THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

San Fernando

Claim No. CV 2018-02551

BETWEEN

Mootilal Ramhit and sons Contracting Limited

Claimant

And

Trinidad and Tobago Housing Development

Defendant

Before The Honourable Madam Justice Eleanor Donaldson-Honeywell

Delivered on February 14, 2019

Appearances

Mr. Ramesh Lawrence Maharaj SC, Mr Prakash Deonarine and Ms. Krystal Kawal for the Claimants

Mr. Dharmendra Punwasee, Mr. Jerome Rajcoomar and Ms. Kimberleigh Peterson for the Defendant

Ruling

A. Introduction

1. There are three separate applications to be determined at this early stage of proceedings, in a construction contract Claim that was commenced by the Claimant against the backdrop of a unique pre-action history.

2. The unique circumstance of the pre-action history is that this Claim arose as a follow-up to threatened litigation in a Pre-Action Protocol ["PAP"] letter sent to the party that is now the Claimant, Mootilal Ramhit and Sons Contracting Limited ["MRSCL"]. That PAP letter dated June 18, 2018 was sent by counsel for The Trinidad and Tobago Housing Development Corporation ["HDC"]. It sought a response from MRSCL to allegations, inter alia, of fraud and bid-rigging concerning MRSCL having been awarded certain housing development contracts, including the Design Build Contract for a 720-home Development at Trestrail Lands, D'abadie ["the contract"]. The said contract is in the form of the FIDIC First Edition 1999 Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works ["FIDIC"]

3. The HDC was the intended Claimant in litigation threatened in the June 18, 2018 PAP letter. However, MRSCL responded to that letter, without much delay, on July 17, 2018. In so doing MRSCL's response not only denied all allegations of wrongdoing but expressly served as a PAP letter threatening the HDC in turn with litigation claiming payments outstanding on the Contract. Another unusual aspect of this pre-action history is that without awaiting a response from the HDC as to
    a. whether the answers given to the fraud allegations were satisfactory,
    b. whether HDC was prepared to pay the alleged amounts owed, or
    c. whether the parties could negotiate a timely and mutually beneficial out of Court resolution,

    MRSCL immediately filed the instant Claim on the same date as their PAP letter. Thus MRSCL, perhaps for strategic reasons, "stole a march" on the HDC by filing the instant Claim before the PAP process for the HDC's threatened Claim was even completed.

4. Though not directly an issue to be determined, this unique approach taken by the Claimant has not adhered to the Practice Directions on Pre-action Protocols issued in 2005 under the provisions of the **Civil Proceedings Rules, 1998 (as amended) ["CPR"]**. **Part 4.2** of the Practice Direction says parties should follow a reasonable procedure suitable to their particular circumstances which is intended to avoid litigation. There is provision for the Defendant to send a detailed response to the PAP. Then sub-

paragraph d) provides for the parties "conducting genuine and reasonable negotiations with a view to settling the Claim economically without Court proceedings".

5. The PAP period is ideal for the parties in discussions to consider Alternate Dispute Resolution ["ADR"] methods whereby timely and specialised attention could be given to bringing the dispute to a mutually agreed end. As it relates to the subject matter of this Claim the FIDIC contract provides at clause 20.2 for disputes to be adjudicated on by a Dispute Adjudication Board. Apart from that stipulation the parties to disputes such as this one can consider ADR methods such as arbitration or mediation conducted with the assistance of persons with specialised knowledge and experience in the field of construction contracts.

6. In the instant case, at the same time as responding to the PAP letter sent by the HDC which had made fraud allegations, MRSCL made sure no pre-action negotiation was possible with regard to their Claim for monies owed, by filing the said Claim the same day. The explanation given by MRSCL as to why it felt that resolution by alternate means was not possible before filing of a Claim was that the allegations of lack of integrity made against it by the HDC were such that it could not await negotiations. The Claimant, MRSCL, preferred to have matters crystalized at Court.

7. There is a further breach of the Practice Direction on PAPs in that the response to the HDC's PAP also served as the Claimant's PAP for the instant Claim for money owed. **Appendix A to the Practice Direction** on PAPs which governs "Claims for a Specified Sum of Money" therefore applies. Under that Appendix, at **Part 1.4,** the HDC as prospective Defendant was to have had 14 days to respond. However, the Claimant did not give the HDC even one day to respond.

8. It is in this context that the three applications to be determined arose. My preliminary comment is that had the PAP Practice Direction been properly adhered to, the time

and costs expended herein by the parties, particularly as it relates to the Claimant's applications, could have been avoided.

B. <u>The Applications</u>

9. The HDC, which was the threatened Claimant but is now the Defendant herein required more time to file a Defence. The Claimant only agreed to one short extension. Thereafter, the Defendant's Notice of Application ["NOA"] pursuant to **Part 10.3(5)** of the CPR for an extension of time to December 4, 2018 was filed on October 3, 2018 for determination by the Court. This was the first application.

10. The NOA was supported by Affidavits dated October 4 and November 5 of Kimberleigh Peterson, their instructing Attorney-at-Law. The Claimant filed an Affidavit opposing the grant of an extension of time to the Defendant. It was sworn on October 9, 2018 by Krystal Kawal, their instructing Attorney-at-Law.

11. The second two applications were set out in the NOA filed by the Claimant on October 9, 2018. The NOA includes an application pursuant to **CPR Part 15** for Summary Judgement as to part of the Claim in the amount of $28,890,867.97 on Interim Payment Certificate #2 ["IPC#2"] plus interest and an application pursuant to **CPR 17.5(1) (d)** for an interim order that the lost profits aspect of the Claim in the amount of $304,662,251.63 plus interest be paid to the Claimant. The NOA was supported by an Affidavit of Mr. Etienne Mendez, Consultant Manager of the Claimant Company. The Defendant did not file an Affidavit in response seven days before the hearing date as required at **CPR 15.5 (2).**

12. On November 7, 2018 I decided to determine the three applications together, giving the Defendant permission to file Affidavit evidence in response to the Claimant's Applications and allowing both sides time to file written submissions before a decision would be delivered. The Defendant's Affidavit of Romel Ramarack, Divisional Manager at the HDC, was filed on November 21, 2018 setting out the elements of the Defences it would be relying on. It completely omitted any of the fraud-related allegations initially threatened in the HDCs June 2018 letter.

