**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV 2017-02302**

**Between**

**MOOTILAL RAMHIT & SONS CONTRACTING LIMITED** **Claimant**

**And**

**EDUCATIONAL FACILITIES COMPANY LIMITED** **First Defendant**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO** **Second Defendant**

**Before the Honourable Madam Justice Margaret Y. Mohammed**

**Dated the 9th March 2018**

**APPEARANCES:**
Mr. Parkash Deonarine instructed by Ms. Krystal Kawal Attorneys at law for the Claimant.
Ms. Shobna Persaud Maharaj instructed by Ms. Kristal Piper Attorneys at law for the First Defendant.

## DECISION

1. Before the Court are two applications filed by the First Defendant for determination. The first application was filed on the 1st November 2017 to stay the proceedings ("the stay application") and the second was filed on the 21st November 2017 to set aside the judgment in default ("the set aside application"). In support of the stay application and the set aside application the First Defendant relied on the affidavit of Ms Danielle Campbell, Senior Legal Officer with the First Defendant ("the Campbell affidavit") filed on the 1st November

2017, the affidavits of Ms Krystal Piper filed on the 21st November 2017 ("the First Piper affidavit") and on the 29th December 2017 ("the Second Piper affidavit").

2. In opposition to both the set aside application and the stay application, the Claimant relied on the affidavit of Krishenchand Seunarine filed on the 10th November 2017 ("the Seunarine affidavit") and the affidavit of Ms Ariel Moonsie ("the Moonsie affidavit").

3. To place the set aside application and the stay application, it is necessary that I outline the history of the matter. The Claimant instituted the instant action against the First and Second Defendants by a Claim Form and a Statement of Case filed on the 23rd day of June 2017. The Claimant claims against the Defendants, the following:

   (i) Payment on Invoice #1 plus contractual interest and/or financing charges in the total sum of $3,611,415.53 as of February 2017 together with contractual interest at a rate of 9.75% per month from 1st March 2017 to the date of payment;

   (ii) Payment on Invoice #2 of the said works plus contractual interest and/or financing charges in the total sum of $3,597,918.52 as of February 2017 together with contractual interest at a rate of 9.75% per month from 1st March 2017 to the date of payment;

   (iii) Payment on Invoice #3 of the said works plus contractual interest and/or financing charges in the total sum of $347,345.73 as of February 2017 together with contractual interest at a rate of 9.75% per month from 1st March 2017 to the date of payment;

   (iv) Payment on Invoice #4 of the said works plus contractual interest and/or financing charges in the total sum of $300,269.58 as of February 2017 together with contractual interest at a rate of 9.75% per month from 1st March 2017 to the date of payment;

   (v) Payment on Invoice #5 of the said works plus contractual interest and/or financing charges in the total sum of $1,075,859.93 as of February 2017 together with contractual interest at a rate of 9.75% per month from 1st March 2017 to the date of payment;

(vi) Payment on Invoice #6 of the said works plus contractual interest and/or financing charges in the total sum of $885,703.34 as of February 2017 together with contractual interest at a rate of 9.75% per month from 1st March 2017 to the date of payment;

(vii) Costs; and

(viii) Such further and/or other relief as this Court deems just in the circumstances.

4. The Claimant's case is that it agreed with the First Defendant to carry out certain works on the Santa Cruz School for the Blind ("the School"). The Claimant averred that the Agreement for the repair works at the School was evidenced in writing by the following documents:

(a) Letter of acceptance dated the 12th May 2014 in the sum of $2,481,725.00 (exclusive of VAT and contingency);

(b) Letter of acceptance dated the 20th May 2014 in the sum of $2,472,45.00 (exclusive of VAT and contingency);

(c) Letter of acceptance dated the 30th January 2015 in the sum of $214,400.00 (exclusive of VAT and contingency);

(d) Letter of acceptance dated the 9th February 2015 in the sum of $ 626,515.00 (exclusive of VAT and contingency);

(e) Letter of acceptance dated the 2nd March 2015 in the sum of $245,700.00 (exclusive of VAT and contingency);

(f) Letter of acceptance dated the 2nd March 2015 in the sum of $ 761,025.00 (exclusive of VAT and contingency).

5. The parties agreed that the Form of Contract between the Claimant and the First Defendant was the FIDIC First Edition 1999 Short Form Contract. After performing the works as agreed the Claimant caused invoices between the period 18th March 2015 to 17th June 2015 (set out at paragraph 3 above) quantifying the value of the work completed and called upon the First Defendant to pay the said sums.

6. The First Defendant issued six Completion Certificates for the aforesaid works and which acknowledged that the said works were satisfactorily completed as agreed and/or completed at the First Defendant.

7. The Claimant pleaded that Clause 11.2 of the Agreement provided that:

> "The Contractor shall be entitled to be paid at monthly intervals:
>
> a. The value of the Works executed.
> b. The percentage stated in the Appendix of the value of Materials and Plant delivered to the Site at a reasonable time,
>
> Subject to any additions or deductions which may be due.
>
> The contractor shall submit each month to the Employer a statement showing the amounts to which he considers himself entitled."

8. Clause 11.3 of the Agreement further provided that:

> "Within 28 days of delivery of each statement, the Employer shall pay to the Contractor the amount shown in the Contractor's statement less retention at the rate stated in the Appendix, and less any amount for which the Employer has specified his reasons for disagreement. The Employer shall not be bound by any sum previously considered by him to be due to the Contractor."
>
> The Employer may withhold interim payments until he receives the performance security under Sub-Clause 4.4 (if any)."

