighs the former in the court's view."

42. The decision not to grant the stay was upheld by the Court of Appeal. Rajkumar JA gave the court's ruling in CA P169 of 2017 ***Lee Young and Partners v Estate Management & Business Development Company Limited*** and commented at paragraph 25 that:

> "…..there may be circumstances in which the risk of substantial injustice to the party resisting the stay would constitute sufficient reason why the matter should not be referred in accordance with the arbitration agreement. Such a risk of substantial injustice would weigh in favour of the court's exercising its discretion not to grant a stay."

Heyman v Darwins Limited [1942] AC 356

43. In this House of Lords case, Lord Macmillan at page 370 considered the words "if satisfied that there is no sufficient reason" in deciding whether an action ought to be stayed under the identical provisions of the UK 1889 Act. He outlined a four-pronged test:

> "The law permits the parties to a contract to include in it as one of its terms an agreement to refer to arbitration disputes which may arise in connection with it, and the courts of England enforce such a reference by staying legal proceedings in respect of any matter agreed to be referred "if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission": Arbitration Act, 1889, s. 4. Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the **first thing to be ascertained is the precise**

<u>nature of the dispute which has arisen</u>. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause, and the clause having been found to be still effective, there remains for the court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration."

[Emphasis added]

Methanex New Zealand Ltd. v. Fontaine Navigation S.A. 1998 [1998] 2 FCR 583

44. This case referenced that of ***Heyman*** and stated, *"The Heyman case certainly predates the Commercial Arbitration Code, however the principle, of examining the nature of the dispute and whether it falls within the arbitration clause and then determining whether there might have been an intervening event making the arbitration clause ineffective, is perfectly valid today."*

45. The learned judge, relying on ***Heyman***, expounded the rationale for the test adopted by the Canadian Courts, namely that:

> "…since most arbitration clauses express the right and obligation to arbitrate in terms of 'disputes' the claimant cannot ordinarily give a valid notice of arbitration unless his claim is disputed. Moreover, in the absence of a 'dispute' (which has been understood as meaning a genuine dispute) the Court will not order that the action should be stayed so that the matter can be referred to arbitration. The procedural consequences are important, for this principle opens the way for the plaintiff, even in a case governed by an arbitration clause, to employ the summary mechanisms of the Court where the defendant has no defence at all to the claim, or only a spurious defence. What happens is this. That claimant commences an action in the High Court, and states on affidavit his belief that there is no defence to the claim. The defendant must then respond, also on affidavit, showing reasons why he does have a defence. If the Court accepts the contention of the plaintiff, it will refuse to stay the proceedings and will instead give immediate judgment for the plaintiff.' In effect, neither may a party give notice of arbitration unless there is a disputed claim, nor will a court order a stay of an action in favour of arbitration, if there is no genuine dispute"

46. Having considered the law put forward by the parties, it is necessary to consider the contractual arrangement between the parties in relation to clause 20 of the FIDIC Red Book and FIDIC Yellow Book and clause 15 of the FIDIC Short Form of Contract.

Clause 20.4

47. Notwithstanding the reference to clause 20.6 in the Notice of Application, the court is of the respectful view that the relevant clause for initial consideration ought to be clause 20.4. This clause provides:

> "If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, then after a DAB[4] has been appointed pursuant to Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board] and 20.3 [Failure to Agree Dispute Adjudication Board], either Party may refer the dispute in writing to the DAB for its decision, with a copy to the other Party. Such reference shall state that it is given under this Sub-Clause."

48. In the event of the parties being dissatisfied with the DAB's decision, and in the event the matter is not amicably settled, under clause 20.6 the dispute would be settled by international arbitration unless otherwise agreed by both parties.

Clause 15

49. This provides for arbitration in the following manner:

> "15.1 Unless settled amicably, in the dispute or difference which arises between the Contractor and the Employer out of or in connection with the Contract, including any evaluation or other decision of the Employer, shall be referred by either Party to adjudication in accordance with the attached Rules for Adjudication ("the Rules"). The adjudicator shall be any person agreed by the Parties. In the event of disagreement, the adjudicator shall be appointed in accordance with the Rules."

[4] Defined as the Dispute Adjudication Board at Sub-Clause 20.2 and appointed as set out therein jointly by the parties 28 days after party gives notice to the other of its intention to refer a dispute to the DAB in accordance with Sub-Claus 20.4.

50. Similar to the preceding clause, in the event of dissatisfaction with the decision of the adjudicator, the matter would be settled by a single arbitrator[5].