13. The Defendant in submissions raised the issue of what it saw as the prematureness of the Claimant's summary Judgement application. It was submitted that no such application should have been made or considered until the Defendant had filed a Defence. Accordingly, the Court should consider the application for an extension of time first before considering whether to grant Summary Judgement to the Claimant. The authorities cited by the Defendant included obiter dicta of Pemberton J, as she then was, in **Hosam v Hosam CV2011-04355** and the decision of the Jamaican Court of Appeal in **Fiesta Jamaica Limited v National Water Commission [2010] JMCA Civ 4.**

14. On the other hand, the Claimant pointed out that in **Hosam,** Pemberton J duly considered the Summary Judgement application, although no Defence had been filed. This was achieved by assessing the merits of the possible Defence as gleaned from the Defendant's Affidavit in support of an application for extension of time to file the Defence. Furthermore, the Claimant argued that paragraph 25 of the Judgement in **Roland James v AG Civ App No 44 of 2014** provides authority that a Summary Judgement Application against a Defendant can be filed before an application is filed by that Defendant for permission to file their Defence out of time.

15. This is not in my view an accurate statement regarding the point made at paragraph 25 of **Roland James**. The more accurate summary of that authority given by Counsel for the Defendant in Reply submissions at paragraph 3, provided guidance in my determination.

16. What Mendonca JA explained at paragraph 25 of **Roland James** was how the Court is to treat with an application for extension of time where the application is opposed on the basis that the defendant has no meritorious Defence. Generally speaking it is not necessary for a Defendant to file a Draft Defence or give evidence of the proposed Defence in applying for an extension of time to file one. However, once the Claimant has given Notice that lack of merit in a prospective Defence is being raised as a reason to oppose the extension, then the Court could only refuse the extension application

on grounds of lack of merit if it is of the view that a Summary Judgement application would have succeeded.

17. In this case the Claimant has, by way of the Summary Judgement Application, clearly given notice that it objects to the extension on the basis of lack of merit of any possible Defence. As such in considering the application for an extension of time for the Defence I must also consider the merit of the Defence.

18. Heavy weather was made of the prematurity issue on both sides, with additional authorities submitted for my consideration after the time permitted. However, while it is clear that in terms of practicality, an application for Summary Judgement would be better placed after the Claimant has seen what the Defendant will put forward by way of a Defence, I have made no determination against the Claimant based on the timing of its application.

19. I reiterate the observation that time and costs could have been saved if the Claimant had awaited the ventilation of opposing positions in the PAP period not only before filing a Claim but before applying for Summary Judgement in the Claim. The actions of the Claimant were, in the unique context outlined above, somewhat premature from the filing of the Claim to the filing of the instant applications. However, prematurity is of no relevance to my determination herein.

20. As it relates to what application is to be considered first, there is in my view no strict determination in any of the authorities cited by the parties. It may indeed, in some cases, be more practical to consider the strength of the Defence first where notice is given that the extension of time is challenged based on its lack of merit.

21. In the instant case however, the application for Summary Judgment is in relation to a limited part of the Claimant's claim against the Defendant. Accordingly, even if I were to find in favour of the Claimant on the application for summary judgment in relation to the amount claimed under IPC#2, the Defendant's application for an extension of time to file a defence in relation to the remaining parts of the claim must be

addressed. Accordingly, the consideration of merit first in relation to the Summary Judgement application regarding part of the Claim will not obviate the need to assess all other factors to be considered in relation to the extension.

22. In all the circumstances, I have considered all the factors together in relation to the extension of time and the summary judgement applications. The Application for interim payments also required my consideration of the merits of the Claim as a whole. However, the standard of proof is different from the standard that applies to the Summary Judgement applications. I considered that application separately. The applicable law, factual matrix and my findings in relation to each application are set out below.

C. <u>Findings</u>

Extension of Time to File Defence

23. There is no specific test set out in the CPR governing this application made under **CPR 10.3(5).** The relevant considerations have however, been established by the Court of Appeal in **Dr. Keith Rowley v Anand Ramlogan**[1] and **Roland James v The Attorney General**[2].

24. The approach to be adopted by the Court in determining an application for an extension of time was succinctly explained by Rajnauth-Lee J.A. (as she then was) in the following terms:

> "In the above cases, the Court of Appeal was disposed to the view, and I agree, that the trial judge's approach in applications to extend time should not be restrictive. In such applications, there are several factors which the trial judge should take into account, that is to say Rule 26.7 factors (without the mandatory requirements), the overriding objective and the question of prejudice. These factors, however, are not to be regarded as *"hurdles to be cleared"* in the determination of an application to extend time. They are

[1] Civ. App. P125 of 2014.
[2] Civ. App. No. 44 of 2014.

factors to be borne in mind by the trial judge in determining whether he should grant or refuse an application for an extension of time. The trial judge has to balance the various factors and will attach such weight to each having regard to the circumstances of the case. Of course, not all the factors will be relevant to every case and the list of factors is not exhaustive. All the circumstances must be considered."

25. A similar view was expressed by Mendonca JA in **Roland James** at paragraphs 20-25 where the Honourable Justice of Appeal also noted that:

> "So far as the merits of the defence are concerned the applicant is not required to establish that he has a good defence or for that matter to outline the merits of the defence."

26. As aforementioned however, Mendonca JA in **Roland James** indicated that the general position that establishing a good defence is not required does not apply where the Claimant gave notice that whether a good Defence is possible will be challenged. Such Notice could be by way of response to the Application for Extension of Time or as in this case by applying for Summary Judgement. Since notice challenging the merits of any possible Defence regarding at least part of the Claim has been given, I will also consider the merits of the proposed defence in deciding whether to extend the time to file it.

27. Having regard to the abovementioned authorities the following factors are relevant to the defendant's application for an extension of time:
    a. The CPR 26.7 factors other than the threshold requirement:
    (a) whether the application was made promptly;
    (b) whether the failure to comply was not intentional;
    (c) whether there is a good explanation for the application;
    (d) whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions;

(e) the interests of the administration of justice;

(f) whether the failure to comply was due to the party or his attorney;

(g) whether the failure to comply has been or can be remedied within a reasonable time; and

(h) whether the trial date or any likely trial date can still be met if relief is granted

b. The CPR 1.1(1) overriding objective factors:

(a) ensuring, as far as practicable, that the parties are on an equal footing;

(b) saving expenses;

(c) dealing with case in ways which are proportionate to –

i. the amount of money involved;

ii. the importance of the case;

iii. the complexity of the issues; and

iv. the financial position of each party;

(d) ensuring that it is dealt with expeditiously; and

(e) Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

c. Prejudice:

Whether the interests of the Claimant will be more prejudiced than the interests of the Defendant if the extension of time is granted or vice versa and the issue of prejudice generally, which can include possible prejudice to the community as a whole.

