THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2015-03486

BETWEEN

CLIMATE CONTROL LIMITED

Claimant

AND

C.G. CONSTRUCTION SERVICES LIMITED

Defendant

<u>Before the Honourable Mr. Justice V. Kokaram</u>

Date of Delivery: 21st March 2016

Appearances:
Mr. Matthew Gayle for the Claimant
Mr. Stephen Salandy for the Defendant

JUDGMENT

1. On 19th November 2015 the Claimant, Climate Control Limited, obtained judgment in default of appearance against the Defendant, C.G. Construction Services Limited, for the sum of $376,795.87. The Defendant has now applied to the Court, by application dated 22nd December 2015, to stay the proceedings and have the judgment vacated pursuant to section 7 of the Arbitration Act Chapter 5:01 (the Act) or alternatively to set aside the judgment and for the Defendant to be given leave to file its Defence pursuant to Rule 13.1 of the CPR and or the inherent jurisdiction of the Court.

2. There was a heated debate by Counsel for both parties as to which application should properly be heard first, whether the application to stay the proceedings on the basis that the dispute is the subject of an arbitration clause or whether the judgment ought to be set

aside should first be heard. I understood Counsel for the Defendant to be concerned that an application to set aside judgment may be construed as a step in the proceedings and therefore a submission to the jurisdiction of the Court rendering the application for a stay otiose. Accordingly in the Defendant's view, the Court should first consider whether the proceedings should be stayed first. A stay of the proceedings, without setting aside the judgment, can only properly mean a stay of the execution of a properly entered judgment. If the proceedings are stayed without setting aside the judgment, it would mean that there is a properly entered judgment against the Defendant at the same time it is pursuing its arbitration proceedings.

3. In my view the application to set aside the judgment in default of appearance should be dealt with first before any consideration of a stay can be entertained. The jurisdiction to stay proceedings under section 7 of the Act is premised upon a Defendant "entering an appearance" in the proceedings. In this case unless the judgment is set aside to permit the Defendant to enter an appearance this aspect of the statutory regime to stay proceedings would not be satisfied. In any event, the answer to the debate is largely academic as I have found no merit in either application made by the Defendant to stay the proceedings or set aside judgment and for the reasons explained in this judgment its application would be dismissed with costs.

The proceedings

4. The Claimant commenced these proceedings against the Defendant on 21st October 2015 as a simple debt collection claim. It was contracted by the Defendant to deliver and install industrial air conditioning systems in "Toyota facilities" located at South Park, San Fernando pursuant to a sub contractor sub contract document dated 3rd May 2011. Some material terms of that contract which were exhibited to the Statement of Case were as follows:

"Net Value of the Works: $871,319.97 - Eight Hundred and Seventy One Thousand Three Hundred and Nineteen Dollars and Ninety Seven Cents.

Main Contract Start and Finish Dates: February 2011 - July 2012

Sub-Contractors Start and Finish Dates: 22/3/11 - 11/7/12

Project Name and Address: New Toyota Facilities - South Park, San Fernando

	Form of Contract:	This sub-contract shall be governed under the same rules that govern the main contractor, i.e.:- “Federation Internationale Des Ingenieurs Conseils” (FIDIC) 1988. A copy of this contract is held by the main contractor and may be perused at the Contractors office. However, the Sub-Contractor attention is down to the following clauses:-
a.	Defect Liability Period:	Six (6) months
b.	Fixed Price Contract:	
c.	Insurance:	Sub-Contractors to provide both Contractor’s All Risk and Workmen Compensation Cover.
d.	As Built Drawings:	Sub-Contractor will produce these as works proceed.
e.	Liquidated Damages:	$6,000.00 per day to a maximum of 5% of contract sum.
f.	Retention:	5% to a maximum of 5% of the contract sum.
g.	Programme:	Sub-Contractor must provide a programme prior to his work commencing using Microsoft Project. ”

5. Pursuant to the agreement the Claimant delivered and installed air conditioning systems to the Defendant at the Toyota facilities and submitted several invoices to the Defendant. The invoices were annexed to the Statement of Case and a term of the invoice was that payment was due within 30 days after the invoice date. The Defendant paid some sums but not all the invoiced sums and the balance due on the invoices amounted to $246,716.56 plus interest at the contractual rate of 2%.

