THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No.CV2017-02303

Between

CONTECH LIMITED

Claimant

And

EDUCATION FACILITIES COMPANY LIMITED

First Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Defendant

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Before Her Honour Madame Justice Eleanor Joye Donaldson-Honeywell

RULING

Delivered on April 20, 2018

Appearances:

Mr. Prakash Deonarine, Mr. Vijay Deonarine and Ms. Krystal Kawal for the Claimant

Ms Kristal Piper and Ms Persad for the First Defendant

Mr Duncan Byam and Ms. Avaria Niles for the Second Defendant

A. Introduction

1. In this Ruling decisions are given concerning Notices of Applications filed by the parties. The Applications determined herein are as follows:

   a. The Claimant's application filed on October 3, 2017 for Judgment in Default of Defence against the Second Defendant;

   b. The Second Defendant's application filed on October 11, 2017 to strike out the Claim against it;

   c. The First Defendant's application filed on November 17, 2017 to set aside the Default Judgment entered against it by the Registrar on October 9, 2017;

   d. The First Defendant's application filed on November 17, 2017 to stay the proceedings so the matter can be referred for arbitration; and

   e. The Claimant's application Filed on November 01, 2017 requesting that a Case Management Conference be scheduled.

B. Background

2. The Claim against the Defendants is one seeking payment of outstanding amounts on two construction contracts for work on the School for the Blind in

Santa Cruz. They were entered into between the Claimant and the First Defendant on the 3rd and 16th of June 2014.

3. The Second Defendant is joined in the matter based on points pleaded at paragraphs 5 to 8 of the Statement of case as to the Second Defendants role as a principal in the said transactions and thus liable to make the payments.

4. The contract is in a FIDIC standard form and a payment process is set out at Sub-Clauses 11.2 and 11.3. The clauses speak to payment at monthly intervals on statements being submitted by the contractor regarding the value of works executed. The First Defendant as Employer is required to make payments within 28 days of delivery of such statements. Such payments can however be made less **any amount for which the Employer has specified his reasons for disagreement.** Accordingly, if there is a dispute concerning payments due the Employer can at the time when payment is due, i.e. within 28 days of delivery of a statement, withhold payment and set out reasons for the disagreement.

5. The Claimant's pleadings do not make mention of any monthly statements delivered however, it is pleaded that two invoices dated April 20, 2015 were delivered to the First Defendant on completion of the works. No payment was made within 28 days. There was no notification by the First Defendant to the Claimant that there was any disagreement with reasons regarding the payments withheld.

6. There was correspondence from the Claimant seeking payment and some ten months after the invoices were sent the First Defendant wrote on January 22nd, 2016 confirming a global sum of payments due to the Claimant, not limited to or specifically naming payment arising from the contracts referred to in this Claim. Prompt payment as soon as funds are received from the Ministry of Education was promised in the letter. No payments were made in the months that followed the promise and on May 8, 2017 a pre-action protocol letter was sent to the Claimant. In response the First Defendant asked that the Claimant hold its hands on litigation for 21 days to facilitate investigations and with a view to arriving at an amicable solution. The response made no mention of planned referral for arbitration.

7. The 21 days elapsed with neither further communication nor payments from the First Defendant so the instant Claim was filed on June 23, 2017. Appearances were entered for the First and Second Defendants in early July 2017. The First Defendant's then Attorneys requested of the Claimant an extended time to prepare and file a Defence. The Claimant agreed to extend the time to September 21, 2017. The Second Defendant made no request for extended time and on October 3, 2017 the Claimant filed a Notice of Application seeking Judgment in Default of Defence against it. The Second Defendant countered on October 11, 2017 by filing a Notice of Application seeking to have the Claim stuck out as disclosing no cause of action against it.

8. When the extended deadline for the First Defendant to file a Defence elapsed the Claimant filed a Request for Default Judgment to be entered by the Registrar. This was done on October 9, 2017 and although the Registrar did not stamp the Judgment until weeks later on November 3, 2017 the Judgment was in effect entered on October 9, 2017, save for the quantum of interest which was left to be determined by a Judge.