9. The Claimant averred that after duly performing the said works as agreed the Claimant caused invoices quantifying the value of the work completed and called upon the First Defendant to pay the agreed sums as follows:

a) Invoice for Payment in respect of repair works at the School Phase #1 dated 18th March 2015 (Invoice #1) claiming payment from the First Defendant to the Claimant in the sum $2,853,983.75.

b) Invoice for Payment in respect of repair works at the School Phase #2 dated 18th March 2015 (Invoice #2) claiming payment from the First Defendant to the Claimant in the sum of $2,843,317.50.

c) Invoice for Payment in respect of electrical works at the School dated 17th June 2015 (Invoice #3) claiming payment from the First Defendant to the Claimant in the sum of $282,555.00.

d) Invoice for Payment in respect of fire system works at the School dated 17th June 2015 (Invoice #4) claiming payment from the First Defendant to the Claimant in the sum of $244,260.00.

e) Invoice for Payment in respect of additional building works package 1 at the School dated 17th June 2015 (Invoice #5) claiming payment from the First Defendant to the Claimant in the sum of $875,178.75.

f) Invoice for Payment in respect of additional building works package 2 at the School dated 17th June 2015 (Invoice #6) claiming payment from the First Defendant to the Claimant in the sum of $720,492.25.

10. Notwithstanding the Claimant's completion of the said works and/or its said contractual obligations, the First Defendant in breach of the Agreement failed to pay the Claimant the said sums in accordance with the clause 11.3 of the Agreement within the stipulated 28 days or at all, and has not raised any dispute in relation to the said invoices.

11. Alternatively, the Claimant contends that the said sums are reasonable fees which the Claimant is entitled to recover by way of quantum meruit and accordingly, that it is entitled to recover the Defendants and/or either of them are required to pay the said sums or such other sum as the Court considers to be a reasonable fee in the circumstances of the case.

12. Subsequent to the issuing of the aforesaid Invoices, the Claimant requested, for banking purposes, a letter from the First Defendant for the pending payments which had been processed and still to be made. By letter dated 22nd January 2016, the First Defendant

confirmed that the amount of *"$97,526,023.13"* was *"due"* to the Claimant as at the date of the said letter (which said sum included the outstanding sum) and it *"will be paid promptly upon receipt of the funding from the Ministry of Education"*.

13. According to the Claimant, clause 11.8 of the Agreement further provided that if payment was not received the Claimant would be entitled to interest for each day that the First Defendant failed to pay beyond the prescribed payment period. The Claimant averred that it would apply the standard clause in the FIDIC Contracts which deals with delayed payment at clause 14.8 and states:

> "If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the date for payment specified in Sub-Clause 14.7 [Payment], irrespective (in the case of its sub-paragraph (b)) of the date on which any Interim Payment Certificate is issued.
>
> Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above the discount rate of the central bank in the country of the currency of payment, and shall be paid in such currency.
>
> The Contractor shall be entitled to this payment without formal notice or certification, and without prejudice to any other right or remedy."

14. The Claimant averred that the interest rate would have been:

(a) 8.50% commencing on 15th April 2015 for Invoice #1;

(b) 8.50% commencing on 15th April 2015 for Invoice #2;

(c) 9.25% commencing on 15th July 2015 for Invoice #3;

(d) 9.25% commencing on 15th July 2015 for Invoice #4;

(e) 9.25% commencing on 15th July 2015 for Invoice #5; and

(f) 9.25% commencing on 15th July 2015 for Invoice #6.

15. By letters dated 22nd February 2017, the Claimant called upon the First Defendant to pay the outstanding sums, together with interest in accordance with clause 11.8 of the said contract, totaling the sums of:

(a) $3,611,415.53 of which $757,431.78 represented interest on Invoice #1 of the work done;

(b) $3,597,918.52 of which $754,601.02 represented interest on Invoice #2 of the work done;

(c) $347,345.73 of which $64,790.73 represented interest on Invoice #3 of the work done;

(d) $300,269.58 of which $56,009.58 represented interest on Invoice #4 of the work done;

(e) $1,075,859.93 of which $200,681.18 represented interest on Invoice #5 of the work done;

(f) $885,703.34 of which $165,211.09 represented interest on Invoice #6 of the work done.

16. By pre-action protocol letter dated 8th May 2017, the Claimant's Attorney-at-Law wrote to the First Defendant calling upon it to satisfy the sums and interest due and owing on the aforesaid amounts and attached all essential documents.

17. By letter dated 18th May 2017, the First Defendant responded to the said pre-action letter acknowledging receipt of same and requested that the Claimant hold its hands from litigation for twenty-one (21) days by the date thereof so as to facilitate its investigations with a view to arriving at an amicable solution but failed to issue a response complying with the Practice Direction governing Pre-Action Protocol and/or to pay the sums outstanding in part or at all.

18. The proceedings were served and an appearance was entered on the 4th day of July 2017 by the First Defendant and on the 13th July 2017 by the Second Defendant. The First Defendant requested an extension of time to file a defence by the 21st September 2017. No defence was filed for the First Defendant as of the 21st September 2017 and on the 5th October 2017 the Claimant requested judgment in default defence. The Second Defendant filed an application on the 11th October 2017 where it applied to strike out the Claim against it. Both the Claimant and the Second Defendant agreed to stay the hearing of this application pending the outcome of a similar application.

19. Although the stay application was filed before the set aside application I will deal with the latter first.

**The set aside application**

20. It was submitted on behalf of the First Defendant the judgment in default of defence which was signed by the Registrar on the 9th October 2017 was irregular since it was signed on the 30th October 2017 which was after the First defendant filed an application to stay the proceedings. It also argued on behalf of the First Defendant that the default judgment was not final since the hearing fixed for the outstanding issue of interest impliedly operates to lessen the stringency of the requirement under CPR Part 13.3(b). Notably the First Defendant did not provide any basis to ground this submission.

