REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-02465

BETWEEN

MOOTILAL RAMHIT & SONS CONTRACTING LIMITED

Claimant

AND

EDUCATION FACILITIES COMPANY LIMITED

First Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Wednesday 11th April 2018

Appearances:

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

Ms. Shobna Persad and Ms. Krystal Piper for the First Defendant

JUDGMENT-

PROCEDURAL APPLICATION FOR STAY OF PROCEEDINGS

1. The Education Facilities Company Limited (EFCL) is seeking to stay these proceedings instituted by the Claimant, Mootilal Ramhit and Sons Contracting Limited, for the recovery of a total sum of Twenty four million two hundred and eight four thousand five hundred and twelve dollars and fifty two cents ($24,284,512.52)[1] due to it for the execution of works in our public school system. EFCL had engaged the services of the Claimant for design-build

[1] The sum comprises sums due on Interim Payment Certificates nos. 1, 2, 3 together with retention monies, standby charges and loss of profit.

services to upgrade the Arima Central Secondary School. The parties contract included the FIDIC yellow book[2] which makes provision for the arbitration of disputes. EFCL has not yet determined if that sum is to be paid to the Claimant. It has not yet filed a defence in this matter nor has it responded in substance to the Claimant's pre-action letter. Instead, it has applied to stay these proceedings pursuant to section 7 of the Arbitration Act Chapter 5:01 and the inherent jurisdiction of the Court on the ground that this dispute is one that should be arbitrated pursuant to clause 20 of the FIDIC yellow book. If it is not successful on that application EFCL seeks an extension of time to file its defence.

2. The two main issues that arise for determination on EFCL's application, by no means the only ones, are whether (1) there is no sufficient reason why the matter should not be referred to arbitration in accordance with the contract and (2) at the time when these proceedings commenced EFCL was and still remains ready and willing to do all things necessary for the proper conduct of the arbitration.

3. In my view, in spite of strong policy or public interest reasons to encourage parties to resolve their disputes by utilising the ADR mechanism which they had bargained for, there are sufficient reasons in this case why the matter should not be referred to arbitration. EFCL has not to date, for the reasons set out in this judgment, identified the nature of the dispute between the parties nor has it indicated its readiness to arbitrate this matter beyond making a bald statement in its application. Although in some cases this may be of no moment, but having regard to the substantial evidence already filed by the Claimant and the lack of any response by the Defendant to what appears on its face to be a clear case of non-payment on several Interim Payment Certificates (IPCs) issued by the Engineer under the parties contract, this application can be viewed as a means to delay the payment of sums due to the Claimant. It would certainly be counterproductive and inconsistent with the parties' agreement to arbitrate disputes to now submit this matter to arbitration when nothing has been demonstrated to this Court of any serious dispute between the parties that can or ought to be arbitrated or which merits the diversion of this claim from its litigation path to the arbitration process.

[2] FIDIC Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works, Designed by the Contractor (First Edition 1999) known as the FIDIC yellow book.

4. In this judgment, I first examine the parties' agreement to arbitrate, the applicable principles to grant a stay under section 7 of the Arbitration Act and the inherent jurisdiction of the Court. I also analyse the Defendant's application by a brief examination of the relevant facts and its application to the threshold requirements under section 7 of the Arbitration Act. The starting point is the parties' agreement to arbitrate which is not in contest.

The agreement to arbitrate

5. The provisions for dealing with disputes under the FIDIC Yellow Book Contract Appendix 2- Conditions of Contract are set out in Clause 20 and sets out the terms, conditions and provisions and procedures in relation thereto. Sub clause 20.1 deals with contractors' claims and Clause 20.2 deals with the appointment of a Dispute Arbitration Board (DAB) to determine those disputes referred to it for arbitration. Clauses 20.2 to 20.8 set out the procedure in relation to disputes adjudicated by the DAB. Importantly, by sub clause 20.2 the parties agreed to appoint a DAB twenty eight (28) days after a party gives notice to the other party of its intention to refer a dispute to a DAB in accordance with sub clause 20.4. Neither party in this case has done so.