28. Applying the approach outlined above, I considered all the evidence put forward by the parties. I found that the information provided by the Defendant in the two Affidavits of Kimberleigh Peterson which is summarised at paragraphs 8 to 30 of written submissions for the Defendant, fully supported a determination in the Defendant's favour regarding all the factors set out above.

29. In particular, taking into consideration that no time was given after the PAP letter for a response from the Defendant to this Claim, I agree that the application for an extension was made promptly in circumstances where the Long Vacation commenced shortly after the Claim was filed. Furthermore, the application was made within the time for filing a Defence which by agreement from the other side was by October 9, 2018.

30. It is clear to me that the failure to file a Defence in time was not intentional as very plausible reasons are fully explained. I have no doubt that the Defendant genuinely faced difficulties in light of the number of actions involving millions of dollars it was dealing with at the same time. It is clear too that for the instructing attorney retained, addressing a matter involving the significant amounts claimed herein to be paid by taxpayers, the bulk of documentation, the possible conflicts with a prospective witness and the need to retain appropriate counsel, could reasonably have taken more time than is provided for under the CPR to file a Defence.

31. Based on the foregoing, the failure to meet the deadline was not based on any fault of either the Defendant or its Attorneys. Overall the explanations given for the delay were good. I noted that the Claimant sought to cast doubt on Ms. Peterson's evidence about needing more time due to the sheer volume of documents to be reviewed. The Claimant suggested that based on having sent a PAP letter in June 2018 alleging fraud regarding the same contract, the Defendant should be familiar with all the documentation.

32. However, the Defendant need not necessarily have been prepared for the issues raised by the Claimant in their PAP letter and this Claim, which were issued on the same day giving no time for a response or negotiations. The subject matter of this Claim is one of the contracts referred to in the HDC's earlier PAP which raised fraud allegations. However, apart from the fact that the same contract is involved the HDC's PAP allegations bear no relation to what the Claimant has pleaded herein.

33. The allegations in the HDC's PAP were about fraud. This Claim concerns the allegation that pursuant to the Contract an admitted amount is owed to the Claimant on an IPC. It also concerns the allegation of extensive profits owed on the alleged lawful termination of the contract by the Claimant by virtue of the FIDIC terms or by virtue of common law repudiation by the Defendant. In the circumstances, there is no merit to the Claimant's contention that the Defendant should have been familiar enough with all documentation to quickly prepare a Defence.

34. There was no lack of compliance by the Defendant with any other rules of the CPR. As it relates to whether granting this extension of time will be in the interest of the Administration of Justice, I agree with the Defendant's submissions. They cited **Roland James** where at paragraph 40 Mendonca J, observations apply equally to this case, namely that:

> "*Clearly as between the parties, the administration of justice would favour the grant of the extension. To refuse the application would mean the defendant would lose by default and be liable to pay damages to the claimant, which will be met by public funds, without a trial and therefore without an opportunity to put forward evidence in support of the defence and to challenge the claimant's claim no matter how weak or unfounded it might be. So far as other court users are concerned, the practical effect is that time has been spent in dealing with the application in the Court below and the appeal before this Court. Had the application not been opposed and the order of the Judge appealed I do not think it would have had any significant impact on the Court's time, nor any significant impact on other court users. What has considerably enlarged the time is the claimant's decision to vigorously oppose the application and subsequently appeal to this Court. I do not think that the claimant should be able to rely on time taken up in that way*."

35. It is clear that the failure to comply with the CPR by filing a Defence on time could have been remedied in a reasonable time. This would have been so if the NOA went unopposed and the Court had granted the time requested which was until December 4, 2018. The objection to the extension of time and not the application itself has

therefore resulted in the failure to comply not being remedied for a further two months. No Trial date has been affected.

36. As it relates to the overriding objectives factors, in my view no additional costs would have been incurred had there been no objection to the Defendant's extension of time. There is no basis for finding that the extension places the parties on unequal footing if granted. Having regard to the quantum of money claimed and the complexity of the issues the grant of a reasonable extension would in my view be proportionate to the efficient management of the Claim. It would have allowed for the matter to proceed expeditiously, if there had been no objection to the December 4, 2018 extension.

37. Finally, as it relates to prejudice, it is clear that the Defendant and taxpayers will be unduly prejudiced if no extension of time to file a Defence is granted. The result will be an award of Judgement in excess of $300,000,000.00 to the Claimant without the merits of the Claim being tested.

38. On the other hand, I agree with the submission of Counsel for the Defendant that there is no evidence that there would have been prejudice to the Claimant had they agreed to the Defendant's requested extension of time to December 4, 2018. At paragraph 26 of the Defendant's submissions it is observed that at paragraphs 9 and 10 of her Affidavit Ms. Kawal deposed "on the advice of Counsel" that:

> "An extension of time will prejudice the claimant. The advice from Counsel appears, from the said paragraphs, to be advice in relation to the internal affairs and management of the claimant. This evidence is at the very least second hand hearsay in relation to which no source of knowledge has been disclosed. Furthermore, assuming that Counsel is not an employee or officer of the claimant, as one would surely expect, there is no basis for his alleged knowledge. It is therefore respectfully submitted that the evidence (paragraphs 9 and 10) carries no weight and ought to be ignored."

39. Even if the hearsay evidence of Ms. Kawal with no clarity as to source is not to be ignored, there is no merit to the reason put forward as to why the Claimant will be prejudiced. I am persuaded by the submission of Counsel for the Defendant that *"the allegations of prejudice at paragraphs 9 and 10 are connected with certain allegations raised in the defendant's pre-action letter annexed to the statement of claim as exhibit 36. That pre-action letter and the cause/s of action alluded to therein are unconnected to the case at Bar. Even if those allegations have caused prejudice to the claimant, which is not admitted, the prejudice cannot be relied on to support the claimant's objection in this application."*

40. Furthermore, the Claimant had every opportunity to address those fraud allegations and did so in its response to the HDC's PAP letter. However, the Claimant gave no time for negotiations with the HDC after that, as provided for in the Practice Directions. It is by such negotiations in good faith that the Claimant may have succeeded in lifting the weight of fraud allegations from its shoulders. The HDC may well, after being given at least 14 days to consider MRSCLs responses, have gone no further with the fraud allegations. Thus, in my view if any prejudice is suffered by the Claimant due to the allegations of fraud made by the HDC, refusing to agree to an extension of time herein will not effectively diminish the prejudice. That could have been addressed at the pre-action stage.

