THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port-of Spain (Virtual Hearing)

Claim No. CV2020-02303

Between

Southern Exploration & Production Limited

Claimant

And

National Maintenance Training and Security Company Limited

First Defendant

National Library and Information System Authority

Second Defendant

Before The Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Delivery Date: 19 January 2021

Appearances

Mr Prakash Deonarine and Ms. Ariel Moonsie, Attorneys at Law for the Claimant

Mr Farai Hove Masaisai, Ms. Antonya Pierre and Ms. Desiree tommy, Attorneys at Law for the First Defendant

Ms. Sushma Gopeesingh and Ms. Kamini Persaud-Maraj, Attorneys at Law for the Second Defendant

Oral Ruling

A. Introduction

1. In this breach of construction contract claim, the Claimant seeks to recover outstanding payments. The payments are alleged to be due for work done on a library in Mayaro and are outstanding since September 2018 based on Interim Payment Certificates ["IPCs"]. The Claimant also seeks the release of retention monies and damages for breach of the contract, which the Claimant terminated on 23 January 2019.

2. The contract was entered into on 31 October 2014 between the Claimant and the First Defendant. Based on documents and correspondence on record the Claimant contends that the Second Defendant is jointly liable as the First Defendant's principal. There are alternate claims alleging the Defendants' unjust enrichment in benefiting from the construction work completed by the Claimant and for payment on a quantum meruit basis for the work completed.

3. The Claimant's Statement of Case refers to and attaches correspondence between the parties from as early as 13 March 2019 to August 2019 indicating the repeated requests by the Claimant for payments due after termination. There is no indication in the correspondence that the Defendants denied liability to pay. The only point in issue was their requests for further assessment/evaluation of some aspects of the quantum to be paid.

4. The Claimant issued a pre-action protocol letter to the Defendants on 16 August 2019. In response, the Claimant received repeated requests from the First Defendant for documentation previously submitted but said to be relevant to the assessment of the quantum to be paid. Evidence of provision of these documents by correspondence up to October 2019 is attached to the Claimant's Statement of Case. There being no resolution of the matter at the pre-action protocol stage of proceedings, the Claimant filed the instant Claim on 06 August 2020.

5. The Ruling delivered today determines four Applications filed by the parties. Each application is supported by Affidavit evidence; however, the un-contradicted record as to facts to be considered remains as stated in the Claimant's version of events.

6. Three of these applications were discussed at a first hearing on 07 October 2020. The hearing was adjourned to today's date and parties were encouraged to utilize the intervening period to engage in settlement negotiations. Should discussions fall through, parties would be heard orally on the applications but were permitted to file Speaking Notes.

7. At the time of the first hearing, the Claimant had already filed for Judgment in default of Defence against the Second Defendant, under the Civil Proceedings Rules 1998 (as amended) ["CPR"] Part 12. The Judgment was entered on 30 September 2020 but only delivered electronically to the Claimant on 16 October 2020.

8. As all parties then filed Speaking Notes, it appeared that settlement talks bore no fruit. This was confirmed at the hearing of the Applications on 19 January 2020 at which oral submissions were made. The Applications will now be considered and determined.

B. <u>The Applications</u>

The First Defendant's Application filed on 08 September 2020 for a Stay of Proceedings pursuant to Section 7 of the Arbitration Act Chap 5:01 ["the Act"]

Applicable Contractual terms, Legislation, CPR and case law

9. Clause 12 of the Contract entered into between the Claimant and the First Defendant provides:

   " DISPUTE RESOLUTION

a) *In the event of any dispute between the parties in relation to or arising out of this Agreement ("the Dispute"), either of them shall serve notice on the other giving particulars of the dispute and requesting a meeting to attempt to reach an amicable resolution of the Dispute. The parties agree to negotiate in good faith for the resolution of the Dispute during a period of up to thirty (30) days from the receipt of t such notice (the "Negotiating Period").*

b) *If the parties fail to resolve the Dispute between themselves during the Negotiating Period, the parties may refer the same to a mutually agreed mediator for non-binding mediation.*

c) *If after thirty (30) days from the date of reference of the Dispute to mediation or such further period as the parties may agree in writing, the parties fail to resolve the Dispute by mediation, or if the parties do not proceed to mediation, either of the parties may submit the Dispute to arbitration in accordance with the provisions of the Arbitration Act of the Laws of Trinidad and Tobago Chapter 5:01 or any statutory modification thereof for the to time being in force."*