21. The Claimant responded that the default judgment is regular and that the basis of the First Defendant's submission is fundamentally flawed since it is based on law which predates the CPR and that the relevant provisions in the CPR was designed to eliminate the mischief created by the pre CPR law which permitted delinquent litigants to put things right until the judgment was signed. It also argued that the date of the default judgment is the date when all requisite documents were filed.

22. Part 12 CPR deals with default judgments. Rule 12.5 sets out the procedural requirements and rule 12.5(2) CPR clearly states that the date the judgments takes effect is *"from the date that all requisite documents have been filed".* I have not been able to locate any local

judgments on this rule. However there is learning emanating from the Jamaican Courts where section 451 of the **Judicature (Civil Procedure Code) Laws of Jamaica** which deals with the date of entry of default judgments state:

> "451. Date of entry of other judgments.
>
> In all cases not within the last preceding section, the entry of judgment shall be dated as of the day on which the application is made to the Registrar to enter same, and the judgment shall take effect from that date."

23. In the Court of Appeal decision of Jamaica **Worker's Savings and Loan Limited v McKenzie**[1] the Court found that the effective date of the default judgment is the date of filing of the requisite documents regardless of how long after the filing judgment is actually entered. The Court saw the entry of the judgment by the Registrar as an administrative act.

24. In another Jamaican case **Janet Edwards v Jamaica Beverages Limited**[2] one of the issues to be determined was whether a default judgment was irregular since it was signed after an application to strike out was filed. Sykes J applied **Workers Savings and Loan Limited** and found that the judgment was regular since if the Registrar had acted promptly in the matter before him, the Claimant would have had her default judgment well before the Defendant applied to strike out the proceedings.

25. In the instant case the dated date and the entered date on the default judgment against the First Defendant is the 9th October, 2017 but it is stamped by the Court Office on the 30th October 2017. It was not in dispute that as at the date of the filing of the request for the entry of the default judgment against the First Defendant, the time for the First Defendant filing its defence which was the 21st September 2017 had passed and there was no Defence filed. There was no evidence presented by the First Defendant to demonstrate that the Registrar did not have the requisite documents at the time when the request for the default judgment was filed. There was no query issued by the Registrar and any delay by the Registrar in perfecting the judgment was an administrative act which in an efficiently run

[1] (1996) 33 JLR 440
[2] Suit C.L. 2002/E-037

Registry ought to have been done no more than 2-3 days after the request was filed. For these reasons I am of the view that the default judgment dated the 9th October 2017 is regular and that the hearing of the outstanding issue of interest does not alter the regularity of the default judgment.

26. I now to turn to the merits of setting aside the regular default judgment. Rule 13.3 CPR provides that:

> "13.3 (1) The court may set aside a judgment entered under Part 12 if-
>
> (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.
>
> (2) Where this rule gives the court power to set aside a judgment, the court may instead vary it.

27. It is not in dispute in this jurisdiction that the onus is on the First Defendant to satisfy the Court of both limbs to succeed with the set aside application[3]. It was argued on behalf of the First Defendant that it acted as soon as reasonably practicable after the default judgment was brought to its attention and that the First Defendant has a realistic prospect of success.

28. In response the Claimant argued that the judgment in default ought not to be set aside since there has been inexcusable delay by the First Defendant; there is no affidavit of merit and the First Defendant has no realistic prospect of success in defending the Claimant.

29. Did the First Defendant act as soon as reasonably practicable when it found out that judgment had been entered against it?

30. According to the Campbell affidavit the Claimant was served a pre-action protocol letter dated the 8th May 2017 demanding payment of the sum claimed in the Claim Form in the instant action and that the First Defendant by letter dated the 18th May 2017 indicated to the Claimant that it was investigating the claim and requested the Claimant to hold its hand

[3] Nizamodeen Shah v Lennox Barrow Civ App 209 of 2008

on pursuing litigation for 21 days so that the First Defendant could work towards an amicable solution. She did not dispute that the instant action was filed and served on the First Defendant on the 23rd June 2017 and that the First Defendant filed a Notice of Intention to Defend on the 4th July 2017 and that by letter dated the 6th July 2017 the Claimant consented to grant the First Defendant an extension of time to file its defence by the 21st September 2017. Ms Campbell deposed at paragraph 18 of her affidavit that *"in light of the fact that the First Defendant is disputing the jurisdiction of this forum being the High Court and is requesting a stay of proceedings, I do humbly submit that it will be severely prejudicial for the Defendant to file a defence and implicitly accept and/or accede to the jurisdiction hereof."*

31. Based on the Campbell affidavit there was no evidence when the First Defendant first became aware of the default judgment but based on her evidence she was aware that the deadline had passed and the First Defendant had not filed a defence.

32. The First Piper affidavit deposed that the instant action was instituted on the 23rd June 2017 and the First Defendant was served on the 23rd June 2017. The First Defendant filed a Notice of Intention to Defendant on the 4th July 2017. She assumed conduct of the instant matter on the 17th October 2017. She filed the stay application on the 20th October 2017. The stay application was listed before the Court on the 2nd November 2017 which was when she was first informed by the attorney at law for the Claimant that a default judgment was obtained. The officers of the First Defendant informed her that the Claimant's request for the default judgment was not communication to them.