41. The final factor to be considered regarding the extension of time is the merit of the proposed Defence. Applying **Roland James**, I must consider that because the Claimant gave notice by way of its Summary Judgment application that one of the reasons it challenges the extension of time is that there is no Defence with a realistic prospect of success to part of the Claim. This consideration overlaps with my determination of the Summary Judgement application which will be addressed more fully under a separate heading.

42. My finding as it relates to the merit of proposed Defence for purposes of considering the extension of time Application is that the Defendant has put forward in its Affidavit of Romel Ramarack and its Submissions, the elements of a possible Defence with a

realistic prospect of success. The part of the Claim for which the Defendant had to provide proof that it had a Defence on the merits, as summarised in the Claimant's submissions, was that:

> "*i. Interim Payment Certificate #2 was certified by PSL in the amount of $22,734,100.41 on 2nd May 2016 – paragraph 8 Mendez Affidavit;*
>
> *ii. "At no point did the Defendant forward any complaints in writing or otherwise under the said contract to the Claimant in relation to the authenticity or accuracy of IPC #2" – paragraph 9 Mendez Affidavit;*
>
> *iii. The Claimant had made its position clear in relation to IPC #2 by letter dated 5 July 2016 and 22 July 2016 wherein the Claimant called upon the Defendant to make payment: paragraph 10 Mendez Affidavit;*
>
> *iv. The Defendant stated in their letter dated 25 July 2016 "…HDC shall proceed to deduct the advanced payment paid to you from the sum of $44,480,039.25 owed on Interim Payment Certificate No. 2": paragraph 11 Mendez Affidavit."*

43. The Defence put forward in the Defendant's Affidavit and submissions is not limited to the IPC#2 part in relation to which the Claimant seeks Summary Judgement. In summary, the elements of the proposed Defence gleaned from the Defendant's Affidavit are that:

    a. The Claimant breached the contract and then purported to terminate it on specified grounds provided for under clause 12.6(d) of the FIDIC terms, which said grounds were not established. Accordingly, the Claimant having breached the contract is not entitled to the damages claimed under the contract in general and including the amount alleged to have been admitted as owed on an Interim Payment Certificate ["IPC"].
    b. The Claimant's alternate basis for terminating the contract which is by virtue of the common law would not allow for entitlement to Claim for payments based on the FIDIC terms.
    c. The Claimant has repudiated the contract and the Defendant intends to counterclaim for breach of contract against the Claimant. Damages

due to the Defendant can be set-off or serve as an abatement against any amount the Court may find due to the Claimant on the allegedly admitted amount due and owing on the IPC.

44. As will be addressed more extensively hereafter, the Defence set out in the Defendant's Affidavit sufficiently satisfies the requirement of showing a realistic prospect of success.

45. The Defendant has succeeded in every respect in establishing that an extension of time should have been granted to file its Defence by December 4, 2018. That time has now passed and I will grant a further extension of time to February 21, 2019, two days from today's Ruling.

46. The Defendant argues that the Claimant acted unreasonably in refusing to agree to the extension of time and should therefore pay the costs of this application. Although there were some uniquely unsatisfactory elements of the Claimants approach to this matter at the PAP stage, the Claimant did agree to one extension for the Defendants. I do not agree that it was entirely unreasonable to insist on the Defence being filed without further delay, particularly as the Claimant claims to be out of pocket for a substantial sum of money. Furthermore, they were of the view that no Defence on the merits was genuinely possible or forthcoming.

47. Despite some of the comments made by Ms. Kawal in her affidavit I do not accept, as submitted by Counsel for the Defendant, that the refusal to agree to this extension was merely done as a "tit for tat" by the Claimant. Thus, there is no basis to penalise the Claimant in costs for the Defendant's delays.

Summary Judgement

48. The CPR sets out specifically the test required to establish that Summary Judgement should be awarded. **Part 15.2(a)** provides that the Court may give summary judgement on a Claim or part of a Claim or on a particular issue if it considers that the Defendant

has "*no realistic prospect of success on his defence to the claim, part of the claim or issue*."

49. The principles to be applied in relation to this test are well established. Similar authorities were relied on by both sides in submissions. The submission of Counsel for the Claimant on the applicable principles was correctly stated. He cited the decision in **Mercury Marketing Limited v VB Enterprises Limited CV2014-02694** where at paragraph 7 Kokaram J noted the observations of Lord Woolf in **Swain v Hillman [2001]1 All ER 91**. As summarised in the **Mercury** decision::

> "*In a summary judgment application the Court is now engaged in a thorough examination of the facts as presented in the defence (or claim), where difficult questions of law may be engaged and the interpretation of documents or determination of factual discrepancies may not need the expense and resources of a trial to resolve. To determine whether the Defendant's prospect of success is real, the Court must be satisfied that the defence advances grounds which are more than arguable and the chances of succeeding on the propositions advanced are not speculative nor fanciful but deserves fuller investigation"*

50. At paragraph 9 of **Mercury** the following principles to be taken into account regarding a Summary Judgement application were outlined:

> *"i. The Court should not conduct a mini trial without giving the parties ample opportunity to present their evidence through witness statements and the process of disclosure and further information;*
>
> *ii. The Court must consider whether this Defendant has a realistic as opposed to a fanciful prospect of success;*
>
> *iii. A realistic defence is one that carries some degree of conviction. This means a defence that is more than merely arguable;*
>
> *iv. This does not mean that the Court must take at face value and without analysis everything the Defendant says in his statements before the Court. In some cases it may be clear there is no real substance in the factual assertions*

made, particularly if contradicted by contemporaneous documents. However, in reaching its conclusion the Court must take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence which can reasonably be expected to be available at trial;

v. Where a party advances a groundless defence or no defence it would be pointless and wasteful to put the particular case through such processes, since the outcome is a foregone conclusion"

51. The Defendant by its submissions cited **Blackstone's Civil Practice at para 34.22** to persuade the Court that there should be a reluctance to award summary judgement where the Claim involves disputes of fact or contractual issues requiring disclosure of documents, investigation, cross-examination and testing at Trial.

52. The part of the Claim in relation to which summary Judgement is sought has been set out above. However, for a full consideration of the Summary Judgment application, in relation to which the Claimant had the burden of proving there is no realistic prospect of a successful Defence, I have considered the pleadings in the Statement of Case as a whole. This broader consideration is relevant in that I have noted, as underscored by the Defendant, that elements of a possible Defence would have been apparent to the Claimant even from its own pleadings. As the Claimant's pleadings and evidence are usefully summarised in the Defendant's submissions I have drawn from same in considering the following factual matrix.

