THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2017-02463

Between

MOOTILAL RAMHIT AND SONS CONTRACTING LIMITED

Claimant

And

EDUCATION FACILITIES COMPANY LIMITED [EFCL]

First Defendant

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Defendant

Before Her Honour Madam Justice Eleanor Donaldson-Honeywell

Appearances:

Mr P. Deonarine, Mr. V. Deonarine and Ms Odette Clerk for the Claimant.

Ms Persad and Ms. Piper for the 1st Defendant.

Mr Byam, Ms L. Almarales and Ms. S. Latchan for the 2nd Defendant.

Delivered on January 15, 2018

Oral Ruling

1. There is one application filed by the Claimant for the scheduling of a Case Management Conference [CMC] and two other applications by the Defendants before the Court for consideration. On the last occasion I gave an indication of my preliminary views on

the issues raised in the 1st Defendant's Application to stay the proceedings to allow for Arbitration.

2. My final ruling as to the Application for a Stay was deferred for two reasons. Firstly, I felt that a decision on the 2nd Defendant's application to strike out the Claim against it and dismiss the Claim on the preliminary points raised, had to be considered first. That application was on grounds, inter alia, of there being no basis on the pleadings for a finding that the 2nd Defendant was the Principal of the 1st and in any event, and even if there were such a relationship of agency as to render the 2nd Defendant a party to the transactions in question, the said transactions were entered into outside of the authorized procedures under the Central Tenders Board Act. According to the 2nd Defendant, there being no proper authority when the 1st Defendant entered the contracts in question "there is no contract between the government and the other party".

3. Secondly, my reason for deferring the decision as to the stay was to await delivery of three pending Judgments relevant to the issues at hand. In one matter Madam Justice Kangaloo had ordered a Stay and the Reasons for the Decision are pending, In another Mr. Justice Rampersad was due to decide on whether to grant a stay for arbitration. In the third matter Mr. Justice Seepersad was deciding on whether to set aside a Judgment entered against the 2nd Defendant in circumstances where the same issues raised in the 2nd Defendant's application to strike out herein were to be raised in a Defence.

4. All submissions have now been filed in relation to the 2nd Defendant's Application. I have also had the benefit of reading the decision of Seepersad J in **Claim No. CV2017-02132 Mootilal Ramhit and Sons Contracting Ltd v EFCL and AG** where he allowed for the 2nd Defendant to defend the matter by setting aside the Judgment entered. I have decided not to grant the 2nd Defendant's application to strike out the Claim against it. 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.

5. 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.

6. The latter issue raised has been shown by the submissions of the Claimant to require further examination as to the provisions of the CTB Act applied to the pleaded case and evidence thereon. Some matters that appear to require further consideration include the following:
    - What is the effect of Section 20(1) A(c) of the CTB Act? Does it intend that when the Government of Trinidad and Tobago [GORTT] contracts out certain works to a State Company the CTB ACT does not apply to the sub-contractors thereunder e.g in this case could GORTT be seen to have contracted the works to EFCL and then EFCL sub-contracted to the Claimant? If so then would the GORTT would be authorized to enter into contracts with the EFCL without going through the CTB? Detailed evidence of the contracting mechanism would have to be considered as well as an analysis of the effect of the CTB Act thereon before deciding whether the 2nd Defendant's position is a good Defence to liability. Accordingly, it cannot be said at this stage that this position is basis for striking out or dismissing the Claim.
    - Is the Judgment of Nelson J in **AG v Mootilal Ramhit and Sons Contracting Limited CV.A No. 124 of 1996** still persuasive? Is it distinguishable on the facts pleaded by the Claimant and yet to be pleaded by the other parties and presented in evidence? Is it that failure of a State Agency to apply CTB Act procedures cannot deprive the other party of rights to sue on the contract? Or does this only apply where that other party had no control over and/or could not be aware of a particular instance of failure to apply CTB procedures? If so these are issues of fact to be determined.

7. Even if the contention of the 2nd Defendant that "there is no contract" and/or there is no agency can be said to have been so borne out by submissions with no evidence that it is a foregone conclusion, there remains the option of the Claimant to amend its case by adding alternate causes of action in equity. Such possible alternate pleadings e.g. unjust enrichment, have been referred to by both parties in their submissions.

8. As it relates to the 2nd Defendant's submissions that Ministries do not have contracting power and so should not have been named in the Claimant's pleadings as Principals in the transaction, the Claimant may have been imprecise in its pleadings. That too can be addressed by amendment.