6. Sub-clause 20.4 of the General Conditions of the FIDIC Yellow Book Contract contains the parties' agreement to arbitrate. It states inter alia:

> "If a dispute of any kind whatsoever arises between the Parties in connection with, or arising out of, the Contract of the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, then after a DAB has been appointed pursuant to Sub-Clause 20.2 [appointment of the Dispute Adjudication Board] and 20.3 [Failure to Agree Dispute Adjudication Board] either party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause."

7. Notably sub clause 20.5 encourages parties to settle their dispute amicably before commencing arbitration:

> "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. However, unless both Parties agree otherwise, arbitration may be commenced

on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made."

8. The parties' agreement to submit matters to arbitration is quite wide. They agreed that a dispute "of any kind whatsoever" in relation to the execution of the works may be referred to arbitration. Sub clause 20.4 is a common mechanism for parties in the commercial world to resort to this ADR mechanism to swiftly resolve their disputes. Importantly, it is a method of resolving a dispute by, in most cases, subject specialists where parties have the ability to appoint experts in such building contract disputes. Sub clause 20.4 however, does not deprive a party of submitting its dispute to the High Court. Of course any such claim instituted is subject to the Court's inherent jurisdiction and in this case section 9 of Arbitration Act to stay the proceedings pending the determination of the arbitration process as provided for in the contract.

9. Although no submissions were made by EFCL to invoke the Court's inherent jurisdiction, I have also considered the Court's wide discretion and case management powers in the analysis of the EFCL's application for a stay.

The Court's jurisdiction to grant a stay

10. Mendonca JA in **LJ Williams Ltd v Zim Integrated Shipping Services Ltd and Zim America Shipping Services Co. Inc** Civil Appeal No. PO59 of 2014 noted at paragraph 17:

> "17. It is not in dispute that, in addition to the power to stay proceedings under section 7 of the Arbitration Act, the High Court also has the power under its inherent jurisdiction to control proceedings to stay proceedings in favour of arbitration. The scope of this jurisdiction has to a large extent been overtaken by the power given under section 7 of the Arbitration Act. It is fair to say that in this matter the focus was on the statutory jurisdiction and it was not advanced by Zim Israel that should its application fail under section 7 the Court should nevertheless grant the stay under its inherent jurisdiction."

11. EFCL's application has been similarly articulated in this case. Its main focus is on section 7 of the Arbitration Act. Although section 7 of the Arbitration Act confers a discretion on the Court to stay proceedings in favour of arbitration the Court also has an inherent jurisdiction to do so. Dealing with the section 7 jurisdiction it must be noted that our arbitration

legislation is much a relic of the past. Our Arbitration Act modelled on the United Kingdom's (UK) Arbitration Act of 1889 has been overhauled in other commonwealth jurisdictions[3], notably the UK. The Arbitration Act of 1996 (UK) contains a coherent, modern framework to make arbitration in that jurisdiction more accessible and free of technicality for parties in a commercial world. It commends itself as a model to be accepted in this jurisdiction. However, one must exercise caution in relying on UK authorities post 1996 as a guide to interpreting section 7 of our 1939 Arbitration Act. Indeed, the 1996 UK Act deliberately and expressly espouses a principle of non-intervention by the Courts. The principle of non-intervention was discussed in **Lesotho Highlands Development Authority v Impregilo SpA and others** [2006] 1AC 221. In **Cetelem SA v Roust Holdings Ltd** [2005] 1 WLR 3555 the Court of Appeal noted:

> "a central and important purpose of the 1996 Act was to emphasise the importance of party autonomy and to restrict the role of the courts in the arbitral process. In particular the Act was intended to ensure that the powers of the court should be limited to assisting the arbitral process and should not usurp or interfere with it."

12. Section 9 of the UK Arbitration Act 1996 confers on the Court a discretion to stay proceedings "unless satisfied that the arbitration agreement is null, void, inoperative or incapable of being performed."[4] It gives primacy, therefore, to party autonomy and so long as the arbitration agreement cannot be impeached then the parties should submit their dispute to arbitration and not litigation.

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[3] See also Jamaica's Arbitration Act (2017).