53. The Claimant's pleaded case against the defendant is in contract. The allegation is that by letter of acceptance dated February 19, 2014 the Defendant accepted the Claimant's tender for Design and Build of the Defendant's Housing Development at Trestrail Lands, D'Abadie- Package 1 which involved Construction of 720 Housing Units and Related Infrastructure ("the Project") for the sum of $1,053,452,969.00 inclusive of Value Added Tax (VAT).

54. The parties subsequently entered into a contract dated April 28, 2014.

55. The Claimant alleges that in accordance with the terms of the contract, on April 20, 2016 it submitted an application for an interim payment in the sum of $245,759,070.03 plus VAT for works completed under the contract. The Claimant says that the Engineer's designate, Project Specialists Limited ["PSL"], assessed the value of the works completed and issued an Interim Payment Certificate for $22,734,100.41 inclusive of VAT [IPC#2]. Further, the defendant failed to pay the amount approved by PSL in IPC#2 in accordance with the terms of the contract.

56. Further, the claimant alleges that by a Notice of Termination dated May 4, 2016 the claimant gave notice of termination of the contract pursuant to Sub-clause to 16.2(d) and (g), to take effect on May 19, 2016 (later extended by the claimant to June 20, 2016), on the following grounds:

    a. Re 16.2(d) -the Defendant had failed to substantially perform its obligations in that:
        i. The Defendant had failed to notify the Claimant of a Commencement Date in breach of Sub-clause 8.1;
        ii. The Defendant had failed to issue a Notice of Right to Access to Site in accordance with Sub-clause 2.1
        iii. The Defendant had failed to pay a mobilization advance of 10% of the Contract Sum despite delivery of the Claimant's Advance Payment Security.

    b. Re 16.2(g) - there was an occurrence of circumstances which are equivalent to insolvency, bankruptcy and compounding with creditors in that in the Mid Term Review of the Economy delivered to the Parliament on April 8, 2016 the Honourable Colm Imbert, MP, Minister of Finance declared publicly that:

        "These two factors sharply reduced available liquidity in the financial system, which also acted as a break on Government spending. At the same time, we were close to the limits in Government borrowing and thus could not finalize a number of loan agreements entered by the

previous administration for Government projects, simply because we did not have the lawful authority to conclude these financing arrangements"

Which statement the Claimant interpreted as tantamount to evidence that the Defendant is unable to pay its debts.

57. By reason of these pleaded matters the Claimant claims that it is entitled to:
    - **a.** Payment of the sum of $28,890,867.97 being the amount due under IPC#2 with accrued interest in accordance with the terms of the contract
    - **b.** Payment of the sum of $225,550,983.787 or any part thereof together with interest thereon (this is the difference between the amount the Claimant sought to have PSL approve in the interim payment application as the value of works completed and the amount PSL actually assessed to be the value of the works completed by the claimant under the contract); and
    - **c.** Payment of $305,662,251.63, being its claim for loss of profit, together with interest thereon.

58. The Claimant relies on the affidavit of Etienne Mendez (the Mendez affidavit). Mr. Mendez gives evidence that the parties entered into the contract for the Project, a fact which is not disputed. He says generally and in relation to the IPC#2 that:
    - **a.** At the Mid-Year Budget Review delivered on April 8, 2016 the Honourable Colm Imbert, MP, Minister of Finance, stated that, due to factors which "sharply reduced available liquidity" of the Government of the Republic of Trinidad and Tobago (GROTT), it "could not finalize a number of loan arrangements entered by the previous administration for Government projects" …
    - **b.** At a meeting on April 16, 2016 the Defendant's representatives expressed inability to finance the project and requested a revision.
    - **c.** By letters dated April 20, 2016 and May 2, 2016 the Claimant submitted its application for IPC #2 in the sum of $245,759,070.03 plus VAT. The application was submitted together with supporting documents and monthly progress reports for the period June 21, 2015 to March 20, 2016.

d. On May 2, 2016 IPC#2 was issued by PSL in the amount of $22,734,100.41 inclusive of VAT. That sum has not been paid by the Defendant.

e. At a meeting on May 3, 2016 the Defendant reiterated inability to fund the project as is.

f. The Defendant has not challenged the authenticity or accuracy of IPC#2 in accordance with the provisions of the contract. On the contrary, it was the Claimant who objected to PSL's assessment.

g. The Claimant issued its Notice of Termination on May 4, 2016 pursuant to *inter alia* sub-clause 16.2(d) of the Contract, namely failure of the HDC to perform its obligations.

h. The Defendant by letter dated May 17, 2016 responded to the Notice of Termination stating, inter alia, that the Claimant has failed to establish the 16.2(d) grounds for termination.

i. The parties held ongoing discussions with a view to continuing the project. At a meeting on June 10, 2016 Romel Ramharack reiterated that the Defendant was unable to fund the project without it being revised. The Claimant extended the deadline for termination to June 30, 2016 to facilitate discussions between the parties.

j. Notwithstanding its objection to PSL's assessment, the Claimant called upon the Defendant to pay the sum certified in IPC#2 by letters dated June 5, 2016 and June 22, 2016.

k. By letter dated June 25, 2016 the Defendant admitted that the sum of $20,208,089.25 exclusive of VAT was owed to the Claimant.

l. The Claimant subsequently wrote to the Defendant on August 10, 2016 in an effort to recover payment and to indicate its intention to refer the Defendant's non-payment to a Dispute Adjudication Board (under a provision in the contract).

59. It is clear to me from the evidence of Mr. Mendez highlighted in bold above that the Claimant was fully aware, that to the extent that the Claimant relied on proper termination of the contract based on its May 4, 2016 Notice of Termination, the

Defendant had a Defence to the Claim. The Defendant had foreshadowed this in its letters to the Claimant. The Defendant's position was that it had not failed to meet any obligations. Instead it was the Claimant that had failed to meet design presentation and work progress obligations.

60. Furthermore, the Claimant's termination notice also relied on FIDIC clause 16.2(G) which required proof of certain facts regarding insolvency of the Defendant which could not be established. The Defendant had informed the Claimant by letter dated May 17, 2016, even before IPC#2 was due for payment, that if it did not withdraw the ill-founded Notice of Termination the Defendant would consider the Claimant to have breached the contract. The Defendant expressed in the May 17, 2016 letter its intention to pursue compensation from the Claimant for that breach. Based on clause 14.7 of the FIDIC contract, payment of IPC#2 was not due until 56 days after PSL received the Contractor's Statement and supporting documents. That date was April 20, 2016, so no payment was due until around June 15, 2016.