6. The Claim was served on 21st October 2015. On 27th November 2015, no appearance having been filed, judgment was entered against the Defendant.

7. The Defendant in its application to stay or set aside the judgment briefly sets out its grounds for its application as follows:

"i. The Defendant is a contractor which secured a contract (hereinafter referred to as "the main contract") to construct a building on behalf of "Toyota" (hereinafter referred to as "Toyota") at South Park, San Fernando, subject to the terms and conditions of the Federation Internationale Des Ingenieurs Conseils (FIDIC).

ii. The Defendant sub-contracted the procurement and installation of the Air Condition system to the Claimant, and it was a term of the agreement between the Claimant and the Defendant that the sub-contract shall be governed under the same rules that govern the main contract i.e. Federation Internationale Des Ingenieurs Conseils (FIDIC).

iii. The Terms and Conditions of the Federation Internationale Des Ingenieurs Conseils (FIDIC) as amended made provisions for the settling of disputes and in the event such provisions failed that the matter proceed to Arbitration.

iv. A dispute arose between the Claimant and Defendant regarding defects in works undertaken by the Claimant and its demands for payment therefore.

v. To secure payment, the Claimant failed to adopt the process outlined in its Terms and Conditions of contract to settle the dispute and in breach thereof proceeded directly to litigation.

vi. Further, by exchange of correspondence the Claimant knew that the Client's Architect identified defective work in the Air-Condition installation, occasioning damages to its compound for which the Claimant would ultimately be liable.

vii. Due to administrative error and inadvertence the Claim Form and Statement of Case filed were not forwarded to the Defendant's attorneys. As soon as it was brought to the Defendant's attention that Judgment was entered against it, steps were taken to vacate or set aside the Judgment and stay the proceedings.

viii. The Defendant has a good defence and or set off and or counterclaim to the Claimant's claim."

8. Insofar as the Defendant seeks to stay the proceedings in furtherance of a dispute settlement procedure, the terms of the FIDIC which deals with the settlement of disputes provides as follows:

“Settlement of Disputes

Engineers Decision:

If a dispute of any kind whatsoever arises between the Employer and Contractor in connection with, or arising out of the contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence

arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor."

9. This dispute settlement procedure agreed to by the parties to that contract contemplated the settlement of disputes by the Engineer in the first instance and then at arbitration if the dispute is unresolved. Notably this dispute settlement procedure regulates disputes between "Employer" and "Contractor" and not "Contractor" and "Sub Contractor". The main issue on the Defendant's application to stay the proceedings is whether this term which governs the Employer-Contractor relationship was incorporated into the contract qua Contractor-Sub Contractor to govern the settlement of any disputes that may arise between the Claimant and the Defendant.

10. It is also noted that in its grounds of its application, the Defendant contended that the Claimant failed to invoke the settlement process under the FIDIC but is silent as to the Defendant's own willingness or action in invoking this settlement process itself before these proceedings were launched by the Claimant. Second it alleges that the Architect identified defective work in the air condition installation. Presumably on this basis the Defendant contends that it has a good defence or set off or counterclaim to the Claimant's claim. The extent of that counter claim has however not been particularised, identified nor quantified in any way in the grounds of the application.

11. From the outset the Defendant should demonstrate that there is no sufficient reason why the matter should not be referred to arbitration 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. I would expect that in a proper application for a stay of the proceedings based upon an invocation of section 7 of the Act that these matters are dealt with openly and directly in the grounds of the applicants application unlike this instant application.

12. Turning to the affidavit, in support of the application, it can be characterised as making bald assertions, lacking in the type of detail necessary to convince a Court that it is just to exercise its inherent or statutory jurisdiction to stay the proceedings or set aside

judgment. In my view the facts presented do no more than attempt to delay the payment of the Claimant's invoice.