33. The Second Piper affidavit confirmed that she first realized that an application had been made for default judgment on the 2nd November 2017 when she attended Court to deal with the First Defendant's stay application and when the attorney for the Claimant briefly showed her a copy of the document purporting to be the judgment. Ms Piper also deposed that upon assuming conduct there was no apparent notification or indication by the Claimant through its attorney-at law or themselves that they had applied for judgment in default. She stated that after she had served the notice of change and the stay application until the hearing of the stay application she had communications with the Claimant's

attorney in related matters and she received no notification, information or advice from the Claimant's attorney that they had applied for the default judgment.

34. Ms Piper then stated that after the stay application was adjourned further investigations revealed that the judgment in default of defence was filed on the 9th October 2017; the stay application was filed on the 20th October 2017; when the stay application was filed the default judgment had not been perfected by the Registrar and that the default judgment was perfected by the Registrar after the stay application was filed.

35. At paragraph 16 of the Second Piper affidavit she acknowledged that she assumed conduct in two matters CV 2017-02133 and CV2017-02138 from different attorneys for the First Defendant but she rejected that knowledge of a judgment on default in those matters was imported to her.

36. Based on Ms Piper's evidence the first time the First Defendant became aware of the default judgment was on the 2nd November 2017 and she filed the set aside application on the 21st November 2017.

37. The Moonsie affidavit did not dispute that at the hearing of the stay application on the 2nd November 2017 Counsel for the Claimant informed Ms Piper that a default judgment had been obtained and that a copy of the said judgment was shown to Ms Piper. She deposed that Counsel for the Claimant objected to the Court adjourning the stay application to allow the First Defendant to amend the stay application to include relief to set aside the default judgment.

38. Ms Moonise further deposed that after Ms Piper had come on record in the instant matter she and/or the First Defendant was aware that default judgments had been entered and/or were being pursued against the First Defendant in related matters CV 2017-02133 and CV 2017-02138. Ms Moonsie stated that Ms Piper deposed in an affidavit in support of a similar application to set aside a default judgment in CV 2017-02133 that she had assumed conduct on the 1st November 2017 and that she was advised by the First Defendant upon her assumption that a default judgment had been obtained by the Claimant in that matter.

Ms Piper had also deposed in her affidavit filed in support of an application to set aside a default judgment in CV 2017-02138 that she assumed conduct on the 8th November 2017 and that upon assumption she was advised by the First Defendant that a request for default judgement was filed by the Claimant on the 5th October 2017.

39. According to Ms Moonsie in another related matter CV 2017-02465 involving the same parties, on the 20th October 2017 Kokaram J directed the parties to convene an all parties conference to discuss without prejudice areas of agreement and future management of the claims but despite the Claimant's efforts the First Defendant did not respond favourably for the convening of the all parties conference which resulted in an adjournment to facilitate the all parties conference.

40. The Seunarine affidavit primarily dealt with opposing the stay application which I will address in greater detail later. However for the purpose of the set aside application he set out the same information with respect to the Claimant's pre-action protocol letter, the date of filing and service of the claim, the filing of the Notice of Intention to Defendant, the extension granted by the Claimant for the First Defendant to file its Defence to the 21st September 2017 ,the request for judgment in default of defence filed on the 27th September 2017 and the service of the notice of Change by Attorney for the First Defendant on the Claimant on the 18th October 2017.

41. It was argued by the Claimant that the there was no evidence that the First Defendant acted as a soon as practicable after default judgment became known to it and that the delay in making the set aside application ought not to be judged from the date when the First Defendant's attorney became aware that the judgment had been entered which was the 2nd November 2017 but rather from the date when the First Defendant ought to have known its defence was due which was the 29th September 2017. In support of this submission the Claimant relied on the *dicta* of Stollmeyer JA in **Ima E Louis v Trinidad and Tobago Housing Development Corporation**[4] at page 3, lines 33-44 which stated:

[4] Civ App 228 0f 2009 Transcript

"However, a defendant who knows there is a defence outstanding, runs the peril of having to claw his way back into contention at some later stage. If, for example, and it's well known, a defendant allows, knowing his defence is outstanding, he allows a judgment to be taken up against him, say, in a running-down action, then he is not permitted to appear at the assessment of damages, except for the sole purpose of putting forward any views he may have as to costs, he can't lead any evidence of his own and he can't cross-examine the other side's witnesses. So it ill behoves a defendant to sit back, allow a judgment to be taken up, and do nothing…"

42. The Claimant also referred the Court to the learning of Narine JA who gave a dissenting judgment where he also stated at page 5, lines 35-48 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, especially in a situation where it must have been, where the defendant, that is, must have been aware that his defence was due some six weeks before judgment was actually entered.

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."

43. I accept that Ms Piper first found out about the default judgment on the 2nd November 2017 and that Ms Campbell was well aware that after the 21st September 2017 a default judgment could have been obtained against it. I agree with Counsel for the Claimant's submission that there was no duty on the Attorney at law for the Claimant to inform the First Defendant or its Attorney at law that it was seeking to obtain a default judgment after the 21st September 2017. In my opinion the duty was on the First Defendant and /or its Attorney at law to take steps to ensure that the Claimant did not obtain a default judgment since Ms Piper was well aware that there were other related matters involving the two parties where a default judgment had been obtained and a request for a default judgment had been made. Ms Piper ought to have known that by the 18th October 2017 the First Defendant had not filed a defence and therefore a request for judgment in default of defence could have be

filed against her client the First Defendant. But for reasons only known to her she did not act diligently and immediately conduct a search of the Court file to ascertain the status of the matter. Indeed based on her evidence she only took this step after the 2nd November 2017 when she was told that a default judgment had been entered against her client and there is no explanation from Ms Piper to account for her failure to do so.