61. The Defendant's letter dated May 17, 2016 warned that "*In the event that MRSCL fails to withdraw the Notice of Termination prior to 19th May 2016, MRSCL will be considered to have abandoned the Works and demonstrated the intention not to continue performance of its obligation under the Contract and the Employer will, in accordance with sub-clause 4.2 [Performance Security], make a claim under the Performance Security.*"

62. So even on the face of the Statement of Case with no indication of a Defence by the Defendant, it is clear that the Claimant could not establish that there was no Defence with a realistic prospect of success. It is in that context that the Claimant has sought, in submissions, to persuade the Court that the termination of the contract was properly done, not based solely on the FIDIC terms but also on the common law right to terminate on grounds that the Defendant allegedly was unable to finance the project.

63. On the face of the Claimant's pleadings there was not a sufficiently established case that the Defendant had no prospect of successfully defending the Claim. It was clear that a possible set-off or abatement cross-claim and a counterclaim for breach of contract were in the Defendant's contemplation. However, there are points of interpretation of clause 2.5 and other clauses in the FIDIC contract which, if applicable, the Claimant says would debar such Defences.

64. The proposed Defences of the Defendant can be gleaned from the Affidavit of Mr. Ramerack as summarised in submissions. Importantly, as it relates to IPC#2 Mr. Ramarack noted that the amount applied for was extremely high given the amount of work completed on the Project, was inconsistent with the Claimant's own cash flow projection and included the second instalment of the Advance Payment which had not yet become due and payable. He confirmed that PSL assessed the works as having a value of $22,734,100.41 inclusive of VAT and issued IPC2 on 4th May 2016.

65. As it relates to the clause 16.2(d) basis set out in the Notice of Termination, Mr. Ramarack's Affidavit sets out evidence based on which it could show that the Claimant could not prove that the Defendant had failed to meet its obligations. This evidence is summarised at paragraph 81 to 84 of the Defendant's submissions.

66. At paragraph 85 of submissions the Defendant highlights that the Claimant presented evidence only of its speculation, based on a statement from the Minister who does not speak for the HDC as well as MRSCLs own self–serving meeting minutes, that the HDC is unable to finance the contract. The issue as to whether the Defendant was unable to finance the project or expressed to the Claimant that it was unable to do so is clearly an issue of fact that must be determined at Trial.

67. At paragraph 104 of submissions counsel for the Defendant raises the point of law in contention between the parties that in the context of a termination of the contract IPC#2, which was to have been an interim payment, cannot now be paid until there is a final assessment of the value of the work by the engineer. The FIDIC clauses said to be applicable in the circumstances are Sub-Clause 61.4(b) read together with 19.6.

68. The Claimant contends that the Defendant's proposed Defence amounts to the type of set–off against the IPC#2 Claim which is barred by the terms of clause 2.5 of the FIDIC contract.

69. According to Counsel for the Claimant, no counterclaim can be allowed since there has been non-compliance with clause 2.5 of the FIDIC contract which mandates that the Defendant gives Notice with particulars of any such claim "*as soon as practicable after [it] became aware of the event or circumstances giving rise to the claim*" and which said notice was clearly never issued.

70. Counsel wrongly states that the first time the Claimant became aware of any potential set-offs or counterclaims was upon seeing the Ramarack Affidavit. In fact, the potential set-offs were signalled in around four letters where in 2016 the HDC said that it was not accepting that MRSCL's termination was proper. This was made clear even in the June 25, 2016 letter wherein the Claimant alleges the Defendant admitted the amount in IPC#2 was owed.

71. The June 25, 2016 'admission', such as it was, came after stating that MRSCL was in breach of contract. The admission was made expressly "without prejudice to any right or remedy which HDC may possess". A question that arises is whether this signalling of a counterclaim/set-off in the various letters sent to MRSCL by the HDC was in proper form and timely enough as required by clause 2.5 of the FIDIC contract and if not, whether the Defendant is debarred from raising it now as a Defence. In addition, as highlighted by Counsel for the Defendant in Reply submissions, the nature of the set-off claimed by the Defendant, as to whether it is in fact an abatement, is an issue of fact that must be investigated to determine whether by virtue of clause 2.5 it is excluded as a Defence.

72. In the Privy Council case of ***NH International (Caribbean) Limited v National Insurance Property Development Company Limited*** **[2015] UKPC 37 [TAB 12],** the Employer

attempted to raise set-offs or counterclaims, in respect of which the Board remitted the sums awarded for reconsideration by the Arbitrator on the basis that any of those sums *"(i) were not the subject of appropriate notifications complying with the first two parts of clause 2.5 and (ii) cannot be characterised as abatement claims as opposed to set-offs or cross-claims*": see paragraph 42.

73. The Board went further to state that "*more generally, it seems to the Board that the structure of clause 2.5 is such that it applies to any claims which the Employer wishes to raise. First, "any payment under any clause of these Conditions or otherwise in connection with the Contract" are words of very wide scope indeed. Secondly, the clause makes it clear that, if the Employer wishes to raise such a claim, it must do so promptly and in a particularised form: that seems to follow from the linking of the Engineer's role to the notice and particulars. Thirdly, the purpose of the final part of the clause is to emphasise that, where the Employer has failed to raise a claim as required by the earlier part of the clause, the back door of set-off or cross-claims is as firmly shut to it as the front door of an originating claim":* paragraph 40.

74. The Defendant in Reply submissions contends that the Claimant's reliance on the **NH case** is misplaced in that relevant parts of the Judgement, which clarify that an abatement-type set-off defence is not excluded, were omitted from the Claimant's submissions. Counsel for the Defendant underscored further that:

    i. "The JCPC noted at **paragraphs [41] – [42] of NH**, that Clause 2.5 of the General Conditions did not prevent abatement claims.
    [41] The reasoning of Hobhouse LJ in *Mellowes Archital Ltd v Bell Products Ltd* (1997) 58 Con LR 22, 25-30, supports this conclusion. It also demonstrates that a provision such as cl 2.5 does not preclude the Employer from raising an abatement argument…

    ii. The nature of an abatement claim was described by *Mendonca JA* in the **Civil Appeal 246 of 2009 NH International (Caribbean) Ltd v**

National Insurance Property Development Co. Ltd at **paragraphs 27-28** as follows:

27. The distinction between the rights of abatement and of set off was explained by Lord Denning in Henriksens Rederi A/S v PHZ Rolimpex [1973] 3 All ER 589, 594-595 (cited in Mellowes Archital Ltd v Bell Products Ltd. 58 Con. L R 22):