9. Several days after the Default Judgment was entered against it the First Defendant filed a Notice of

Application on October 20, 2017 seeking a stay of the proceedings in the Claim so that the matter can be referred for arbitration.

10. On November 16th 2017 the matter was listed for a determination of the interest on the Default Judgment against the First Defendant. Due to an administrative oversight the Notices of Application filed by the Second Defendant on October 11th and by the First Defendant on the 20th October were not placed on file for my attention until the morning of the hearing. In addition, the Claimant had filed a Notice of Application on November 1st, 2017 requesting that a CMC date be scheduled which was not placed on the file until that morning. A decision was made to dismiss the First Defendant's application for a Stay of the Claim on the basis that the Default Judgment had already been entered hence there were no proceedings on the Claim against the First Defendant to be stayed. The hearing of all other Notices of Applications was adjourned.

11. The First Defendant's Attorneys took great umbrage to the fact that the Claimant had entered Default Judgment without the courtesy of informing counsel for the First Defendant. They claimed to have first come

to know of it on the day of the said hearing. The Court was notified that an application would be made to set aside the Judgment. This was done without delay on the following day November 17, 2017. The First Defendant filed two Applications. One application sought to have the Default Judgement set aside and the other revived the request that the proceedings in the Claim be stayed for the matter to be referred for arbitration.

12. When the matter was next before the Court on November 23, 2017 the five Applications mentioned above were yet undetermined. The parties were permitted to file further affidavits in relation to the First Defendant's applications. The Claimant filed a notice indicating reliance on an Affidavit of Krishchenand Seunarine sworn on November 30, 2017.

13. Directions were given for the filing by the parties of submissions on the first four applications listed above.

C. **Applicable Legislation, CPR Provisions and analysis of cases**

14. The CPR Rule governing setting aside Judgment is CPR 13.3 which provides as follows:

"(1) The court may set aside a judgment entered under Part 12 if—

(a) the defendant has a realistic prospect of success in the claim; and

(b) the defendant acted as soon as reasonably practicable when he found out that judgment had been entered against him."

15. As submitted in the Claimant's submission at [9], the law is clear that where a defendant seeks to set aside a regular judgment: "*the defendant must, by evidence, establish he has a defence that has a realistic prospect of success. He or others should, therefore, depose in an affidavit or affidavits to such facts and circumstances that demonstrate the defendant has a realistic prospect of success*": *Anthony Ramkissoon v Mohanlal Bhagwansingh Civil Appeal No. S-163 of 2013* [10]. This principle was buttressed in *Knolly John v Brenda Mahabir et al* CV2005-00866 p.5 as follows: "*The prospect of success must be real i.e. the court will disregard prospects which are false, fanciful or imaginary. A realistic prospect of success means that the defendant has to have a case which is better than merely arguable*".

16. The First Defendant's only purported defence as set out in the application is that a stay of proceedings with a view to arbitration referral is mandatory in the circumstances of this case. This raises two legal issues as addressed in submissions for the Claimant.

17. Firstly the purported Defence is a challenge to the jurisdiction of the Court. CPR 9.7 provides the procedure to challenge the Court's Jurisdiction as follows:

"(1) A defendant who wishes—

(a) to dispute the court's jurisdiction to try the claim; or

(b) to argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first enter an appearance.

(3) An application under this rule must be made within the period for filing a defence."