[4] Section 9 of the UK Arbitration Act provides:

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

13. In contrast, section 7 of the Arbitration Act of Trinidad and Tobago confers a "wider" discretion for the Court's "intervention" in a contractual dispute governed by FIDIC which for arbitrators and ADR specialists can significantly undermine the arbitration and ADR movement. Section 7 of the Arbitration Act provides:

> "7. 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."

14. The Claimant was correct in its submissions to point out the difference in the statutory provisions of section 7 of our legislation and section 9 of its UK remodelled counterpart. It underlies the difference in approach of the Court under these statutes and the interpretation of a "dispute" to submit to the arbitral process in Sub Clause 20. In UK case law the question whether there is in existence a "dispute" is set out in **Amec Civil Engineering Ltd v Secretary of State for Transport** [2004] EWHC 2339:

    1. "The word "dispute" should be given its normal meaning.
    2. Litigation over the meaning of the word "dispute" has produced helpful guidance but no hard-edged legal rules as to what is or is not a dispute.
    3. The mere fact of notification of a claim does not automatically and immediately give rise to a dispute; a dispute does not arise unless and until it emerges that the claim is not admitted.
    4. The circumstances from which it may emerge that a claim is not admitted are "Protean". For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the

claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not automatically curtail what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the Court comes to consider what is a reasonable time for responding.

7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

15. These propositions have now been widely accepted in UK case law and adopted by the Court of Appeal in the same case, where May LJ added the further observation that:

"In many instances, it will be quite clear that there is a dispute. In many of these, it may be sensible to suppose that the parties may not expect to challenge the engineer's decision in subsequent arbitration proceedings. But major claims by either party are likely to be contested and arbitration may well be probable and necessary. Commercial good sense does not suggest that he clause should be construed with legalistic rigidity so as to impede the parties from starting timely arbitration proceedings. The whole clause should

be read in this light. This leads me to lean in favour of an inclusive interpretation of what amounts to a dispute or difference."[5]

16. Rix LJ in the Court of Appeal decision in **AMEC Civil Engineering Ltd v Secretary of State for Transport** [2005] EWCA Civ 291 underscored the contextual nature of determining what constitutes a dispute:

> "Secondly, however, like most words, "dispute" takes its flavor from its context. Where arbitration clauses are concerned, the word has on the whole caused little trouble. If arbitration has been claimed and it emerges that there is after all no dispute because the claim is admitted, there is unlikely to be any dispute about the question of whether there had been any dispute to take to arbitration. And if the claim is disputed, any argument that the arbitration had not been justified because at the time it was invoked there had not been any dispute is, it seems to me, unlikely to find a receptive audience (although it appears that it did in *Cruden Construction v Commission for the New Towns* [1995] 2 Lloyd's Rep 37). So it is that in this arbitration context the real challenge to the existence of a "dispute" has arisen where a party seeking summary judgment in the courts had been met by a request for a stay to arbitration and the claimant has wanted to argue that an unanswerable claim cannot be a real dispute. In that context it was held in *Hayter v Nelson and Home Insurance* [1990] 2 Lloyd's Rep 265 that for the purposes of s 1 of the Arbitration act 1975 "there is not in fact any dispute" where a claim is unanswerable, even if disputed. However, for the purposes of s 9 of the Arbitration Act 1996, from which that particular language had been dropped, this court held, applying *Ellerine Brothers (Pty) Ltd v Kliner* [1982] 2 All ER 737, [1982] 1 WLR 1375, that an unadmitted claim gave rise to a dispute, however unanswerable such a claim might be: *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 WLR 726.
>
> It follows that in the arbitration context it is possible and sensible to give to the word "dispute" a broad meaning in the sense that a dispute may readily be found or inferred in the absence of an acceptance of liability, a fortiori because the arbitration process itself is the best place to determine whether or not the claim is admitted or not."

[5] **AMEC Civil Engineering Ltd v Secretary of State for Transport** [2005] EWCA Civ 291.

17. The interpretation of what amounts to a dispute is an inclusive interpretation and eschews opportunistic technical obstacles to achieving this beyond those which the clause necessarily requires. The argument that a dispute has not arisen because the claim is unanswerable or has not been admitted may not always find welcome reception by the Court in determining whether the dispute ought not to be arbitrated. See **Halki Shipping Corp v Sopex Oils Ltd ('The Halki')** [1998] 1 Lloyds Rep. 465. However, as Rix LJ observed "dispute" takes its flavour from its context.