Submissions

51. The claimant did not dispute that the threshold requirements espoused by Mendonça JA in ***LJ Williams*** were or could be satisfied in this case.

52. As relates the two further conditions of the Act, the defendant submitted that they met those conditions as outlined in the affidavit evidence of Annesa Rahim. The claimant asked the court to find however that the two conditions were not met and submitted that:

    52.1. The defendant's pre-action conduct demonstrates that the defendant is not ready and willing to do all things necessary for the proper conduct of arbitration. It was submitted that the defendant ought not to be allowed to rely on the bald assertion in its affidavit in support that it was ready and willing in light of the failure to address the reasons for its inaction (i) upon the pre-action letter being served and (ii) upon demands being made for payment pursuant to the completion and interim payment certificates; and

    52.2. The defendant should be estopped from invoking the arbitration clause given its conduct during the administration of the contract. In this way it was suggested that there is sufficient reason why the matter should not be referred to arbitration especially in light of the claimant having been issued completion and interim payment certificates together with an absence of any issue being raised by the defendant to suggest any disentitlement to be paid for the works done.

53. The claimant further submitted that it could not have been reasonably expected to commence arbitration proceedings when there existed no ascertainable dispute because the defendant remained silent upon receiving the claimant's pre-action protocol letter.

54. In reply, the defendant contended that the claimant was incorrectly making heavy weather of its pre-action conduct and invited the court to reject the claimant's submission and rely instead on the dicta of Rahim J in the previously cited case of ***Executive Bodyguard Services v NGC.*** At paragraph 26 of that ruling Rahim J

[5] See Clause 15.3

noted that arbitration clauses are enforceable both as a matter of public interest and or giving effect to the bargain entered by the parties. The defendant noted that both parties, upon execution of the agreements herein, subjected themselves to the terms contained therein and argued that the onus was on the claimant to engage the defendant in accordance with the respective adjudication and arbitration clauses. The defendant further argued that the claimant is not entitled to rely on any purported estoppel as it failed to engage the defendant pursuant to the explicit terms of the agreements between the parties.

Analysis

Does the court have jurisdiction?

55. Firstly, the court wishes to address the allegation made in the Notice of Application that the court has no jurisdiction to deal with this matter. The court rejects this contention.

56. The Act quite clearly recognizes the court's supervisory jurisdiction over all arbitration agreements with section 7 applying deference to the parties' agreement. When one looks closely at the language of section 7, it is clear that the court's jurisdiction is not ousted as it retains the discretion whether or not to grant a stay.

57. This section provides a non-mandatory approach towards an arbitration agreement allowing the parties to that agreement to make a choice whether or not to apply to stay the proceedings. This choice is manifest in the words:

> "… any party to such legal proceedings **may**, ….apply to the Court to stay the proceedings …"
>
> **[Emphasis added]**

58. Consequential upon the exercise of that choice, the court's jurisdiction itself is not ousted as its discretion is to stay the proceedings rather than to have it dismissed altogether for lack of jurisdiction. Even then, the exercise of that discretion is not an automatic one since the provision states that the court *"may make an order staying the proceedings"* providing the threshold referred to above has been crossed and that the court is satisfied that the conditions set out in the section have been met. In that regard, reference is made to the following terms of the provision as emphasized:

" …, and the Court, **if satisfied** that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, **may make an order staying the proceedings**"

[Emphasis added]

59. Therefore, the contention that the court has no jurisdiction to deal with this matter is, to my mind, without merit and is therefore dismissed.

Conduct

60. The court agrees with the claimant's submission that the pre-action conduct of the defendant ought rightly to be considered. The defendant failed to explain why it did not respond to the pre-action letter. As referred to above, one of the parties to the arbitration agreement, in this case the defendant, has approached the court to request the exercise of its discretion to stay the proceedings to give effect to the arbitration agreement. To meet the requirements of the section, it is necessary for the court to be satisfied of the matters set out therein. In considering whether the court is satisfied with respect to the sufficiency of the reason why the matter should not be referred to arbitration, it is this court's respectful view that it has a wide berth, especially in circumstances where the defendant has not taken any positive steps whatsoever towards arbitration but has merely made a bald statement of a future intention. Obviously, in assessing that future intention, the bona fides of the party making such a statement as to future intention must be considered and the court must look at the conduct of the applicant party to date. Whereas that conduct may not be determinative of the defendant's bona fides as to its future intention, it may be a valuable indicator.