13. The Defendant alleges in its affidavit, that on 10th February 2011 it entered a main contract with Toyota Trinidad Limited. Included in the terms under that contract was the appointment of an architect, NLBA Architects Limited. In paragraph 5 of his affidavit the Defendant states:

    "Included in the team which undertook the construction project is an Architectural company, being NLBA Architects Limited (hereinafter referred to as "the Architect"). The Architect on the project is pivotal in determining whether or not works executed by the Contractor have been done in a good and workman like manner and in accordance with the tendered specifications. Having completed sections of the works, the Contractor would issue its claim therefore to the Architect, and if the works accords with the specifications and to the Architect's satisfaction, the Architect would issue an interim Certificate upon which payments would be made by the client.

    In the event the works were not executed in accordance with specifications, the interim certificate for payment would not be issued and the Client would not make any payments therefore."

14. However the relevant sections of the contract are not exhibited to this affidavit. Further there is no description of the Claimant as the "client" or "employer" in this contract. It is clear from the submissions of the Defendant however that the terms "Employer" refer to Toyota and "Contractor" to the Defendant.

15. The Defendant explains that as the installation of air condition units was not within its core competencies, it hired the Claimant. There is no dispute between the parties that the contract exhibited to the Statement of Case contained the full terms of the agreement between the parties. The Defendant alleges however that the terms incorporated the FIDIC contract and the terms of settlement referred to above. This may be so with some terms of the FIDIC contract but examining the Settlement of Disputes clause on its face and without more it would not be correct to say that term was incorporated as a term of the sub contractor's contract as the term "Contractor" and "Employer" clearly refer to the main parties to the contract and not to the parties to the sub contract.

16. At paragraph 14 the Defendant explains:

> "It was essential for the Defendant to bind the sub Contractor to the FIDIC terms and conditions, which it entered into with the Client since, faulty contract works by the Sub-Contractor could lead to conflict between the Defendant and its Client, and possibly Arbitration. Furthermore, the Defendant would not wish to be obliged to pay a Sub-Contractor's claim before any such arbitration is adjudicated upon."

17. However this without more is the interpretation of the Defendant without putting before the Court the full terms of the contract or any reasonable basis to so construe that the dispute settlement clause is binding on the parties to the sub contract other than a simple contracting out of the services of the parties without making this dispute settlement term a or a material term of the contract. On its face the settlement of disputes clause refers to disputes between the Employer (Toyota) and the Defendant. It does not refer to disputes between the Defendant and its sub-contractor. The Engineer indeed has jurisdiction over the Employer and the Contractor/Defendant. It is another matter if the Contractor/Defendant has an issue with regard to faulty works with the sub-contractor.

18. A further examination of the Defendant's affidavit reveals an implied admission that the Claimant simply invoiced the Claimant and some payments were made by the Defendant to the Claimant on account. Notably there is no evidence by the Defendant in its documentation that it followed any terms of the main contract of awaiting certification from the architect before payment was made to the sub-contractor. Indeed payments were made by the Defendant to the Claimant on account of sums due after the invoices were tendered by the Claimant. See paragraphs 5 and 6 of the Claimant's pre action protocol letter which has not been disputed by the Defendant in its pre action response.

19. At paragraph 15 of the Defendant's affidavit there is no evidence that the Claimant was bound to await the certification of the Architect for its own payment from the Defendant.

20. Furthermore in paragraph 15 the Defendant contends that the Architect indicated that the installation of the air condition units were faulty. This however is not supported by the Defendant's own evidence. The architect is quite clear in its letter to the Defendant dated 25th August 2014 that:

"Please be advised once again we have been informed by the Client that the resultant leak, which we expressed to you on 20th August, has resulted in partial collapse of some of the ceiling tiles within the File Room as well as a complete saturation and damage of the flex ducting within the Showroom. Toyota has been informed by Climate Control that approximately 12'- 0" of ducting would need to be changed due to the damage as well as the ceiling in the First Floor Male Toilet would need to be changed where damaged. **Whether it is the roof, the air condition, the plumbing- you are responsible for the water damage.**"

21. It is clear that the Architect contended that the defect in the works was a leak and whether this was a result of "the roof, the air conditioning, the plumbing" the Defendant is responsible for the water damage. In addition there were other significant leaks to fire lines and plumbing below the building clearly outside the sub contract with the Claimant. The exchange in emails does not alter the effect of the architect's clearly stated letter which does not attribute blame to the Claimant for faulty works.