10. Sections 20.4, 20.5 and 20.6 of the International Federation of Consulting Engineers Conditions of Contract for Construction ("FIDIC") 2005 states:

"20.4 If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DB [dispute board] for its decision, with copies to the other Party and the Engineer. Such references shall state that it is given under this Sub-Clause…

20.5 Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration.

20.6 Unless settled amicably, any dispute in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by international arbitration… "

11. Section 7 of the Act provides as follows:

    ***"If any party to an arbitration agreement**, or any person claiming through or under him, **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 there is **no sufficient reason why the matter should not be referred** in accordance with the arbitration agreement, and that **the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration**, may make an order staying the proceedings. [Emphasis Added]"*

12. The matters highlighted in this section, as the basis for deciding whether to grant a stay so that parties can arbitrate, have been the subject of analysis and explanation by the Court in several Rulings.

13. In **Civ Appeal No P059 of 2014 L.J. Williams Limited v Zim Integrated Shipping Services Limited et al** at paras 15 to 20, cited by Counsel for the First Defendant, Mendonca JA explained that there are, firstly, certain threshold requirements prescribed in the section to be met. These are that there is, in fact, an arbitration agreement, that one of the parties to it has commenced legal proceedings against another party in respect of a matter agreed to be referred and that an appearance has

been entered but no other step taken in the proceedings. There is no contention in this case that any of these threshold requirements has not been fulfilled.

14. Secondly, where the threshold requirements have been met, two conditions to be satisfied are set out in "plain and unambiguous language" in Section 7 of the Act for the Court to exercise its discretionary power to stay the proceedings. These, as underscored by Mendonca JA in the **L.J. Williams case** at paragraph 19, are as follows:

> *"(1) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement and (2) that the person seeking the stay was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration."*

Application to circumstances of this case

15. The Claimant's case, in objecting to the application for a stay of the proceedings is that the Second Defendant has not established either of the two conditions. Accordingly, there is no basis for the Court to grant a stay in order for arbitration to take precedence over the commenced litigation. On a review of the affidavit evidence on record and having considered the submissions on both sides, it is clear that there is merit to the Claimant's objection to a stay being granted. As such, for the reasons further explained, a stay will not be granted.

16. The first condition that has not been established by the Second Defendant is that there is "no sufficient reason" why the matter should not be referred to arbitration. The Court has stated in a number of Rulings ***addressing contractual terms equivalent to Clause 12***, that in order to determine whether there is "no sufficient reason", the precise nature of the dispute must be clarified and taken into consideration. This was made clear in **Mootilal Ramhit and Sons Contracting Limited ("MRSCL") v Education Facilities Company Limited ("EFCL") v the Attorney General of Trinidad and Tobago ("AG") CV2017-02463**; **Kall Co. Ltd v EFCL CV2017-01397; MRSCL v EFCL v AG CV2017-02134** and **MRSCL v EFCL v AG CV2017-02465** cited by the Claimant.

17. In this regard, there must as a starting point, be evidence of at least of a genuine dispute. In the instant case, the Claimant has fully set out the particulars of the Claim including a chronology of events supported by documentation. The un-contradicted record includes admissions by the First Defendant that payments are outstanding and the fact that the Defendants have not raised issues as to fulfillment by the Claimant of contractual obligations.