44. Despite the laissez-faire approach by the First Defendant before the 2nd November 2017 the rule does not contemplate that the time is to run from the deadline for the filing of the Defence but rather from the date the First Defendant found out about the default judgment. In **Ina E Louis** Kangaloo JA stated his interpretation of rule 13.3(1) (b) as:

> "It is my view that the second limb of that rule, doesn't have to be reinterpreted by the Court to mean when the defendant could reasonably have found out that the judgment was entered against him. The rule is worded very clearly, I assume, for a particular purpose…"

45. Therefore the rule clearly did not contemplate the Court taking into account the 62 days delay by the First Defendant between the deadline for the filing of the defence and the date the set aside application was filed in determining the set aside application under rule 13.3.(1) (b).

46. The time between when the First Defendant found out about the default judgment ie the 2nd November 2017 and the date of the set aside application ie the 21st November 2017 was 19 days. In my opinion this was a short time frame which elapsed and as such I am of the view that the First Defendant acted as soon as reasonably practicable when it found out that the judgment was entered against it to take steps to set aside the said default judgment.

47. Having found that the First Defendant acted as soon as reasonably practicable after becoming aware of the Defence I now turn to the next limb which is the burden on the First Defendant must show that its defence has a realistic prospect of success. In **Anthony**

**Ramkissoon v Mohanlal Bhagwansingh**[5] Mendonca JA described the burden on the First Defendant as:

> "the Defendant must,by evidence, establish he has a defence that has a realistic prospect of success. He or others should, therefore, depose in an affidavit or affidavits to such facts and circumstances that demonstrate the defendant has a realistic prospect of success."

48. The merits of the First Defendant's defence is to be found primarily in the Campbell affidavit. According to the Campbell affidavit there were several agreements between the Claimant and the First Defendant evidenced in writing by respective letters of acceptance dated between the period 12th May 2014 to 2nd March 2015. The First Defendant accepted the Claimant's tender and agreed that the Claimant would perform certain repair works to the School and that it was a term of the agreement that the form of the contract shall be the FIDIC Short Form of Contract (First Edition 1999). Clause 15 of the General condition of the FIDIC Green Book Contract comprises sub clauses which deal with the resolution of disputes and lay out the terms, conditions and provisions and procedures relating thereto and the clauses. According to the Campbell affidavit Sub-Clause 15.1 of the General Conditions of the FIDIC Green Book Contract states:-

> "Unless settles amicably, any dispute or difference which arises between the Contractor and the Employer out of or in connection with the Contract, including any valuation or other decisions of the Employer, shall be referred by either party to adjudication in accordance with the attached Rules for Adjudication ("the Rules"). The Adjudicator shall be any person agreed by the Parties. In the event of disagreement, the adjudicator shall be appointed on accordance with the Rules."

49. The Campbell affidavit deposed that Sub-Clause 15.2 of the General Conditions of the Fidic Green Book Contract states:-

> "If a party is dissatisfied with the decision of the adjudicator or if no decision is given within the time set out in the Rules, the Party may give notice of dissatisfaction referring to this Sub-Clause within 28 days of receipt of the decision

[5] Civ App No S 163 of 2013

or the expiry of the time for the decision, if no notice of dissatisfaction is given within the specified time, the decision shall be final and binding on the Parties. If notice of dissatisfaction is given within the specified time, the decision shall be binding on the Parties who shall give effect without delay unless and until the decision of the adjudicator is revised by an arbitrator."

50. It was also deposed that sub-clause 15.3 of the General Conditions of the Fidic Green Book Contract states:-

> "A dispute which has been subject of a notice of dissatisfaction shall be finally settled by a single arbitrator under the rules specified in the Appendix. In the absence of agreement, the arbitrator shall be designated by the appointing authority specified in the Appendix. Any hearing shall be held at the place specified in the Appendix and in the language referred to in Sub-Clause 1.5."

51. According to the Campbell affidavit the clauses were never amended, rescinded, revised or revoked and they accurately reflect the true and full agreement of the Claimant and the First Defendant. Ms Campbell deposed that after the First Defendant was served with the pre-action protocol letter its Corporate Secretary indicated to the Claimant that it was investigating the claim and it requested it to hold its hand in litigation for 21 days so the First Defendant could work towards an amicable solution. Ms Campbell's position was that the threat of legal action was premature since complying with the arbitration agreement was the correct method to deal with the dispute. She stated that at the time when the instant action was started the First Defendant was and still remains ready and willing to do all things necessary for the proper conduct of the arbitration/ adjudication and pursuant to the subsisting arbitration agreement Claimant is bound by the arbitration agreement and there is no sufficient reason why the instant claim should not be referred to arbitration. In the penultimate paragraph of Ms Campbell's affidavit she stated that since the First Defendant is disputing jurisdiction of the High Court and is requesting a stay of the proceedings it would have been prejudicial for the First Defendant to file a defence and implicitly accept and/or acceded to the Court' jurisdiction.

52. The First Piper affidavit and the Second Piper affidavit mirrored the information in the Campbell affidavit and does not add any further information.

53. Apart from challenging the Court's jurisdiction, there was no evidence placed before the Court by the First Defendant disputing the sums claimed or setting out that the Claimant did not perform the work which it was claiming payment for. The sole defence which the First Defendant was relying on was lack of the Court's jurisdiction due to the arbitration agreement. In my opinion based on the evidence, the First Defendant has failed to put forward any defence on the merits. For these reasons the First defendant has failed to demonstrate that it has a defence with a realistic prospect of success.