> "Our law has divided cross-claims (which arise out of the same transaction as the claim) into two categories. First, when the cross-claim goes directly in diminution or extinction of the claim, such as cases where goods are sold with a warranty and by reason of the breach of warranty the goods are worth less than the contract price; or cases where work and labour expended on a building and, by reason of defects, the work actually done is worth less than the contract price. In every such case it is plain that the plaintiff, not having completed the agreed work in accordance with the contract, is not entitled to the whole of the agreed sum. He ought not, therefore, to recover judgment for that sum but only for the lesser sum... Secondly, when the cross-claim does not reduce the value of the goods sold or the work done, but causes other damage. Such as the cases where goods are delayed in delivery and the buyer has a cross-claim for damages for delay; or where a contractor who is employed to clean windows negligently breaks the leg of a chair. In former times such damages could only be recovered in a separate action... and would no doubt be subject to a time bar..., however, these damages can be set up by way of an equitable set-off in diminution or extinction of the claim - leaving any over-plus to be the subject of a counterclaim... It is available whenever the cross-claim arises out of the

same transaction as the claim; or out of a transaction which is closely related to the claim".

28. The first scenario referred to above gives rise to a right of abatement, the second to a right of set off. As Hobhouse, L.J stated in **Mellowes Archital Ltd. v Bell Products Ltd**, supra (at pp 30 and 32):

> "The contrast is between those failures to perform the contract which 'directly' reduce the value of the thing itself as opposed to breaches which have caused the relevant party loss and give rise to cross-claims which he is allowed to set off.
>
> .....
>
> It is therefore clear that, for a party to be able to rely upon the common law right to abate the price which he pays for goods supplied or work done, he must be able to assert that the breach of contract has directly affected and reduced the actual value of the goods or work –'the thing itself.' In other words any loss or damage, if it is to be relied upon by way of answer to a claim for the price, has to arise from the principle of equitable set-off".

iii. An abatement defence therefore arises where the breach by the opposing party has rendered the thing supplied valueless or of reduced value.

iv. In the instant case, the Defendant has sought to partially resist the grant of summary judgment on IPC#2 on the ground that the amount certified for payment for design drawings has been rendered valueless on account of the Claimant's wrongful termination of the contract, see **paragraph 93 of the Defendant's submissions**. In view of the foregoing,

it is submitted that the Defendant is well within its right to maintain its cross claim against payment under IPC#2**.**

v. The foregoing therefore amounts to an arguable defence which requires the determination of 2 issues of fact which cannot be determined at the summary judgment stage but only after a trial with all evidence being led, namely (i) whether the Claimant was not entitled to terminate the Contract and (ii) whether the design drawings are in fact valueless."

75. Furthermore, the Defendant argues that in any event the Claimant cannot rely on IPC#2 if its Notice of Termination was ill-founded and amounted to a breach of contract. Thus this fundamental dispute as to fact regarding the basis for termination must be determined before a Judgement can be awarded. It requires extensive examination of the conduct of the parties over an extended period of time and cross-examination of witnesses.

76. Having considered the Claimant's pleadings, the Affidavit evidence on both sides and the submissions as to possible evidence that may be available at Trial, it is my finding that the Claimant has not established that the Defendant has no realistic prospect of success on its Defence to the part of the Claim concerning IPC#2. On the other hand the Defendant has established that on the Claimant's pleadings there are complex issues of fact concerning the conduct of the parties under the contract to be determined.

77. The Defendant's Affidavit and submissions raise further disputes of fact that must be addressed as to whether the contract was properly terminated and the impact of improper termination on the claim under IPC#2. There are also issues of fact as to whether the Defendant has enforceable set-off and/or abatement entitlements which present a good Defence to the Claim. These issues must be ventilated at Trial. Accordingly, the application for summary Judgement will be dismissed.

78. There has been no shortcoming of the Defendant in the presentation of its opposition to this Summary Judgement application, save that no Affidavit was filed within the time provided for at **CPR 15.5(2)**. If the Defendant had filed its evidence on time seven days before the first hearing date, that application may have been resolved between the parties or it may have been possible for me to have disposed of it on the first hearing date. Accordingly, while the Claimant will be ordered to pay the Defendant's costs of the Summary Judgement Application, I will only allow costs for one day of hearing.

The interim Payment Application

79. **CPR 17.5** sets out a number of circumstances when the Court can consider making an order for an interim payment. The Claimant has applied specifically based on 17.5(d). Accordingly, it must present a case that satisfies the Court that "*if the Claim went to Trial, the Claimant would obtain Judgement against the Defendant …for a substantial amount of money or for costs*."

80. As to the amount of an interim payment that can be awarded **CPR 17.4** makes clear that it cannot be more than a reasonable proportion of the likely amount of the final judgment. Thus a factor the Claimant must be in a position to persuade the Court about is what quantum would be awarded on a final judgement. In addition **CPR 17. 5(b)** says the Court in ordering such a payment must take into account any relevant set-off or counterclaim.

81. At the outset, it is clear that the Claimant has a significant set of hurdles to overcome to succeed in this application. This is particularly so in that, as I have already stated, the proposed Defence to the Claim has a realistic prospect of success and raises set-off and counterclaim. Further as the contract was alleged by the Defendant to have been wrongly terminated by the Claimant, questions have been raised as to the Claimant's entitlements to payment.

82. Further the cases interpreting wording similar to that used in **CPR 17.5** establish that a high standard of proof is required. The burden of proof is on the Claimant and the standard is at the higher end of the civil standard of on a balance of probabilities. This is made clear in the Judgement of Lord Justice Aikens in **Her Majesty's Revenue and Customs v The GKN Group [2012] EWCA Civ 57** paragraphs 33 to 39 cited by the Defendant.

> 38. "…The court must be satisfied (to the standard of a balance of probabilities) that the claimant would in fact succeed on his claim and that he would in fact obtain a substantial amount of money. It is not enough if the court were to be satisfied (to the standard of a balance of probabilities) that it was "likely" that the claimant would obtain judgment or that it was "likely" that he would obtain a substantial amount of money.
>
> 39. There is the question of what is meant by "a substantial amount of money". In my view that phrase means a substantial, as opposed to a negligible, amount of money. However, that judgment has to be made in the context of the total claim made."