18. The Defendants, in response to the Claimant's pre-action correspondence, raise no substantive dispute. Instead, over a period of nearly three years, there is correspondence containing admissions of certain amounts certified by IFCs and requests for documents previously provided with repeated indications of intended assessment.

19. In support of the Application for a Stay so that the matter can be referred for Arbitration, there is no further information provided to support that a genuine dispute exists. As summarized by Counsel for the Claimant in his Speaking Note, the First Defendant merely:

    i. Relies on a provision in the contract relating to the Second Defendant's delay in payment at paragraph 5 of the Jones Affidavit;
    ii. States provisions in the contract relating to dispute resolution "*ending in arbitration"* at paragraphs 6 and 7 of the Jones Affidavit; and further;
    iii. States *"parties engaged in settlement discussions with the Claimant which seemed fruitful and therefore the 1st Defendant was absolutely shocked by the initiation of these proceedings. The 1st Defendant is yet still desirous of continuing said discussions and should said discussions fail, is willing to proceed to mediation or arbitration"* at paragraph 8 of the Jones Affidavit.

20. The Claimant has disclosed correspondence from the First Defendant proposing assessment of the quantum to be paid and seeking documentation, which was

provided. However, there is no indication in the correspondence over a period of more than two years as to any basis for the Defendants' failure to pay the Claimant.

21. In **Mootilal Ramhit CV2017-02134,** Rampersad J underscored that mere refusal to pay upon a claim which is not really disputed does not necessarily give rise to a dispute and further *"just sending the matter to arbitration because the clause exists without identifying what has to be arbitrated does not make sense. This is especially so since the parties are already before the court, have already retained counsel and would be in no better position in pursuing relief before this court than before an arbitrator whereas engaging in the latter course at this time could very easily incur further costs and delay the claimant's payment".*

22. Furthermore, the Court, in **Mootilal Ramhit CV2017-02463**, expressed the view that a stay of proceedings for referral to arbitration in a case where there is no genuine dispute "*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."*

23. In all the circumstances, there is no evidence before the Court of a genuine dispute referable for arbitration. In fact, the Claimant goes further in the final paragraph of its Speaking Note in suggesting that "there being no material before the court", the Claimant is requesting that the Court grant final Judgment against the First Defendant. The Claimant made no formal application for such Judgment and, if granted extended time, the First Defendant may yet file a meaningful Defence. Accordingly, Judgment will not be granted at this stage.

24. However, based on lack of evidence of a genuine dispute, there is sufficient reason for the matter not to be referred for arbitration. Likewise, the First Defendant has also failed to provide any evidence to prove that the second condition for grant of a stay has been met. There is no proof in this matter that, at the time when litigation was

commenced some two years after the cause of action arose, the Defendants were ready and willing to do all things necessary to the proper conduct of arbitration pursuant to Section 7 of the Act.

25. Here, as in **Mootilal Ramhit CV2017-02134**, the Defendants made no attempt whatsoever to engage any provision of the arbitration agreement set out in Clause 12 referred to above. Further, there was no evidence of their doing anything for more than two years since the submission of the Claimant's invoices to question the Claimant's entitlement to payment whether in full based on the invoices or on a quantum meruit basis.

26. The authority put forward by the First Defendant of **The Federation Internationale de Football Association v Trinidad and Tobago Football Association C.A.CIV.P.225/2020** is distinguishable from the instant circumstances as the governing arbitration provisions were not equivalent to Clause 12 which is applicable here. In that case, there was a constitutional mandate to arbitrate before a specialized body. In any event, there was clear evidence in that case of a genuine dispute concerning a challenge to a decision by the appellant to remove executives and appoint a normalization committee. The Court of Appeal has determined, based on the evidence on record in that case, that parties on both sides were initially willing to arbitrate the dispute. Accordingly, there is no comparison with this case where neither of the two conditions derived from section 7 of the Act have been proven.