18. Secondly, it is not mandatory for the Court to stay proceedings for Arbitration. The Court has a discretion in determining whether to stay proceedings

so as to allow for referral of a matter to arbitration after litigation has been started. The Court must look at several factors. The main issues to be considered under **Section 7 of the Arbitration Act, Chap 5:01,** are underscored hereunder:-

*"If any party to an arbitration agreement, or any person claiming through or under him, **(1)commences any legal proceedings** in the Court against any other party to the arbitration agreement, or any person claiming through or under him, **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 **(2)there is no sufficient reason why the matter should not be referred** in accordance with the arbitration agreement, and that **(3)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."[Numbers and emphasis added]*

19. As underscored at (1) above the first thing the Court must be satisfied of is that there was a matter to be referred. On the facts of this case there must be a

dispute. The First Defendant submits that the act of the Claimant in instituting these proceedings without more, is a clear indication that a dispute exists between the parties. Counsel for the First Defendant draws the Court's attention to the decision in **Executive Bodyguard Service Ltd v National Gas Company of Trinidad and Tobago CV2016-01683** that so long as the breach and/or the sum has not been admitted, its existence remains in dispute and is therefore an issue in dispute between the parties.

20. The Claimant on the other hand cites the case of **Heyman v Darwins Ltd [1942] 1 All ER 337 p. 345** and submits that a 'genuine dispute' must be proven. In the Claimant's written submission it is noted that the case of **Halki Shipping Corp v Sopex Oils Ltd [1998] 2 All ER 23** which was relied on in **Executive Bodyguard** can be distinguished from the local position as it dealt with the UK equivalent of s.7 of the Act. Accordingly, in the local context a genuine dispute must still be proven before a referral by the Court. The mere non-payment of the claim cannot amount to such a dispute. The Claimant also cites the decision of Rampersad J. in **Kall Co. v Education Facilities Company Limited CV2017-01397** dismissing an application for a stay for referral to arbitration on

the basis that there was no evidence of a dispute on the part of the Defendant.

21. The importance of proving a genuine dispute was outlined prior to the UK 1996 amendment in **Mustill and Boyd on the Law and Practice of Commercial Arbitration in England, Butterworths, 1989** at page 12 as follows: *"First, 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."

D. Consideration of submissions and determinations

Applications concerning the Second Defendant

22. No submissions were filed by the Second Defendant in support of its application to strike out the Claim. However, the Claimant by Notice dated December 15, 2017 indicated reliance on its submissions filed in another matter **CV2017-02463 Mootilal Ramhit And Sons Contracting Limited v EFCL and Attorney General.** In that matter an oral ruling was given on January 15, 2018 dismissing the application to strike out the Claim on grounds that:

"*That application if granted would have left only the 1st Defendant to defend the matter and be subject to enforcement proceedings if the Claimant succeeds.*

The issues raised by the 2nd Claimant are very important matters concerning public procurement procedures and I agree with Seepersad J that it is in the public interest that the matters be ventilated in the Court. The grounds for striking out put forward by the 2nd Defendant do not present an open and shut

case. Instead evidence is required with regard to the lack of agency point. Also a great deal more factual framework and legal analysis, such as would emanate at Trial, is required to prove as alleged that CTB Act procedures were applicable and not followed and if so there was no contract.

……it is my view that the important issues raised are best addressed in the full hearing of the matter. The 2nd Defendant cannot be allowed to merely exit the proceedings on a striking out application. The Claimant has rightly pointed out that it is the State that may be required to pay any amount proven to be owed on the contract at the end of the proceedings and as such the State must be a party to the matter. This is a case involving significant funds, potentially to be sourced from the public purse. The State's Defence/position in the matter must be fully set out in pleadings and supported by evidence and the Claimant and the 1st Defendant must be given an opportunity to file pleadings, evidence and further legal submissions in response."

23. My decision herein in circumstances where no submissions were filed by the Second Defendant follows the decision in CV2017-02463. The Second Defendant's application to strike out the Claim is dismissed.

24. In light of the seriousness of the issues raised as to realistic prospects for a successful Defence, the application for Default Judgment against the Second Defendant will not be granted. There will be no order as to costs on the two applications and the Second Defendant will be permitted time to file a Defence.

Applications concerning the First Defendant

25. In accordance with **CPR 13.3** there were two factor to be established by the First Defendant in order to have the Default Judgment set aside. Firstly, a realistic prospect of success in the Claim and Secondly, that the application was made as soon as practicable after it found out the Judgment was entered. Of the two matters only the second was satisfactorily addressed by the First Defendant in that its application to set aside was filed one day after the Default Judgment came to its attention. The First Defendant in submission also seeks to introduce a third basis for setting aside the Default Judgment namely, that although it was filed on October 9, 2017 it was only

attended to by the Registrar on November 3, 2017 after the First Defendant filed its application for a Stay of Proceedings.