18. The nature of the dispute between the parties is still a live issue to be determined under section 7 of the Arbitration Act. To that extent **Heyman v Darwins Limited** [1942] AC 356 provides a useful interpretation of section 7 of our legislation. Lord Porter commented that where parties have chosen to refer their difference "to arbitration they should go in the ordinary course unless there is some good reason to the contrary". Viscount Simon LC summarised one aspect of the law as follows:

> "My Lords, it is of much practical importance that the law should be quite plain as to the scope of an arbitration clause in a contract where the clause is framed in wide and general terms such as this, and I trust that the decision of the House in this appeal may be useful for this purpose and will remove any misunderstanding which may have grown up out of certain phrases in some of the previous decisions to which I have referred. At the risk of some repetition, I would summarize what I conceive to be the correct view on the matter as follows. An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void. But, in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from

further performance, such differences should be regarded as differences which have arisen "in respect of," or "with regard to," or "under" the contract, and an arbitration clause which uses these, or similar, expressions should be construed accordingly. By the law of England (though not, as I understand, by the law of Scotland), such an arbitration clause would also confer authority to assess damages for breach, even though it does not confer on the arbitral body express power to do so."[6]

19. That is a separate question from whether the Court should exercise its discretion in refusing or granting the stay. Lord Macmillan had propounded four considerations to be taken into account:

    a) The precise nature of the dispute which has arisen;

    b) Whether the disputes is one which falls within the terms of the arbitration clause;

    c) Whether the arbitration clause is still effective or whether something has happened to render it no longer operative and

    d) Having answered the above in favour of granting the stay, whether there is any sufficient reason why the matter in dispute should not be referred to arbitration.

20. In **Uni-Naviagation Ptc Limited v Wei Loong Shipping Limited** [1992] 3 SLR 595 the Court made the following observation of the jurisdiction to grant a stay of an action commenced by a party to an arbitration agreement adopting a holistic approach to the question:

    "15. It therefore follows that where the claim is undisputed or indisputable the courts and not the arbitrators have the jurisdiction to decide upon the claim even though the arbitration agreement stipulates for disputes to be referred to arbitration. So, in a case where the defendant in the action has made a clear and unqualified admission of the claim the court cannot stay the action: London and North Western Railway Co v Jones [1915] 2 KB 35; London and North Western and Great Western Joint Railway Companies v JH Billington Ltd [1899] AC 79; and Bede Steamship Shipping Co Ltd v Bunge Y Born Limitada SA (1927) 43 TLR 374; 27 Ll L Rep 410..

[6] **Heyman v Darwins Limited** [1942] AC 356 at page 366

16. The common form arbitration agreement provides for disputes to be decided by arbitrators. In such a case the court should, save in obvious cases, adopt a holistic and common sense approach to see if there is a dispute. The justification for this approach is that it is important to hold a party to his agreement and avoid double and split hearing of matters. The reasoning in support of this view is found in M J Mustill and S C Boyd, Commercial Arbitration (2nd Ed, 1989) at p 123:

> Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled upon by the arbitrator, not the court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to cases where the defence is unsound in fact or law. A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute. The practice whereby the court pre-empts the sole jurisdiction of the arbitrator can therefore be justified only if it is legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed."[7]

21. Our Court of Appeal in **LJ Williams Ltd v Zim Integrated Shipping Services Ltd and Zim America Shipping Services Co. Inc** and **Sakawat v Denis Turton and another** Civ App 32 of 1974 have set out the guiding principles for our Courts to exercise its jurisdiction under section 7 of our Arbitration Act. At paragraphs 18-20 in **LJ Williams Ltd v Zim Integrated Shipping Services Ltd and Zim America Shipping Services Co. Inc** Mendonca JA noted:

> "18. It is apparent from section 7 that the Court has a discretion to stay proceedings in favour of arbitration. In Civil Appeal 32 of 1974 Sakawat v Denis Turton and another Hassanali, J.A. stated (at p. 4) with reference to the discretionary power of the Court under section 7 that: "In plain and unambiguous language section 7 of the Ordinance prescribes two conditions precedent to the exercise of the discretionary power in the court