54. The First Defendant having failed on this limb has failed to meet the two requirements in Rule 13.3 CPR and as such the set aside application is dismissed.

**The stay application**

55. Section 7 of the **Arbitration Act**[6] ( "the Act") states:

> "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.)

[6] Chapter 5:01

56. In exercising its discretion to stay proceedings under section 7 of the Act, Mendonca JA in **LJ Williams v Zim Americian Shipping Services**[7] at paragraphs 19 and 20 stated as follows:

> "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."

57. Therefore, under section 7 the Court has a discretion to stay proceedings and refer the matter to arbitration after the threshold requirements have been met and the two conditions have been satisfied. I therefore agree with the Claimant that the First Defendant's contention that there is no jurisdiction by the High Court, Judge or Registrar to enter and/or adjudicate upon the matter is without merit.

[7] CA PO 59/14

**The Threshold Requirements**

*Concluded agreement to arbitrate*

58. It was submitted on behalf of the First Defendant that there is an agreement to arbitrate between the Claimant and the First Defendant with respect to the sums claimed by the Claimant. In particular the First Defendant referred to clauses 15, 15.1, 15.2 and 15.3 of the General Conditions of the FIDIC Green Book Contract.

59. The Claimant did not dispute that there is a provision in the Agreement between the parties to arbitrate any dispute which arose between them from it. However Counsel for the Claimant argued that the Claimant has pleaded that the First Defendant was an agent of the Second Defendant and the issue of agency is not covered by the arbitration clause.

60. In the instant matter, the Claimant has brought the action against the Second Defendant on the basis on the basis that it was the agent of the Ministry of Education and/or the Ministry of Finance and therefore it is liable to pay the sums claimed. The basis of this agency pleading was that at all material times the Ministry of Education was in control of the First Defendant since the latter had no substantial assets of its own with the Government of Trinidad and Tobago owing 100% of its shares; funding for the development and management of the First Defendant came from the Ministry of Education and the Board of Directors of the First Defendant was appointed by the Ministry of Finance. The Second Defendant has applied to strike out the claim against it and the application has been stayed pending the determination of a similar application in a related matter CV 2017-01411.

61. Clause 15.1 of the General Terms and Conditions of the FIDIC Green Book Contract limits the disputes for arbitration between the Contractor i.e. the Claimant and the Employer i.e. the First Defendant since it states *" Unless settled amicably, any dispute or difference which arises between the Contractor and the Employer out of or in connection with the Contract, including any valuation or other decisions of the Employer, shall be referred by either party to adjudication in accordance with the attached Rules for Adjudication ("the*

*Rules").”* Therefore while there is no dispute that there is a concluded agreement to arbitrate between the Claimant and the First Defendant, it is clear that the arbitration clause does not extend to the issue of agency which has been pleaded by the Claimant against the Second Defendant and if the issue between the Claimant and the First Defendant is stayed and referred to arbitration, the arbitrator would not have jurisdiction to deal with the agency issue since the Claimant is seeking to hold both Defendants jointly liable for the sums claimed.

62. Therefore, while I am satisfied that this requirement has been met between the Claimant and the First Defendant the arbitration clause does not extend to the Second Defendant which has been sued as being jointly liable for the sum claimed. In my opinion this is a relevant consideration in determining if there is no sufficient reasons why the matter should not be referred to arbitration in accordance with the Agreement.

*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 against another party to the arbitration agreement or a person claiming through or under that person.*

63. There is no dispute that the Claimant which has instituted the instant action is a party to the arbitration agreement and that it is the proceedings which the First Defendant seeks to stay.

*The legal proceedings must be in respect of any matter agreed to be referred to arbitration.*

64. It was submitted on behalf of the First Defendant that the claim in the instant action is for the payment of monies allegedly due to the Claimant for work and services rendered pursuant to the Agreement. The Agreement provide for arbitration in any dispute of any kind whatsoever which arises between the parties in connection with or arising out of the Agreements or the execution of works including any dispute as to any certificate, determination, instruction, opinion or valuation. Therefore, this is a matter that is covered

by the Agreements which contain the precise provision for referring a dispute in relation to a claim following under the agreement to arbitration.

65. In my opinion the legal proceedings between the Claimant and First Defendant is a matter which the parties agreed to refer to arbitration. Therefore, it follows that this threshold requirement has been met.

*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*.

66. It was submitted on behalf of the First Defendant that its request for an extension of time to deliver a defence and an application for an extension of time for filing a defence cannot be construed as a step in the proceedings and as such the First Defendant did not waive its right to object or request a stay and it has not taken a step that can be seen as submitting to the jurisdiction of the Court.

67. Counsel for the Claimant argued that the stay application should ideally have been filed by either by the 21st August 2017 and/ the time granted for the extension of time to file a defence, the 21st September 2017 and since the stay application was filed on 21st November 2017 it was filed out of time.

68. Rule 9.7 CPR deals with the procedure for disputing the Court's jurisdiction. According to the rule 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, may apply to the Court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have; the application must be made within the period for filing a defence. It sets out the time within which a party which disputes the Court's jurisdiction is to file such an application. In **West Indies Players' Association v West Indies Cricket Board Inc**[8] Jones J (as she then was) interpreted rule 9.7 (3) CPR as 28 days after the date of service of the Claim Form and Statement of Case.

[8] CV 2011-03130

69. Section 7 of the Act is clear that the party seeking to stay the Court's proceedings should do so "at any time after entering an appearance and before delivering any pleadings or taking any other steps in the proceedings". While the rule 9.7(3) can be interpreted as 28 days after the date of service of the Claim Form and Statement of Case in my opinion this rule cannot supersede the time set down in section 7 of the Act which is before the delivering of any pleadings or taking any other step in the proceedings.