83. This burden and standard of proof to be met by a Claimant seeking an interim payment order at a time when the Defendant's liability has not yet been determined requires the Court to make a determination which depends on being able to predict the outcome of the Claim before the Trial has even started. The author of **Zuckerman on Civil Procedure, Principles of Practice,** Third Edition at para 10.305 observes that "*It is unlikely that the Court should be able to predict the outcome of a Trial where difficult or complex issues of fact or law arise. Applications for interim payment are therefore inappropriate in such cases, not least because they may require lengthy hearings*."

84. The instant application falls within the category described by Zuckerman as one involving complex issues of fact and law. At the outset it appears to me that it was an inappropriate application, particularly coming as it has before the filing of a Defence,

before disclosure of documents, without the Court having the benefit of expert witnesses and witness statements.

85. The interim payment sought by the Claimant is in relation to the alleged loss of profits on the Claimant's termination of the Contract. It is alleged, based on the evidence and calculations of Mr. Mendez that the lost profit amounts to $305 million dollars.

86. The Claimant accepts, at paragraph 78 of its submissions, that before dealing with the issues of interim payment and/or loss of profit, it must cross the hurdle of whether the contract was lawfully terminated. The Claimant however, contends wrongly that this is only an issue of law.

87. It is clear to me, even on the Claimant's own pleadings that this is not so. Firstly, there is a dispute of fact as to which type of termination was affected by the Claimant i.e. whether based on the FIDIC Terms cited in the Notice of Termination or on Common Law or both.

88. Secondly, depending on which type of termination is being pursued there is a dispute as to whether the termination was lawful. The dispute is based on facts. Regarding the FIDIC based termination, the Defendant disputes the points raised in the Termination Notice i.e. that it failed to carry out its contractual obligations or was insolvent. Regarding the alleged common law termination, [which the Defendant says is a fiction] there is a dispute of fact as to whether the Defendant conducted itself in a manner that made clear and/or expressed an inability to finance the contract.

89. In addition to the foregoing there is a dispute as to the quantum of lost profits owed to the Claimant, if any, and a contention that it is the Claimant that factually may be required to compensate the Defendant for breach of the contract.

90. The authors of **Hudson's Building and Engineering Contracts 12th Edn at 7-044,** cited by the Defendant at paragraph 95 of submissions, explained that proving actual loss of profit is not as straightforward a process as contemplated by the Claimant in this

case. In a lengthy discussion, an extract of which follows, the authors describe what must be proven by the Contractor and the complications which arise in quantifying loss of profits, which makes such claims impractical if not impossible to sustain:

> "*The Contractor must be able to establish that their contract prices for the remaining work would as a fact have been profitable. This will depend primarily on the adequacy of the contractor's original estimate and pricing of the cost of the contract, rather than any profit percentage used when pricing…*
>
> *Whether a claim can be made may also depend, critically, on the state of the accounts at termination. If there is any degree of overpayment relative to the amount of work done up to that time, whether due to weighting of prices or by mistake or for any other reason that may submerge any claim in respect of the remaining work, since the Robinson v Harman principle will require credit to be given for these overpayments if damages are claimed*."

91. In the instant case it clear to me that, as submitted by the Defendant, in the absence of a comprehensive independent assessment there is no rational basis for the Court to assess what would be a reasonable proportion of a possible amount the Claimant could be awarded in a Judgment. It must be recalled that the only assessment by an expert was done in relation to IPC#2 on an interim basis. In that assessment the expert engineer rejected over 200 million dollars' worth of the amount claimed by MRSCL. The Claimant itself says it did not agree with that assessment. There has been no final post termination assessment. As such there is no basis on which I can arrive at a quantum for loss of profits, taking into account what should or should not have been paid in the interim.

92. Even the issue of the quantum of interest to be paid on amounts allegedly owed is disputed and there is no evidence before the Court to support the rate claimed by the Claimant.

93. All of these factual matters must be ventilated by document disclosure, witness statements, expert evidence and cross-examination before the Claimant can come close to proving on a balance of probabilities that it will succeed in being awarded Judgement for a substantial sum at Trial.

94. In all the circumstances, I am not satisfied that if this Claim went to trial the Claimant would obtain Judgement at all and if so for a substantial sum of money. I cannot be satisfied of that in the face of the realistic prospect of a defence and/or set-off/abatement and or a counterclaim based on the allegation that the Claimant breached the contract.

95. Such a Defence was apparent even from the Claimant's own pleadings and was further developed in the Affidavit and Submissions presented by the Defendant. It is a Defence based on issues of fact that can only be determined if properly presented and tested at Trial. In any event the Claim and Statement of Case on the face of it presents no evidential basis for an assessment of lost profits, if any, to be awarded to the Claimant.

96. An application for an interim payment may have been better informed after the filing of a Defence, Reply, lists of documents, witness statements and expert evidence. At this stage the application will be dismissed and the Claimant is to pay the Defendant's costs of the Application.

D. <u>Summary of Findings and Decisions</u>

97. The Defendant has succeeded in persuading the Court that there is good reason to extend the time for filing of its Defence. This has been done based on the Defendant's proof that the Rule 26.7, factors the Overriding Objective of the CPR and the issue of prejudice all favour the extension of time. In addition, in the context where the Claimant is clearly challenging the extension partly based on the contention that there can be no realistic Defence, the Defendant has also established that it has a Defence on the merits of the Claim.

98. The Claimant's application for Summary Judgment in relation to IPC#2 fails because the Claimant failed to establish that the Defendant has no real prospect of success on its defence to that part of the Claim.

99. The Claimant's application for interim payment fails on the basis that the Claimant has not established on a balance of probabilities that if the Claim went to Trial the Claimant would obtain Judgement against the Defendant. The Claimant has also failed to establish that even if it were to succeed in being awarded Judgment it would be for a substantial amount of money or costs. The Court cannot at this stage of the proceedings, on the basis of the evidence make a finding or interim finding as to the quantum of any claim either for loss of profit or entitlement under the interim payment application.

E. Order

It is hereby ordered that:

a. The Defendant's application for an extension of time is granted.
b. The Defendant is directed to file and serve its Defence on or before February 19, 2019 failing which Judgement will be entered for the Claimant.
c. The Defendant is to pay the costs of the application for an extension of time to the Claimant.
d. The Claimant's application for summary judgement on IPC#2 is dismissed.
e. The Claimant is to pay to the Defendant the costs of the Summary Judgement Application limited to one day of hearing.
f. The Claimant's application for interim payment is dismissed and the Claimant is to pay the Defendant's costs of the Application.

g. This is the first Case Management Conference and the Second Case Management Conference is to be held on March 18, 2019 at 11.00 am SF09.

……..
Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely JRC 1