61. In this case, there is, at this time, no contention that the work done by the claimant has not been properly done nor is there any contention that there is any reason whatsoever to question the claimant's entitlement to be remunerated for its work done as per its invoices. Instead, as mentioned, there are certificates of completion before the court with no rivaling contention put forward by the defendant. Against that background, one sees that the defendant has made absolutely no attempt whatsoever to engage any provision of the arbitration agreements referred to above nor is there evidence of it doing anything for more than two years since the

submission of the claimant's invoices to question the claimant's entitlement to the payment of the same. On top of that, despite the clear provisions of the CPR in relation to Appendix A to the Practice Direction relating to *"Pre-Action Protocol for Claims for a Specified Sum of Money"*, the defendant has not responded at all, notwithstanding its more recent stance with respect to the arbitration clauses. Even up to now, it has not given any detailed reasons why the claim is not admitted[6], whether by way of a response to the pre-action protocol letter or by affidavit in support of this application. As it stands, the defendant remains non-committal when the established law, both under the pre-action protocol and under section 7 of the Arbitration Act, warrants an explanation to satisfy the court. It is not sufficient to come to the court to just say that there is an arbitration agreement and that it is ready and willing to do all things necessary to pursue the arbitration. The court is of the respectful view that the parties must go further and say that there is an arbitration agreement and then, identify the dispute that has arisen in some form or the other that requires resolution under the arbitration agreement. It may be desirable to go on further to give the specific reasons as to why that procedure is or is not a more appropriate forum for the resolution of the dispute than the High Court. Only then can the court exercise its mind in relation to whether or not it is satisfied as per the section.

62. It may be argued that the statement of the existence of the arbitration clause and the readiness to arbitrate raises sufficient reason to give way to the clause that parties have agreed to. In such an instance, the court is not required to micro-manage the mechanics of the invocation once the basic elements are there without any compelling reason to do otherwise. The court is not in full agreement with that approach. Parliament has infused the section with an important element - the court's satisfaction - and, to my mind, that satisfaction must be reached judicially rather than just rubberstamped. This court has searched for something a little more than what has been put before it i.e. evidence of a dispute.

63. In this case, in the absence of any proper identification of any dispute, the only issue that is left is the issue of payment. In that regard, the court bears in mind the fact that this matter is one of several other matters before this court[7] brought against the same defendant all of which have similar applications before the court for a stay with a similar lack of information in relation to any dispute. On the facts

[6] See Protocol 1.5

[7] CV2017-02134 ***Motilal Ramhit & Sons Contracting Limited v Education Facilities Company Limited & The Attorney General***; CV2017-02138 ***Contech Limited v Education Facilities Company Limited & The Attorney General***; CV2017-02466 ***Contech Limited v Education Facilities Company Limited et al***

before this court, one can easily understand a perception that this defendant is merely seeking to delay payment. This view is fortified by the information which is in the public domain which the court can take judicial notice of in relation to the defendant's alleged financial woes.

64. The salient question, therefore, is whether the defendant's failure to pay satisfies the requirements of the arbitration clause as to there being a dispute. Rahim J, in the authority referred to above, suggested that, in the circumstances of his case, it may very well be. On the other hand, ***Russell on the Law of Arbitration***, 20th Ed. at page 171 states – *"Mere refusal to pay upon a claim which is not really disputed does not necessarily give rise to a 'dispute' calling an arbitration clause into operation."*

65. Even in this regard, the court has no information from the defendant informing it of any advantage to be gained from pursuing the FIDIC arbitration provisions on a non-payment issue as opposed to invoking the provisions of Part 14 of the CPR which allows for applications to be dealt with before the court for payment by instalments, etc. As it stands, just sending the matter to arbitration just because the clause exists without identifying what has to be arbitrated does not make sense. This is especially so since the parties are already before the court, have already retained counsel and would be in no better position in pursuing relief before this court than before an arbitrator whereas engaging in the latter course at this time could very easily incur further costs and delay the claimant's payment.

66. Therefore, in respect of both conditions and taking into consideration the evidence provided by the defendants, the court is not satisfied that the requirements of section 7 of the Act have been fulfilled. The defendant's conduct since the submission of the invoices to date does not support its bald assertion at paragraph 17 of the affidavit in support nor is there any support for the conclusions made at paragraph 18 of the same. As a matter of fact, in the circumstances, there seems to be sufficient reason for this court to not refer this matter to arbitration.

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The Order:

67. Consequently, the defendant's notice of application is dismissed and the defendant shall pay the claimant's costs to be quantified by the court pursuant to part 67.11 of the CPR in default of agreement.

/s/ Devindra Rampersad

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Justice Devindra Rampersad

Assisted by Charlene Williams
Judicial Research Counsel
Attorney at Law