27. Accordingly, the Claimant's objection to the grant of a stay is upheld. I will therefore dismiss this application by the First Defendant and direct that costs be paid to the Claimant for the application.

The Second Defendant's Application filed on 07 October 2020 seeking relief from the sanction of Part 9.7(5) of the CPR as to the presumption of acceptance that the Court has jurisdiction and to join in the First Defendant's Application for a stay

Applicable CPR

28. CPR rule 9.7 (1) to (4) provides that a Defendant who wishes to dispute the court's jurisdiction to try the claim or to argue that the court should not exercise its jurisdiction must make an application supported by evidence within the period for filing a Defence. If, as occurred in this case on the part of the Second Defendant, such an application is not made within the stipulated time, the party failing to apply is "treated as having accepted that the Court has jurisdiction to try the Claim" [CPR rule 9.7(5)].

Application to circumstances of this case

29. The Second Defendant's application to join the First Defendant's request for a stay so that the matter can be referred for arbitration is now moot. This is so as the determination made herein is that the stay will not be granted.

30. However, if the Second Defendant's proposed challenge to jurisdiction had been substantively viable, there is no merit to the arguments of Counsel for the Claimant that, procedurally, the failure to apply in time was not and could not have been cured by the Second Defendant's Application.

31. Essentially, the Claimant argued that there was no good reason for the delay and thus, the Second Defendant failed to establish one of the threshold requirements for relief from sanctions under CPR 26.7(3). However, as will be explained later in this Ruling, my finding is that the reason for delay was a misunderstanding due to the Second Defendant's expectation that, based on courtesy between Attorneys for the parties whilst discussions were in progress, the Claimant would take no adverse step.

32. As the jurisdiction point is now moot, there is no need to grant the Second Defendant's application for relief from sanctions to allow it to join with the First Defendant in arguing that the court should order a stay instead of exercising jurisdiction in the Claim. I will therefore dismiss this application by the Second Defendant and direct that costs be paid to the Claimant for the application.

The Second Defendant's Application filed on 27 October 2020 seeking to have the Judgment entered on 30 September 2020 in Default of its Defence set aside

Applicable CPR

33. CPR 12.12 (1)(3) and (4) provide as follows:

 "(1) A claimant may obtain default judgment on a claim for money or a claim for delivery of goods against one of two or more defendants and proceed with his claim against the other defendants.

 (3) Where— (a) the claimant applies for default judgment on any claim which is not a claim for money, a claim for recovery of goods or a claim for possession; (b) the claim is made against two or more defendants; and (c) the claim against the defendant or defendants in default can be dealt with separately from the claim against the other defendants, the court may give default judgment against the defendant in default and the claimant may continue the proceedings against the other defendants.

 (4) Where, in a claim to which paragraph (3) applies the court office may not enter judgment against the defendant in default, the court must deal with any application for default judgment against that defendant at the same time as it disposes of the claim against the other defendants."

34. The Court may set aside a judgment entered under CPR Part 12 if the factors set out at 13.3(1) are met, namely–

    (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.

35. Rule 13.2 CPR provides for circumstances in which the Court must set aside a default judgment:

 "(1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because-

 (a) in the case of a failure to enter an appearance, any of the conditions in rule 12.3 was not satisfied; or

(b) in the case of judgment for failure to defend, any of the conditions in rule 12.4 was not satisfied."

Application to circumstances of this case

36. As aforementioned regarding 13.3(1)(b) above, my finding is that the Second Defendant has established that the Application to set aside the Judgment was made promptly when it found out about the judgment. The Default Judgment, though entered in September, was not sent out electronically to the parties until 16 October 2020. Thus the application to set aside was made in a timely manner, around one week after the Judgment could have come to the Second Defendant's attention.