9. No permission is required for the Claimant to amend its pleadings as the first CMC has not yet commenced. Striking out is a "nuclear option" reserved for "hopeless cases" unsalvageable by addition of particulars or amendment of pleadings. In all the circumstances all that the 2nd Defendant has succeeded in proving in the submissions on the striking out application is firstly, that they have a prima facie Defence that should be pleaded, supported by evidence and tried and secondly, that the Claimant's Statement of Case may need be strengthened by amendments.

10. In considering the same points raised by the 2nd Defendant herein which were being put forward as a Defence in **CV2017-02132** a matter involving the same parties, Seepersad J went further; he said "*This Court is of the view that the legal arguments advanced by the 2nd Defendant do in fact have a realistic prospect of success and the articulated position does carry a degree of conviction***."** It was for this reason, as well as the strong public interest aspects of the case highlighted in his Ruling, that Seepersad J made an order setting aside the Default Judgment previously entered and allowing the 2nd Defendant to file a Defence.

11. Likewise in this matter, 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. Accordingly the 2nd Defendant's Application to strike out the Claimant's case is dismissed.

12. Turning to the 1st Defendant's Application for the action herein to be stayed with a view to the parties pursuing arbitration, it is clear that the issues raised by the 2nd Defendant remain to be considered in any determination of the Claim whether before this Court or by an Arbitrator.

13. On the last occasion I had examined the 5 hurdles identified by the Claimant that militated against a stay of the matter for arbitration. I accepted that some were relevant to the main issues to be considered under Section 7 of the Arbitration Act, namely as 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]*

14. In addition to my consideration of submissions filed by the parties I have now read the decision delivered by Rampersad J on the same issues raised herein.

15. As it relates to issue number one underscored at Section 7 of the Arbitration Act, under the FIDIC contract between the parties the matter agreed to be referred under sub-clause 20.4 is "*a dispute….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*….". I had mentioned at the last hearing that 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. The 1st Defendant also in that written response asked that the Claimant wait 21 days before commencing litigation. They failed to respond to a further pre-action letter after the 21 days elapsed.

17. The 1st Defendant citing **Halki Shipping Co v Sopex Oils Ltd [1998]2 All E.R. 23** says that in a case of non-payment, the mere fact that the Claimant filed a claim means there is a dispute. That case was distinguished by the Claimant however, in that it turned on entirely different legislation applicable in the UK. I agree with the Claimant's position as it is my view that 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.

18. Rampersad J expressed the same view that non-payment per se is not enough in **Kall Co Ltd v EFCL Claim No. CV2017 – 01397** at paragraphs 61 to 65. I adopt in full his analysis as to what is required for the Court to exercise a discretion, that is, more than a "rubber stamping" role, when deciding whether there is a dispute that can be dealt with in arbitration such that Court proceedings should be stayed. It cannot be that a party can simply come to court and say I'm not paying, therefore there is a dispute, and then the Court in an automatic reaction stays proceedings for arbitration. The party seeking the stay must at least indicate that the reason for non-payment is that liability to pay is disputed and give a reason why so.

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 procced 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.

23. In addition to the threshold matters to be considered under the Arbitration Act in deciding whether to stay a matter with a view to Arbitration there is also the inherent jurisdiction of the Court to stay proceedings to be considered. This was the second basis for the 1st Defendant's application. The 1st Defendant's Affidavit in support of the Application for a Stay has not set out any grounds as to why a stay, so that the parties can commence arbitration, is in the public interest. My decision on this point is therefore guided by CPR 1.1(1) which sets out the overriding objective of the Rules to enable the Courts to deal with cases justly.

24. In this matter the stay of the proceedings will not be in the interest of justice since it will put the parties on unequal footing. This is so as it would delay the Claimant's access to CPR provisions on default judgment, summary judgment, judgment on admissions etc and other procedures geared to expeditious determination of a Claim, when there may be no Defence to same, thus giving the 1st Defendant an advantage.

25. In all the circumstances, I rule in favour of the Claimant that the 1st Defendant has not surmounted any of the relevant hurdles to making out a case for the Court to exercise its discretion to stay its hearing of this case to allow for arbitration. The application for a stay is dismissed.

26. The 1st CMC in this matter has not yet commenced. The Claimant's application that the CMC be scheduled is granted, however the CMC will be set for a date after the expiry of 28 days from this Ruling. The Defendants are granted extensions of time of 28 days from the date of this Ruling to file their Defences and Counterclaims (if any).

27. The costs of the dismissed Applications of the 1st and 2nd Defendants in an amount to be assessed, if not agreed, are to be paid by the 1st and 2nd Defendants respectively to the Claimant.

…….

Eleanor Joye Donaldson-Honeywell

Judge