[7] **Uni-Naviagation Ptc Limited v Wei Loong Shipping Limited** [1992] 3 SLR 595 at paragraphs 15 and 16.

to stay the appellant's action. They are the conditions upon which that discretionary power is based. The court could not exercise that power unless it is satisfied of them both - namely (the first) that there is 'no sufficient reason why the matter should not be referred in accordance with the agreement'- and (the second) that the respondents were at the time when the action was commenced and still remained (at the time of the hearing) 'ready and willing to do all things necessary to the proper conduct of the arbitration…'

19. In order for the Court therefore to exercise its discretionary power it must be satisfied of the two conditions set out in "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.

20. 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 any 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."

22. On the matter of the burden on the party seeking the stay to demonstrate that it is ready and willing to arbitrate Mendonca JA noted:

"44. The onus is on the person seeking the stay to show that he was ready and willing at the time of the commencement of the proceeding and still remains ready and willing to do all things necessary to the proper conduct of the arbitration. In an affidavit filed on behalf of Zim Israel in support of the application for the stay of the counterclaim, the deponent deposes "that at the time the counterclaim was commenced [Zim Israel] was, and remains, ready and willing to do all things requisite to enable all the alleged matters

in dispute regarding the counterclaim, to be determined by arbitration in accordance with the provisions of the [joint venture agreement]". The Judge noted that this evidence was uncontradicted and stated there was no reason provided that it should be rejected. The Judge therefore accepted the evidence and found that Zim Israel was ready and willing to do all things necessary to the proper conduct of the Arbitration."

23. There are then two main conditions that must be satisfied if a stay is to be granted (1) that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and (2) 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. These two conditions must meet the Court's "satisfaction". This underscores the wide discretion conferred on the Court. Sufficient material must therefore be put before the Court by the applicant for the Court to judicially exercise its discretion.

24. There is ample recent learning on the interpretation of this section and the onus on the applicant to satisfy the Court that a stay ought to be granted. I shall consider some of them although in deference to both attorneys a number of authorities were cited[8].

25. In **Kall Co. Limited v Education Facilities Company Limited** CV2017-01397 Justice Rampersad neatly summarised the authorities on this issue namely **LJ Williams Ltd v Zim Integrated Shipping Services Ltd and Zim America Shipping Services Co. Inc, Climate Control v C.G Construction Services Limited** CV2015-03486, **Quantum Construction Limited v Newgate Enterprises Co. Ltd** CV2014-00338, **Satyanan Sharma and Anor v Christiana Adit and Anor** CV2012-04258, **Executive Bodyguard Services Limited v**

[8] The Claimant submitted the following authorities: **Namalco Construction Services Limited v Estate Management and Business Development Limited** CV2016-01522, **Heyman v Darwins Limited** [1942]AC 356, **Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd** [1992] 3 SLR(R), **Halki Shipping Corp v Sopex Oils Ltd** [1998] 2 All ER 23, **Turnock v Sartoris** (1889) 43 Ch. D. 150, **Taunton-Collins v Cromie and Another** [1964] 2 All ER 322, **Trinsalvage Enterprises Ltd v The Attorney General of Trinidad and Tobago** CV No. 2011-04593, **Fiton Technologies Corporation v Attorney General** BB 2013 HC 28, **Wilesford v Watson** (1873) L.R 8 Ch. App 473, **Ferguson v Attorney General of Trinidad and Tobago** [2016] 87 WIR 495, **Sharma and another v Adit and another** CV2007-00928, **The Attorney General of Trinidad and Tobago v Universal Projects Limited** Civil Appeal No. 104 of 2009.
The Defendant submitted the following authorities: **Executive Bodyguard Service Limited v National Gas Company of Trinidad and Tobago Limited** CV2016-01683/ CV2016-01684/ CV2016-01685/ CV2016/01686/ CV2016-01692/CV2016-01694/CV2016-01695/CV2016-01954, **LJ Williams Ltd v Zim Integrated Shipping Services Ltd and Zim America Shipping Services Co. Inc** Civil Appeal PO59/ of 2014, **Quantum Construction Limited and Newgate Enterprises Co. Ltd** CV2014-00338, **Climate Control Limited v CG Construction Services Ltd** CV2015-03486, **Namalco Construction Services Limited v Estate Management and Business Development Limited** CV2016-01522.