37. The Claimant cites a dissenting judgment of Narine JA (as he then was) in **Ima E Louis v Trinidad and Tobago Housing Development Corporation Civ App. No 228 of 2009 (Transcript) at page 5, lines 35-48.** Justice Narine's position was that "*[he doesn't] think the rule was intended to encourage litigants to sit back and do nothing for such a lengthy period of time, and then claim that it was only recently found out about a judgment, when, if it acted with due diligence, it would have become aware before, …The New Rules were intended to change the culture of litigation not to encourage the previous laissez-faire attitude that characterise litigation in this country."*

38. However in the instant case, no lengthy period elapsed and there is no evidence of the Second Defendant sitting back and doing nothing. It is clear that the parties were heavily involved in discussions about settlement and procedural matters around the time when the default judgment was being processed in the Court Registry.

39. It is for this reason, as well as an apparent misunderstanding between the parties about whether the Claimant was proceeding with adverse steps against the Second Defendant, that counsel for the Second Defendant may not have seen the need to check on whether a Default Judgment was being processed. The Second Defendant has succeeded in establishing the promptitude required in applying to set aside the judgment.

40. Though not comprehensively set out, it was my initial view that the Second Defendant had also included in its supporting Affidavit, the ingredients for a realistic prospect of success in defending the claim. At paragraph 12 d. and e. of the Affidavit of Kamini Persaud-Maraj, the Second Defendant briefly states the basis for a Defence that:

    - The Claimant is aware that, at all material times, payments are made from the First Defendant under their contract, and not by the Second Defendant; and
    - The Claimant has instituted a Claim against the Second Defendant that it is not entitled to bring under the provisions of their contract.

41. However, in oral submissions today, Counsel for the claimant pointed out that at paragraph 3 of the same Affidavit, Ms Persaud-Maraj admitted that, while the contract was entered into between the Claimant and the First Defendant by the law of agency, the Second Defendant is also bound by the contract. Counsel for the Second Defendant thereafter candidly made clear that her client admits to being the Principal in the contractual arrangements and had not intended by paragraph 12 d. and e. to include the elements of a realistic defence to the Claim on the merits. This was based on Counsel's view that to set out any information in the Affidavit as to a realistic defence would be taking a step in the proceedings. In Counsel's view, based on the decision of the Court of Appeal in **MRSCL v EDFCL CV 2017-01411,** such a step would place the Defendants' proposal for a stay outside the terms of Section 7 of the Act and provide a basis for the Court to refuse to grant a stay.

42. Counsel for the Second Defendant also raised in the Speaking Note filed prior to this hearing a point about alleged irregularity of the Judgment entered in Default. This, it was argued, provided an additional reason for the Court to act pursuant to Part 13.2 of the CPR in setting aside the Judgment. Counsel contends, pursuant to CPR 12.12(3) and (4), that, if there is more than one Defendant, Judgment cannot be entered against one of them at the Court Office. Instead, there must be an Application to the Court for a Judge to determine an Application for Default Judgment. Counsel for the Claimant countered, in his oral submissions, that CPR12.12(3) and (4) are not

applicable in the instant case because those provisions are not relevant to "a claim for money".

43. This is in fact clearly so, as it is CPR12.12(1) that addresses the entry of Judgment against one Defendant in a money Claim where there is more than one Defendant. There is no provision stipulating that this cannot be done by the Court Office. Accordingly, this contention fails to support the Second Defendant's case for setting aside the Judgment.

44. A further point raised by the Second Defendant is that "This is not a claim for a specified amount of money which should have enabled an "over the counter" Judgment under CPR 12.

45. In response, the Claimant cites the Jamaican Supreme Court decision in **Naetyn Development Company Limited v Holbrooke [2017] JMCC Comm 11** where an application for interim payment was made in circumstances where the sum claimed had not properly been quantified/specified. In that case however, Simmons J, as she then was, provides guidance on the interpretation of "a specified amount of money" for purposes of a Rule equivalent to CPR 12 in this jurisdiction:

> *"57. In order to fall within the definition of a specified sum of money the sum in question must also be 'ascertained or capable of being ascertained as a matter of arithmetic'."*

46. Counsel for the Claimant argued that the sums claimed and the quantum set out in the Judgment were sufficiently specified. Counsel highlighted that the claim for a declaration of liability was vacated before the judgment was taken up and therefore what remained was a judgment for a specified sum.