22. The Defendant alludes to "as built drawings" as a condition for payment but there are no contemporaneous documents identifying that this is a condition precedent for payment.

23. Instead of demonstrating that it has actively engaged or are engaging the dispute process itself with the Employer, quite to the contrary the Defendant is still considering whether it would do so or at least ambivalent on the issue. Paragraph 21 and 25 of the affidavits states as follows:

"Having regard to the above and other issues emanating from the contract, the Defendant has retained attorneys to commence Arbitration Proceedings against its Client, and it is expected that the issue regarding the defective works by the Claimant and Consequential damage occasioned thereby would emerge."

"Upon perusal of the aforesaid documents and at the hearing of the said supplication, the Defendant would contend that the court ought to stay these proceedings and have Judgment entered against it vacated, since:

i. Having regard to the FIDIC terms and conditions of the main contract which governed the sub contract, if there was a dispute between the Claimant and the Defendant, the Claimant was contractually obliged to comply with the

provisions contained therein to settle same and if indeed those provisions failed, then to proceed to Arbitration.

ii. The Defendant was at all material times, and at the time the proceedings were started and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration.

iii. Having regard to the matters to be resolved, there is no reason why the Claimant should not use the dispute resolution processes provided for by the FIDIC contract, and if same fails, proceed to arbitration."

24. The first difficulty in this evidence is the absence of any documentary evidence to demonstrate a willingness to invoke the settlement process. Second the first step in the settlement process is the referral of the dispute to the Engineer before any question of arbitration arises. This has not been done as between the Defendant and the Employer. Third there is no clear statement of a specific dispute or articulation of a specific claim by the Defendant against the Claimant sub-contractor. Indeed it cannot as the source of the dispute concerning "water damage" may be attributed, as the Engineer stated in his letter, to many factors.

25. Against these facts the Defendant's application to stay the proceedings or to set aside judgment would be doomed to fail.

Stay of Proceedings

26. Section 7 of the Arbitration Act provides:

> "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."

27. The Court has a discretion to stay proceedings in favour of arbitration. It recognises that the parties can make binding arrangements between themselves for the alternative resolution of disputes rather than through litigation. The Court would generally lean towards the parties' agreement to resolve their disputes using an alternative dispute mechanism. However, a party may, rather than wait for arbitral proceedings to commence, take the initiative by commencing a claim. However, ***Russell on Arbitration 21st edition (1997)*** explains that where a party wishes to have the dispute referred to arbitration he must apply without delay to the court for a stay of proceedings brought in breach of the agreement to arbitrate. "The Court has no power to compel a party to proceed with an arbitration. Rather the arbitration agreement is enforced indirectly by the granting of a stay so that a party wishing to pursue his claim can do so only by commencing arbitration proceedings." See para 1-002 ***Russell on Arbitration***.

28. In exercising the power of a stay of proceedings under section 7 of the Act, Mendonca JA in **LJ Williams v Zim American Shipping Services** CA P059/14 explains:

    "In order for the Court therefore to exercise its discretionary power it must be satisfied of the two conditions set out in the "the plain and unambiguous language of section 7" namely, (1) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with agreement and (2) that the person seeking the stay was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.

    However before the Court may exercise its discretion to grant a stay there are certain mandatory or threshold requirements prescribed in the section. In the plain wording of the section these are: 1) There must be a concluded agreement to arbitrate. 2) The legal proceedings which are sought to be stayed must have been commenced by a party to the arbitration agreement or a person claiming through or under that party. 3) The legal proceedings must have been commenced against another party to the arbitration agreement or a person claiming through or under that person. 4) The legal proceedings must be in respect of any matter agreed to be referred to arbitration; and

5) The application for the stay must be made at any time after appearance but before delivery of pleadings or the taking of any other step in the proceedings."

29. The difficulty in this case is that there is no evidence of an agreement between these parties to arbitrate their dispute. Further, there is no evidence that the Claimant has invoked or is ready to invoke the settlement process.

30. The main difficulty for the Defendant is to demonstrate whether the dispute settlement clause was incorporated into the contract between the Claimant and the Defendant. It is a difficulty which typically arises on interpreting contracts between contractors and their subcontractors which incorporate the terms of a main contract. In building contracts these difficulties arise from references often in vague terms lacking precision showing that some other identifiable document or set of documents apply to a sub contract.