National Gas Company of Trinidad and Tobago CV2016-01683, **Namalco Construction Services Limited v Estate Management and Business Development Company Limited** CV2016-01522, **Heyman v Darwins Limited** [1942] AC 356 and **Mathanex New Zealand v Fontaine Navigation S.A** 1998 [1998] 2 FCR 583. In **Kall Co,** Justice Rampersad quite rightly concluded at paragraph 61 and 62 that:

> "61…… It is not sufficient to come to the court to just say that there is an arbitration agreement and that it is ready and willing to do all things necessary to pursue the arbitration. The court is of the respectful view that the parties must go further and say that there is an arbitration agreement and then, identify the dispute that has arisen in some form or other that requires resolution under the arbitration agreement. It may be so desirable to go on further to give the specific reasons as to why that procedure is or is not a more appropriate forum for the resolution of the dispute than the High Court. Only then can the court exercise its mind in relation to whether or not it is satisfied as per the section.
>
> 62…….. The court is not in full agreement with that approach. Parliament has infused the section with an important element- the court's satisfaction- and, to my mind, that satisfaction must be reached judicially rather than just rubberstamped. This court has searched for something a little more than what has been put before it i.e evidence of a dispute."

26. Turning to the Court's inherent jurisdiction, Rahim J in **Namalco Construction Services Limited v Estate Management and Business Development Limited** CV2016-01522 was quite right to observe that apart from Section 7, the Court has a wide discretion to stay a claim under its inherent jurisdiction. The general power to stay proceedings is one of the Court's case management powers. See Rule 26.1(f) Civil Proceeding Rules 1998 as amended (CPR). In exercising its inherent jurisdiction the Court is not limited by the considerations of section 7 of the Arbitration Act but it is obliged to taken into account the principles of equality, expedition, proportionality and fairness which are the core features of the overriding objective of the CPR (Part 1 CPR). It can also take into account matters such as prejudice and the public interest.

27. Applying these principles to different cases may give rise to different results. Depending on the circumstances and context, bald statements that a dispute has arisen or that a Defendant is ready and willing to arbitrate may suffice to stay proceedings. It is convenient therefore at this stage to analyse EFCL's application by examining the context in which EFCL claims it is appropriate to invoke arbitration proceedings.

Analysis- Context of EFCL's application

28. By contract dated 1st December, 2014, EFCL accepted the Claimant's tender for design-build services for the upgrade of the Arima Central Secondary School for the sum of $31,797,323.35 (VAT inclusive).

29. The Claimant sent three interim payment certificates (IPC) at performance of the works issued by the Engineer appointed under the contracts, CE Management and Services Limited, to EFCL. IPC#1 dated 6th October, 2015 was in the sum of $1,856,989.45, IPC#2 dated 25th January, 2016 was in the sum of $6,206,145.38 and IPC #3 dated 21st March 2016 was in the sum of $1,554,883.57. These certificates were issued pursuant to the contract and no objection was taken to them by EFCL.

30. By letter dated 20th October, 2015, the Claimant wrote to EFCL and submitted its invoice for payment of IPC #1. This letter was in the possession of EFCL when EFCL subsequently wrote to the Claimant on 22nd January, 2016 and confirmed that the sum of $97,526,023.16 was "due" to the Claimant and would "be paid promptly upon receipt of the funding from the Ministry of Education".

31. The Claimant by letters dated 25th January 2016 and 4th April 2016 wrote to EFCL and submitted its invoices for payment of IPC#2 and IPC#3. There was no response from EFCL.

32. The Claimant made several demands for the payment of the IPCs but upon receiving no response from EFCL, the Claimant issued a Notice of Suspension of the Works by letter dated 1st June, 2016. Yet again there was silence form EFCL. The Claimant thereafter quantified its claim for stand by charges and set out its claim and breakdown of the sums by letter dated 6th December, 2016 to EFCL. There was no response to that letter by EFCL.