70. In the instant case the Claim Form and Statement of Case were served on the 23rd June 2017 and the appearance was filed by the First Defendant on the 4th July 2017. The First Defendant sought and obtained an extension from the Claimant to file a defence by the 21st September 2017. In my view the extension which the First Defendant sought was a step in the proceedings since rule 10.3(6) permits the parties to agree to extend the period for the filing of a defence up to a maximum of three months after the date of service of the Claim Form (or Statement of Case if served with after the Claim Form). In seeking the extension the First Defendant was in effect indicating to the Claimant and the Court that it was submitting to the Court's jurisdiction. I am therefore not satisfied that this condition has been met.

71. Although the threshold requirements have not been met I will still examine the two conditions which must be satisfied in section 7 of the Act.

**The conditions**

*There is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement*

72. In **Heyman v Darwins Limited**[9] the words "*if satisfied that there is no sufficient reason*" were considered by Lord Macmillan at page 370 in deciding whether an action ought to be stayed under the identical provision of the UK 1889 Act. The Court derived a four-pronged test to be satisfied namely:

[9] [1942] AC 356

A. The precise nature of the dispute which has arisen;

B. Whether the dispute 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.

73. It was submitted on behalf of the First Defendant that the claim is for monies allegedly due for work and services rendered to the First Defendant; the Agreements make provision for a dispute to be dealt with by arbitration and the act by the Claimant of instituting legal proceedings is in itself a clear indication that a dispute exists between the parties. In support of this position the Claimant relied on the authority of **Executive Bodyguard Service Limited v National Gas Company of Trinidad and Tobago[10].**As such there is a dispute in relation to the instant claim and there is no sufficient reason why the matter should not be referred to arbitration.

74. It was argued on behalf of the Claimant that there are several reasons why the matter should not be referred to arbitration namely (a) there is no prima facie case of a dispute/ genuine dispute to be referred to arbitration; (b) the arbitration clause does not deal with the agency issue between the First Defendant and the Second Defendant ; (c) illegality of the Agreements would render the arbitration clause illegal; and (d) there is a statutory requirement for Presidential Consent before the matter is referred to arbitration.

75. What is the precise dispute between the parties to refer to arbitration? In **Executive Bodyguard Service Limited** the Court found that an arbitrable dispute exists merely by virtue of the non-acceptance of the claim. In my opinion, **Executive Bodyguard Services**

[10] CV2016-01683; CV2016-01684; CV2016-0185; CV2016-01686; CV2016-01692; CV2016-01693; CV2016-01694; CV2016-01695; CV2016-01954

**Limited** can be distinguished from the instant case since the Claimant in that case refused to grant the Defendant an extension of time which was requested. In the instant case, the Claimant granted the First Defendant an extension of time to the 21st September 2017 to file a defence. The Claimant attempted to refer the matter to arbitration. In the instant case the Claimant did not attempt to refer the matter to arbitration and the Court's interpretation of " dispute" was not based on the equivalent UK provision as section 7 of the Act but rather on UK legislation which was materially different from the Act.

76. In **Kall Co Limited v Education Facilities Company Limited**[11] the Defendant applied to stay the proceedings where the Claimant had instituted a claim for damages for breach of contract against the Defendant in the sum of $22,953.164.52. It was not in dispute that the contracts incorporated terms and condition in either the FIDIC Red Book, the FIDIC Short Form of Contract or the FIDIC Yellow Book and that all have arbitration clauses. The Defendant argued for the stay of the proceedings on the basis that the Court had no jurisdiction until the determination of the arbitration proceedings. In dismissing the application for the stay of the proceedings Rampersad J was of the view that the affidavit in support of the application failed to identify any dispute between the parties other than the claim for payment and that she gave no explanation for the failure by the Defendant to take positive steps towards arbitration.

77. At paragraphs 61-64 Rampersad J stated:

> "it is not sufficient to come to the court to just say that there is an arbitration agreement…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 the other that requires resolution under the arbitration agreement…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."

[11] CV 2017-01397

78. In **Mootilal Ramhit and Sons Contracting Limited v Educational Facilities Company Ltd and Anor** [12] the Defendant applied for a stay of the proceedings on the basis that there is an arbitration clause in the agreement. Honeywell J dismissed the application on the basis that non-payment is not sufficient to grant a stay. The Court found that there must be dispute which can be dealt with at the arbitration and based on the evidence the Defendant failed to establish any. At paragraph 18, the Court referred to **Kall Co v EFCL** agreeing with its reasoning that "*It cannot be that a party can simply come to court and say I'm not paying, therefore this is a dispute, and then the Court in an automatic reaction stays proceedings for arbitration. The party seeking the stay must at least indicate that the reason for non-payment is that liability to pay is disputed and give a reason why so.*"

79. As stated previously the arbitration clause in the Agreements allows for disputes to be decided by an arbitrator. However based on the evidence before the Court on behalf of the First Defendant there is no precise dispute to be referred to arbitration since the First defendant has failed to identify precisely what aspects of the claim it is disputing. It has not stated that the Claimant did not complete the works neither has it disputed the terms of the Agreements. The First Defendant also has not set out the reasons it has not paid the sums submitted by the Claimant for payment.

80. Does the arbitration clause cover the agency claim made by the Claimant against the Second Defendant? As discussed previously the arbitration clause does not cover any dispute between the Claimant and the Second Defendant. In my opinion if the action between the Claimant and the First Defendant is referred to arbitration the issue between the Claimant and the Second Defendant cannot be dealt with by the arbitrator.