47. The Second Defendant, having established only one of the requirements for the setting aside application, the judgment entered will not be set aside. The comment made by Rampersad J in **MRSCL v EDFCL CV 2017-02134 at para 29** is applicable here

as well that “*The first Defendant’s application for a stay pursuant to.. [Section 7] ..having failed, it follows that the application to set aside on similar grounds must also fail”.*

Claimant’s Application for interim payments filed on 07 September 2020

Applicable CPR

48. The Claimant relies on the provisions of **CPR Rule 17.5(1)(d).** Rule 17.5(1)(d) provides that:

> *“The court may make an order for interim payment* ***only if (d) ….it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant*** *from whom he is seeking an order for interim payment for a substantial amount of money or for costs” [Emphasis added]*

Application to circumstances of this case and decision

49. The Defendants have filed no affidavit in opposition to the detailed case as to the merits of the Claim set out by the Claimant’s Statement of Case and Affidavits. This is so despite the fact that **Part 17.4(5) of the CPR** provides:

> *“(5) If the respondent to an application for interim payment wishes to rely on evidence or the claimant wishes to rely on evidence in reply, that party must— (a) file the evidence…”.*

50. The case pleaded by the Claimant and further reinforced with sworn evidence in support of the application for interim payments is very strong. Not even a scintilla of a case or evidence that the Claimant is not entitled to any payments for the work done under the contract or on a quantum meruit basis has been put forward in response.

51. There being absolutely no indication of a possible defence submitted in the Defendants’ Affidavits, the Claimant is certain at this stage to succeed in obtaining Judgment. The Claimant’s case as to liability provided the only indication that

potentially the Defendants may be considering a defence not as to liability but only as to the quantum payable to the Claimant.

52. The Claimant reasonably suggests only 60% of the quantum claimed under each head of relief be awarded at this interim stage. There has been no counter-submission as to the reasonableness of that quantum as an interim measure. Accordingly, the application for interim payments will be granted in the said amounts. The Defendants will be required to pay the costs of the interim payments application.

C. Conclusion and Order

53. Parties are encouraged to bring this matter to a close by alternate dispute resolution.

54. **IT IS HEREBY ORDERED** that:

i. The First Defendant's Notice of Application filed on 07 September 2020 is dismissed.

ii. The Claimant's Notice of Application filed on 07 September 2020 is granted and the First Defendant to make an interim payment in the sum of **$5,320,124.95** to the Claimant as follows:
   - Payment on application for IPC #10 in the sum of $751,716.94;
   - Payment of retention in the sum of $464,348.41;
   - Payment for loss/damage in the sum of $3,848,274.00; and
   - Payment for loss of profit in the sum of $255,785.60.

iii. A Stay of execution of the Orders at (i) and (ii) above is granted for forty-two (42) days.

iv. The Second Defendant's Notice of Application filed on 07 October 2020 is dismissed.

v. The Second Defendant's Notice of Application filed on 27 October 2020 and the consequential amendments of paragraphs (3) and (4) in the Amended Notice of Application filed on 07 January 2020 is dismissed.

vi. The Judgment in default entered against the Second Defendant on 30 September 2020 is stayed for a period of forty-two (42) days from the date of this Order.

vii. The First Defendant is to file its Defence on or before a period of forty-two (42) days from the date of this Order failing which Judgment will be granted against the First Defendant on the entirety of the Claimant's claim on an application by the Claimant.

viii. The costs of the four Applications in an amount to be assessed by the Court, if not agreed, are to be paid by the First Defendant and Second Defendant respectively to the Claimant.

E J D Honeywell
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Eleanor J Donaldson-Honeywell
Judge