33. By letter dated 23rd January, 2017, the Claimant wrote to EFCL for the earliest possible settlement of its claim for stand-by charges but there was no response by EFCL. As a result

of EFCL's prolonged failure to pay, the Claimant issued a Notice of Termination by letter dated 25th April, 2017. Subsequent to this, the Claimant qualified its claim for loss of profit in the sum of $3,483,104.42 (VAT exclusive) and called up EFCL to pay the said sum by letter dated 26th April, 2017. There was again, no response to that letter. The Claimant was entitled pursuant to Clause 14. 7 of the FIDIC yellow book to all costs and charges. No issue has been raised by EFCL as to the Claimant's entitlement to terminate or to the charges claimed.

34. The Claimant continued to write to EFCL by letters dated 1st February, 2017 and 16th February, 2017 indicating that it had not yet received payment but EFCL did not respond to those letters. Four further letters dated 22nd February 2017 were also sent to EFCL but no response was forthcoming.

35. Due to EFCL's failure to pay the sums or respond to the Claimant, the Claimant issued a pre-action protocol letter on 20th April, 2017 calling upon EFCL to satisfy the certified sums with interest.

36. Finally, EFCL responded to the pre-action letter and indicated that it was investigating the matter and requested that the Claimant hold its hand from litigation for twenty one (21) days so that EFCL can "work towards an amicable solution for the captioned matter."

37. A further pre-action protocol letter dated 12th May, 2017 was sent to EFCL whereby the Claimant set out the facts underlying the suspension and termination and called upon EFCL to satisfy the sums due and owing to the Claimant. EFCL was given twenty one (21) days from the date of that letter to respond or settle the claims which EFCL failed to do.

38. It is the Claimant's contention that EFCL never provided any evidence in writing or otherwise to suggest that it was "at any point prior to the commencement of these proceedings and/or after these proceedings were filed, ready and willing to do all things necessary to the proper conduct of the arbitration."

39. EFCL's only plea in mitigation to its deafening silence over this period of time was that administrative management was undergoing changes and it did not get an opportunity to respond or refer to the Claimant's letters. Nonetheless, EFCL contends that "the threat of legal action therein stated in the respective letters was pre-mature and ill advised, since

complying with the arbitration agreement was the correct method to deal with the dispute."[9] EFCL maintained that it was at the time the proceedings were commenced and still remains, ready and willing "to do all things necessary to the proper conduct of the arbitration pursuant to the subsisting arbitration agreement." It is noted that the Claimant in its affidavits in response has challenged EFCL on its alleged readiness to do so.

Analysis- EFCL's Inability to cross the threshold

40. As discussed above, the stay can only be granted under section 7 if there is no sufficient reason why the matter should not be referred to arbitration and EFCL is and was ready and willing to arbitrate. EFCL fails on both limbs for the following reasons.

41. The Court is starved with any information as to the nature of the dispute save for a bald assertion or inference that a mere non-payment is and in of itself a dispute. Indeed, "mere refusal to pay upon a claim which is not really disputed does not necessarily give rise to a dispute calling an arbitration clause into operation." **Russel on Law of Arbitration** 20th Ed p171. See also **London and North Western Railway v Jones** 1915 2 KB 35 at p. 38:

> "It does not follow that the courts cannot be resorted to without recourse to arbitration to enforce a claim which is not disputed by which the [First Defendant] merely persists in not paying."

42. Simply to say, as EFCL has done in this case, that it has not paid the sums claimed by the Claimant takes this case no further. It has not challenged the IPCs. It has not alleged that there were defective works or some breach of contract. It has not identified which of the IPCs or whether all are in dispute. It has not challenged the Claimant's suspension and termination of the contract. EFCL's only reply was to the effect that it needed time to amicably resolve the matter. Such amicable resolution can be achieved through negotiation, mediation or a judicial settlement conference but it does not suggest remotely that amicable resolution translates to a sufficient reason to refer a dispute to arbitration under Clause 2o of the agreement. The Court is left grasping at straws to determine whether a dispute does in fact exist suitable for arbitration.

[9] Paragraph 17 of the Affidavit of Yvette Hall filed 7th August, 2017.