81. There is a real risk that there may be inconsistent decisions by the arbitrator and the Court since if the claim against the Second Defendant continues the Court will still have to continue to hear the claim against the Second Defendant, the latter would still be faced with deciding the whole of the claim . There would also be the possibility of the arbitrator

[12] CV 2017-02463

finding that the First Defendant is liable while this Court finds the Second Defendant not liable and *vice versa*.

82. If there are parallel proceedings, there may also be prejudice suffered by the Second Defendant. In my opinion the issue of prejudice is an important one due to the substantial size of the claim affecting the possible disbursement of state funds and the nature of the Defendants in particular the First Defendant is a special purpose state enterprise. It is not in dispute that the First Defendant and the Second Defendant are separately represented by Counsel and they have adopted a different approach to dealing with the claim. If the Court declares that it is a principal of the First Defendant and the First Defendant is found by the arbitrator to be liable to pay the sums owing. In such circumstances, the Second Defendant would have been deprived of the opportunity to present a case before the arbitrator disputing its liability or the quantum of those sums.

83. Does the illegality of the Agreements make the arbitration clauses illegal? The basis of the Second Defendant's application to strike out the Claim against it has not been put forward to the Court as yet. I accept that in a related matter the Second Defendant may have argued illegality of the Agreement. If a similar argument is successful in the instant case then illegality of the Agreement would mean that the arbitration clause would also be void rendering the stay application otiose.

84. Is there a requirement for Presidential consent before the matter is referred to arbitration? It is submitted by Counsel for the Claimant that section 35 of the Act made an exception to the Court's general discretion under the Act to refer legal proceedings to an arbitrator (or referee or officer) once the State is a party to those legal proceedings by mandating that consent in writing of the President is received prior to such referral. It was argued that in the instant case, that requirement has not been fulfilled which is a statutory impediment to the stay application.

85. Section 8 of the Act states as follows:

> "Power of Court in certain cases to appoint an arbitrator, umpire or third arbitrator.

8. (1) In any of the following cases:

(a) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator; or

(b) …

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire or third arbitrator…"

86. Section 28 of the Act states as follows:

"Reference for trial

26. In any cause or matter (other than a criminal proceeding by the State)—

(a) if all the parties interested who are not under disability consent; or

(b) …

the Court may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator agreed on by the parties, or in default of agreement, before an official referee or officer of the Court."

87. Section 35 of the Act states as follows:

"This Act, except as herein expressly mentioned, applies to any arbitration to which the State or any officer of the Government in respect of any act by him or by his department, is a party, but nothing in this Act shall empower the Court to order any proceedings to which the State is a party or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer without the consent in writing of the President."

88. In my opinion this is not a relevant consideration since the First Defendant is not "the State" and in any event the arbitration clause is between the Claimant and the First Defendant and it does not bind the Second Defendant.

*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.*

89. According Mendonca JA in **LJ Williams** the onus is on the person seeking the stay to demonstrate that he was ready and willing at the time of the commencement of the proceedings and still remains ready and willing to do all things necessary for the proper conduct of the arbitration.

90. It was submitted on behalf of the First Defendant that there is no evidence or correspondence from the First Defendant to suggest that this matter should not be resolved by arbitration or that it was not willing to take steeps which were necessary to initiate the arbitration process or even request arbitration at all.

91. Counsel for the Claimant argued that although the First Defendant stated that it still is ready and willing to do all things necessary for the proper conduct of the arbitration it has failed to show particulars of its readiness and willingness instead of providing a mere statement of same.

92. According to the Campbell affidavit, at the time when the instant proceedings were commenced, the First Defendant was and still remains ready and willing to do all things necessary to the proper conduct of the arbitration/ adjudication and pursuant to the subsisting arbitration agreement.

93. In my opinion the First Defendant has failed to demonstrate that it was ready and willing to do all things necessary for the proper conduct of the arbitration for three reasons. Firstly, the First Defendant's conduct before it received the pre action protocol letter was not consistent with this articulated position. The First Defendant was made aware of the Claimant's claim since 2015 and by letter dated 22nd January 2016 the First Defendant confirmed to the Claimant that the sum of $97,526,023.13 was due to it from the Claimant and that the said amount would be paid promptly upon receipt of funding from the Ministry of Education. In my opinion the First Defendant did not dispute the sum and therefore it

could not be ready and willing to do all things necessary for the proper conduct of the arbitration.

94. Secondly the First Defendant's conduct after it received the pre-action letter also did not demonstrate that it was ready and willing to do all things necessary for the proper conduct of the arbitration. It was not in dispute that after the First Defendant received the pre action protocol letter that its Corporate Secretary communicated to the Claimant that it was investigating the matter and hoped for an amicable solution. The First Defendant's reason for failing to respond to the pre action letter was because its administrative management was "*undergoing some changes*. In my opinion if the First Defendant was ready and willing to pursue arbitration proceedings it would have responded to the Claimant's pre-action protocol letter indicating its intention to refer the matter to arbitration.

95. Thirdly, the First Defendant did not refer the dispute in writing to the Dispute Adjudication Board (DAB) which was also provided for in the FIDIC Contract.

**Order**

96. The First Defendant's Application filed on the 1st November 2017 and on the 21st November 2017 respectively are dismissed.

97. The First Defendant to pay the Claimant's costs of both Applications.

98. The costs to be assessed by this Court in default of agreement.

**Margaret Y Mohammed**
**Judge**