26. As aforementioned the First Defendant has not satisfactorily addressed whether it has a realistic prospect of success in the Claim. The information to be provided to prove that should have been such as to persuade the Court that there is a good Defence on the merits. Usually the Affidavit of a party seeking to set aside a Default Judgment sets out the essence of their Defence to the Claim and contends that the Defence has merit so as to show a realistic prospect of the Defendant's success in defending the Claim.

27. Here the supporting Affidavit filed by the First Defendant in no way either addresses the Claim or puts forward a Defence to it. The Affidavit fails to deny or even put the Claimant to strict proof of anything pleaded in the Claim and Statement of Case. Significantly the Statement of Case includes an allegation that the First Defendnat by letter dated Jannuary 22, 2016 had admitted to the amount of $38,644,503.35 being due to the Claimant as at that date. The First Defendant's Affidavit does not, in purporting to show that there is a realistic prospect

of its success in the Claim, even deny that the amount admitted includes the sums claimed herein.

28. In summary the First Defendant has not provided in the Affidavit seeking to set aside the Default Judgment any evidence of a realistic prospect of success of a defence to the Claim that could prove that the money claimed is not owed to the Claimant. Instead, without identifying any specific dispute, the First Defendant seeks to set aside the Default Judgment on the basis of its contended realistic prospect of success of its application to stay the proceedings so the matter can be referred to Arbitration.

29. Essentially, the basis for the two Applications filed by the First Defendant is the contention that based on Clause 15 of the FIDIC contract between the parties the subject matter of the instant Claim "*must be resolved by and referred to arbitration. It is submitted that the High Court has/had no jurisdiction to entertain/deal with or enter Judgment in the Claim.*" Accordingly they say the Judgment should be set aside.

30. Further the First Defendant contends that the Claim must be stayed pursuant to **Section 7 of the Arbitration Act Chapter 5:01** or the Court's inherent jurisdiction. The First Defendants premise appears, based on its submissions, to be that the effect of the FIDIC contract and Section 7 of Arbitration Act is that it is mandatory for the Court to defer to proceeding herein being resolved by arbitration. Hence, according to the First Defendant, the Court had/has no jurisdiction to enter Default Judgment, deal with or determine the matter in any way other than to order a Stay.

31. There are two main flaws in this premise as underscored by Counsel for the Claimant in submissions.

32. Firstly, if lack of Jurisdiction is the technicality on which the First Defendant relies to prove it has a realistic prospect of success in the Claim the jurisdiction point should, according to **CPR 9.7**, have been raised by filing of an application not for a Stay but to challenge jurisdiction. Such an application had to be filed within the time prescribed for filing a Defence i.e. within 28 days of being served with the Claim and not several months later after Judgment had

been entered as occurred in the instant case. Accordingly, no point can now be entertained regarding the irregularity of the Default Judgment that was entered.

33. Secondly, it is clear from the wording of Section 7 of the Arbitration Act that staying proceedings to allow for Arbitration is not mandatory. It is done based on an exercise of discretion by the Court takin into consideration three main factors:-

a. Whether as defined by the Arbitration clause in the Contract between the parties the matter is one that it was agreed would be referred for arbitration. On the terms of the contract between the parties what was required was the existence of a dispute.

b. Whether the party seeking to have the matter arbitrated was ready and willing to do so at the time when the Claim was filed.

c. Whether there is no sufficient reason why the matter should not be referred.