43. By analogy if the response by EFCL is subjected to the rigors of the rules under the CPR of the obligation to set out its defence, it would not only be found wanting but there could arise an implied admission to the claim of the Claimant.

44. Even though it can be contended, as the modern authorities on section 9 of the UK Act seems to suggest, that mere silence to a claim in some circumstances can give rise to a dispute and the arbitrator would equally be best placed to determine if a dispute has arisen, it is ultimately a question of discretion at this stage whether such silence on the Claimant's claim would justify diverting the claim on the doorsteps of a judgment, unless some defence is articulated, to arbitration. It is obvious that EFCL has not paid the sums claimed and that is why the claim has been filed. But is there a dispute that should be arbitrated? One consideration which was not explored in the authorities cited to the Court is the purpose for which arbitration has been the preferred mechanism for the resolution of these contractual disputes in the first place. In the commercial world and in some of these building contracts, experts may be required to assist in the unravelling of rivalling contentions which are against a backdrop of a specialist area which Courts are not frequently equipped. For this reason, the DAB can comprise persons of expertise relevant to the dispute. Although arbitration may be as complex as court proceedings, its attraction also comes from the suitability of these disputes being determined against the setting in most cases of expert knowledge.

45. In this case, there is nothing here more than simply to say that EFCL is not paying. It then begs the question why must arbitration proceedings be invoked when the Claimant can obtain summary judgment or a default judgment. There are no reasons advanced for the non-payment of the debt and without making any pronouncement on the matter, recognising that the matter is yet in its preliminary stages, one gets the impression that the application is a mere holding device to delay the payment on the IPCs.

46. There is an additional element in this case of the Second Defendant being a party to these proceedings as the works were conducted within the remit of the Ministry of Education. In paragraph 7 of the Statement of Case the Claimant sets out the particulars of the agency between EFCL and the State. The State is not a party to the arbitration agreement and it would be undesirable to refer part of these proceedings to arbitration and manage the claim

against the Second Defendant in these proceedings. This would lead to the incurring of extra costs, delay and the possibility of inconsistent findings by two different tribunals.

47. Further, the evidence does not demonstrate that EFCL was ready and willing to do all acts necessary to refer this matter to arbitration. EFCL's pre-action conduct demonstrates to the contrary, that it was willing to simply sit on its hands while the Claimant litigates its claim. To its credit, EFCL only awoke from its slumber on receipt of the Claimant's pre-action letter but even then its only response was to seek to amicably resolve the claim rather than to take any steps to refer a dispute to arbitration. For this reason, I endorse the views of Honeywell J, Rampersad J and Mohammed J[10] in related matters and I am not satisfied that there are sufficient reasons why the matter should be arbitrated or that EFCL was at all material times ready and willing to do all things necessary to the proper conduct of arbitration.

48. Further, in exercising my inherent jurisdiction, I am not satisfied that it is just that this matter should be referred to arbitration. Although EFCL made no submissions on the exercise of the Court's inherent jurisdiction, it is apparent for the reasons set out above, that to exercise the discretion in favour of a stay is an act of futility. It does not save the expense of the parties nor is it expeditious nor is it a proportionate response having regard to EFCL's conduct. I can see no prejudice occasioned to EFCL by having this claim proceed along its litigious track. ADR processes are to be properly invoked and there should be a bone fide resort to such procedures as set out in the parties' agreement. Although it is a firm policy of the Court to encourage the amicable resolution of disputes through the use of suitable ADR mechanisms, that objective can equally be achieved through therapeutic case management rather than adversarial arbitration proceedings.

49. Indeed, a matter such as this is amenable to mediation or a judicial settlement conferencing both of which can be accommodated under Part 26 of the CPR.

Disposition

[10] **Mootilal Ramhit and Sons Contracting Limited v Education Facilities Company Limited and That Attorney General of Trinidad and Tobago** CV2017-02643, **Kall Co Ltd v EFCL** Claim No. CV2017 – 01397, **Mootilal Ramhit and Sons Contracting Limited v Education Facilities Company Limited [EFCL] and The Attorney General of Trinidad and Tobago** H.C.2302/2017. CV.2017-02302.

50. For the reasons advanced, EFCL's application for a stay would be dismissed with costs to be assessed.

Vasheist Kokaram

Judge