> "In construction sub contracts these usually take two principal forms, namely references to a part or all of the main contract itself (or to the main contractor's obligation under it which, by implication if not expressly, the sub-contractor undertakes to perform) on the other hand and secondly references often garbled and inaccurate to some known and publicly available set of documents or standard form which it is intended should constitute the formal sub contract conditions".
> ***Hudson Building and Engineering Contracts*** (11th ed) Vol 2 para 13-099.

31. The incorporation of the main contract in the sub contract in this case as evidenced in the document exhibited in the Statement of Case, was done very loosely in general words and without precise or careful consideration of the consequences. ***Hudson*** also observed that in dealing with the incorporation of the terms of the main contract "Each case must be separately considered to determine the precise purpose and extent to which it is desired to incorporate the term or terms of the main contract… This will be very much a question of interpretation on a case by case basis of often informal documentation in an endeavour to ascertain the parties objective intentions to be derived from the language used".

32. In ***Emden and Watsons' Building Contracts and Practice 6th ed*** the authors noted:

> "Where a sub-contractor agreed to be bound by the terms of a principal contract which contains a clause referring disputes between the employer and the contractor to arbitration this does not operate as a submission to arbitration of disputes between the

contractor and sub-contractor unless the term of the principal contract is expressly incorporated into the sub contract".

33. In **Goodwins**, **Jardine & Co v Brand** (1905) 7 F (Ct of Sess) 995, a sub-contractor undertook to carry out work in accordance with certain specifications in the main contract. One of these provided for disputes to be settled by arbitration. The sub-contractor sued for the price of his work and the contractor applied for the action to be stayed under the terms of the arbitration clause. The Court of Sessions held that the arbitration clause was incorporated only to the extent of making the arbitrator's decision binding on matter of dispute between the main contractor and owner but not incorporated so as to govern the dispute between the contractor and sub-contractor. See also **Temperley Steam Shipping Co v Smyth and Co** [1905] 2 KB 791.

34. It is clear from the exchange in correspondence and even in the affidavit of the Defendant at paragraph 21 that it recognises that the "arbitration proceedings" can only be between Toyota the Employer/client and the Defendant. It must therefore mean that the Claimant could not have submitted any of his claims against the Defendant to "arbitration" or utilising the settlement dispute process. There is nothing in the contract which binds the sub-contractor to await "arbitration proceedings" between the Defendant and its client/Employer before it receives payment.

35. Further and in any event, the contemporaneous documents do not reveal a willingness by the Defendant to refer the matter to the architect or invoke the dispute process before the commencement of the proceedings by the Claimant. Nor is there any ascertainable claim being made by the Defendant against the Claimant. At best, as seen in the correspondence passing between the parties, the Defendant is speculating as to the extent of any alleged faulty works which is the responsibility of the Claimant.

36. There is nothing in the material before this Court therefore which would convince it to stay these proceedings pending arbitration between the Defendant and its client or Employer.

37. Further section 7 of the Act makes it clear that the party seeking to stay the Court's proceedings should do so "at any time after entering an appearance". In this case the Defendant has failed to get off the mark as judgment has been entered against it in default of appearance. His right to invoke section 7 is predicated upon him having entered an

appearance and so presumably setting aside the judgment and to obtain leave to enter an appearance. See **Patel v Patel** [2000] QB p551.

38. The application for a stay must be made after entering an appearance and before delivering any pleadings or taking any other step in the proceedings. In my view setting aside judgment for the purposes of entering an appearance and at the same time applying to stay further proceedings in the matter cannot be construed as a step in the proceedings for the purposes of section 7 of the Act which would lead to the application losing its right to arbitrate. To lose the right to arbitration there must be a step which clearly demonstrates that the applicant has submitted to the jurisdiction of the Court. Obviously submitting pleadings, making applications for disclosure, and other unequivocal steps to deal with the case on the merits will be construed as submitting to the Court's jurisdiction. ***Russell on Arbitration*** at para 7-010 explains:

> "By serving pleadings or taking other steps in the proceedings a party submits to the jurisdiction of the court in respect of the claim and will not thereafter be able to obtain a stay requiring the other party to pursue his claim, if at all, by arbitration. In other words, by accepting the court's jurisdiction to hear the case he is treated as electing to have the matter dealt with by the court rather than insisting on his contractual right to arbitrate. This applies even if the applicant did not know of the agreement to arbitrate at the time the relevant step was taken. The same applies to a counterclaim, and a party seeking to stay a counterclaim must not have taken any step in connection with the proceedings by way of counterclaim.
>
> Guidance as to what constitutes a "step in the proceedings", may be gained from the analogous situation of a defendant wishing to dispute the court's jurisdiction under RSC Order 12. He will be prevented from doing so if he has taken a step to defend the case on the merits. Resisting an interlocutor injunction will not constitute a step in the action, whereas applying for discovery or serving a pleading will. An application for a stay is not itself a submission to the jurisdiction of the court."

39. See also **Pitcher Ltd v Plaza Ltd** [1940] 1 ER 151 **Turner and Goudy v McConnell** [1985] 1 WLR 898. A more rational and less legalistic approach to determining whether

the applicant has taken a step in the proceedings to lose its right to arbitration would be to require some conduct demonstrating a deliberate intention to abandon the right to arbitration and in favour of the action proceedings. See ***Hudson*** para 18-123. See also Otton LJ judgment in **Patel**:

> "Merkin, Arbitration Law, looseleaf ed., para. 6.19, states, citing section 9(3): "The right to seek a stay of judicial proceedings will be lost to the applicant 'after he has taken any step in those proceedings to answer the substantive claim'". The author then gives a helpful commentary on the operation of the new section, in the course of which he states:
>
>> "The old authorities, which remain good law under the Act of 1996, established the following proposition.... (e) An act which would otherwise be regarded as a step in the proceedings will not be treated as such if the applicant has specifically stated that he intends to seek a stay." ....
>>
>> "The right to apply for a stay will also be lost if the defendant in the judicial proceedings has expressly or impliedly represented that he does not intend to refer the issues in dispute to arbitration. The matter is determined by the usual rules applicable to estoppels, i.e. has the defendant unequivocally represented that there will be no reference to arbitration, and has the plaintiff conducted his affairs on the basis that the matter will be determined by the court, in reliance on that representation?"

40. It is for these reasons that the application to set aside judgment for leave to enter an appearance should in my view be considered first. Indeed the facts asserted by the Defendant in its application to set aside judgment also includes its reliance on the "arbitration clause" to stay the proceedings and "oust" the jurisdiction of the Court on making a determination on the merits in this matter. However for the reasons set out below even his application to set aside judgment is also doomed to fail.

<u>Setting aside judgment</u>

41. It is trite law that the Defendant must demonstrate that it has a realistic prospect of success and that it acted as soon as reasonably practicable when he found out the judgment had been entered against him. A realistic prospect of success must be one which is more than arguable, and carries a degree of conviction. See **Man Liquid Products Ltd**

v Patel [2003] EWCA Civ 472, [2003] CPLR 384, and **International Finance Corporation v Utexafrica** sprl [2001] CLC 1361.

42. As discussed above in the analysis of the evidence of the Defendant there is no evidence which demonstrates that the Defendant has a viable claim against the Claimant for defective works. The claim is at best speculative. It is speculative as to whether the blame for the alleged faulty works lie with the Claimant for alleged defective air condition equipment or whether it is attributable to defective plumbing or defective roof. There is no conviction by the Defendant itself that the Claimant is culpable. It is merely refuting a refusal by the Architect to honour its own claim for payment. Indeed in a weak reference to the proposed "arbitration" proceedings the Defendant states that its issue regarding defective works by the Claimant and consequential damage "would emerge". However the Defendant has failed here to properly articulate its alleged claim against the Defendant.

43. Notably the Defendant has without demur paid on account on the Claimant's invoices. Further there is no evidence of the Defendant's own allegations or observation of defective work for it to convince the Court that it has a realistic prospect of defending the Claimant's claim.

Conclusion

44. The Defendant's application will therefore be dismissed with assessed costs to be paid by the Defendant to the Claimant.

Vasheist Kokaram

Judge