34. In **CV2017-02463** a decision was given against the First Defendants determining a similar Application for Stay of Proceedings with a view to Arbitration. The reasons

stated therein also apply in the instant matter and are reiterated herein as follows:

"*15. I agreed with the Claimant's submission that the first major hurdle facing the 1st Defendant, as a reason why a stay for arbitration is not appropriate, is the fact that no dispute has been identified. Thus, there is no matter agreed to be referred as required by the Arbitration Act as basis for a stay. …… .*

16. ……All there is in this case is a failure to pay and the 1st Defendant has only said in a response dating back one year ago on April 17, 2017 to pre-action requests for payment that the claim is being investigated.

17. …..non-payment without more does not provide any basis for holding that there is a dispute, which could be 'a matter agreed to be referred' for purposes of our Arbitration Act. Instead non-payment may be a result of inability to pay or simply a matter of delayed payment that is prejudicial to the party awaiting payment. ……

19. As to the second point to be looked at namely, whether there is sufficient reason why the matter should not be stayed for arbitration, it is my view that the Claimant has provided compelling reasons why the matter should not be stayed. There is the fact that the Claimant would be unduly prejudiced since the

1st Defendant has made it known that it is in a position of financial difficulties. As such, any delay for arbitration may make the Claimant less likely to recover on the claim due to inability to pay. On the other hand if the matter remains before the Court it must be Defended in a timely manner and if there is no good defence the claimant can benefit, without delay, from getting default judgment, summary judgment, judgment on admissions etc depending on the steps taken hereafter by the 1st Defendant.

20. Additionally, as highlighted in the Judgments of Seepersad J and Rampersad J there are significant public interest issues to be determined in these matters, so it is appropriate to have same ventilated in the Courts as opposed to in a private arbitration.

21. The third and final point to be considered is whether the 1st Defendant was always ready and willing to proceed with arbitration. In my view the Claimant correctly identified this as a major hurdle for the 1st Defendant, because the 1st Defendant has done nothing to show such readiness and willingness except to file this application for a stay. The 1st Defendant cited LJ Williams Ltd v Zim Integrated Shipping Services Ltd CV No. PO59 of 2014 as authority that the

mere 'say-so' in the affidavit in support of its application is sufficient to prove readiness.

22. However, as pointed out by counsel for the Claimant, that case provides no such authority. Instead it is only where such 'say-so' in evidence is un-contradicted that the Court may accept that the party was ready, since there may be no reason to reject it. In the instant matter the Claimant has contradicted the 1st Defendant's claim to being willing and ready to arbitrate. I find that it is clear on the evidence in the affidavits that the Defendant was not ready or willing to proactively move to arbitrate anything concerning the payments claimed. It never intended to take any such steps until, in reactive mode, it decided to use the possibility of arbitration as a counter attack to the proceedings filed in Court by the Claimant."

35. In addition, the position that in the instant case there should be no stay of proceedings is further bolstered by the fact that the manner whereby a dispute could have been identified early on is provided for at Clause 11.3 of the FIDIC Contract between the parties. Based on an application of that Clause, had there been any disagreement about the

amount to be paid, that sum could have been withheld from any payment which was otherwise due to be made within 28 days of delivery of a statement. Importantly, the First Defendant was required to ***give notice of such disagreement by providing the Claimant with reasons for same*** at the time of withholding payment.

36. Up to two years after the invoices in question were delivered no payment was made and there was no notification of a disagreement with the reasons as required under the contract. Accordingly, the procedure in the contract for raising a dispute about the amount to be paid was not followed.

37. The **Heyman** and **Kall Co.** decisions referred to by the Claimant are pertinent to the wording of S.7 of the Act. Proof of a genuine dispute is required before this Court can order a stay for referral to arbitration and mere non-payment by the First Defendant cannot suffice as evidence of a genuine dispute.

38. It is my determination that the Applications for Stay of Proceedings filed both before and after the entry of Default Judgment by the Registrar did not provide information on a realistic prospect of either a

Defence on the merits to the Claim or any basis for staying the proceedings for Arbitration. There was also no basis in law for the contention that the Default Judgment was entered irregularly by the Registrar.

39. For these reasons the First Defendants Notices of Application are dismissed with costs to be paid to the Claimant to be assessed if not agreed.

Dated this 20th day of April, 2018

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely JRC1