REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2016-01522

BETWEEN

NAMALCO CONSTRUCTION SERVICES LIMITED

Claimant

AND

ESTATE MANAGEMENT & BUSINESS DEVELOPMENT COMPANY LIMITED

Defendant

(*By Original Action*)

And Between

ESTATE MANAGEMENT & BUSINESS DEVELOPMENT COMPANY LIMITED

Ancillary Claimant

And

ANDREW WALKER

First Ancillary Defendant

And

ATLANTIC PROJECT CONSULTANTS LIMITED

Second Ancillary Defendant

And

BBFL CIVIL LIMITED

Third Ancillary Defendant

And

LEE YOUNG AND PARTNERS

(A Partnership and/or Firm registered under the laws of Trinidad and Tobago and issued pursuant to Section 12 of the Partnership Act Chapter 81:02 and in accordance with Part 22.1 of the Civil Proceedings Rules 1988, as amended)

Fourth Ancillary Defendant

(By Ancillary Claim)

Before the Honourable Mr. Justice R. Rahim

Appearances:

Ms. S. Barwise Q.C. and Mr. C. Kangaloo instructed by Ms. S. Moe for the Ancillary Claimant

Ms. D. Peake S.C. and Mr. R. Heffes-Doon instructed by Ms. M. Ferdinand for the Fourth Ancillary Defendant

DECISION ON APPLICATION BY THE FOURTH ANCILLARY DEFENDANT TO STAY THE ANCILLARY CLAIM

1. The claimant ("Namalco") and the defendant ("EMBD", a state enterprise) entered into contracts for six construction projects at Mahaica, Brickfield, Cedar Hill, Roopsingh Road, Petite Morne and Picton, Monkey Town ("the said contracts") under which Namalco was to perform infrastructural works. The Cedar Hill, Roopsingh Road, Petite Morne and Picton contracts were governed by the FIDIC Conditions of Contract 1999 edition ("FIDIC Conditions"). The Mahaica and Brickfield contracts were based on contracting terms developed by the defendant.

2. By claim form filed on the 6th May, 2016, Namalco sued for sums allegedly due and owing by EMBD in relation to all six contracts. According to Namalco, the said contracts provided for it to carry out and complete works to the design specification of EMBD and/or its engineer. The works would subsequently be evaluated by the engineer, with payment being made from time to time upon the issue of certificates called interim payment certificates ("IPCs"). Namalco claims that under the FIDIC Conditions, EMBD was obligated to pay the amount certified in each IPC within a specified number of days after receipt of certain stipulated documentation. The same overall regime was applicable to the Final Payment Certificate.

3. By ancillary claim filed the 14th March 2017, EMBD in turn instituted claims against four ancillary defendants seeking indemnity/contribution should EMBD be adjudged liable to Namalco. The fourth ancillary defendant, Lee Young and Partners ("LYP") allegedly entered into contract with EMBD by agreement in writing on the 24th June 2014, to provide design supervision services for the works relating to the Picton contract only.

4. By application of the 11th April 2017, LYP seeks a stay of the ancillary claim against it pursuant to **section 7** of the Arbitration Act Chap 5:01 ("The Act") and/or under the inherent jurisdiction of the court. In the alternative, LYP asks that the claim against it be

dealt with separately. It is to be noted that LYP was not a party to the other contracts which form the subject of the claim and so there is no allegation against it in that regard.

5. It is necessary to set out the cases of the parties in broad terms so as to understand the competing interests and issues to assist in determination of the application.

The claim (Picton)

6. By a contract in writing between Namalco and EMBD entered into in May 2009 Namalco agreed to carry out works detailed in the Picton contract. The estimated contract price at that time based upon the quantities provided for in the tender documents was sixty-five million, seven hundred and fourteen thousand, nine hundred and forty-seven dollars and thirty-eight cents ($65,714,947.38), inclusive of ten percent (10%) contingency and VAT. EMBD then contracted LYP on the date and for the purpose set out above.

7. Work on the Picton project commenced on the 15th June 2009. It is the claim against EMBD that the Picton project was beset with numerous difficulties. Due to the numerous difficulties, on or around the 4th March, 2011, Namalco served a notice of termination of the Picton project but subsequently agreed with EMBD and the engineer to re-start the works on the basis that the Picton contract rates would be increased by twenty percent (20%) and the duration for completion of the remaining works would be fifteen months. The works on the Picton project therefore resumed on the 11th April, 2011.

8. Thereafter, Namalco carried out and completed the works, although subject to ongoing delays and additional costs which arose, according to Namalco, due to ongoing design changes and the failure of EMBD to pay sums due which gave rise to numerous claims. Another notice of termination was given in July of 2013 but was subsequently withdrawn when part payment was made. Eventually, the works were completed on or around the 13th January, 2014, with the Completion Certificate having been issued by the engineer on or around the 31st October, 2014 (which certified the completion of the Picton contract on the

13th January, 2014). In its evidence filed in support of its application, LYP deposes that it completed its services to EMBD on or about the 21st May, 2014.

9. Whilst the majority of the IPCs in relation to the Picton contract have been paid, most of the payments made against same were months or years late. As such, Namalco's claim on the Picton contract relates to claims of interest in respect of those late payments and the balance of IPC 27 which remains outstanding. According to Namalco it is entitled to and claims interest for the late payment of the IPCs and the late partial payment of IPC 27, pursuant to FIDIC condition 14.8.

10. The gross value of work certified in IPC 27 was the subject of a Dispute Adjudication Board ("DAB") decision. This decision was made by the Engineer and is dated the 31st October, 2014. The DAB decision in relation to IPC 27 appears to have confirmed the value of the work as $364,992,534.16, although this is disputed by the defendant. FIDIC condition 20.4, provides for decisions to be made by a DAB and further provides that if no notice of dissatisfaction is given by either party within twenty-eight days after receipt of the decision of the DAB, the decision becomes final and binding upon the parties.

11. According to Namalco, by letter dated the 4th November, 2014, EMBD admitted that the balance outstanding on works certified in relation to the Picton contract was $124,714,547.45 (comprising $10,109,961 unpaid at the time against IPC 20 together with the balance of IPC 21-27 including interest). Further, or alternatively, Namalco claims that since no notice of dissatisfaction has been issued in relation to the DAB decision, same was final and binding. As such, it is its case that despite having completed the said contract and having same approved as contracted, EMBD has failed to pay the monies owed.

<u>The defence and counterclaim</u>

12. By its Amended Defence and Counterclaim filed on the 4th January, 2017, EMBD avers that the sums certified in relation to the said contracts are not binding and are susceptible to challenge. It says that the certified payments it made are inaccurate as the works were

overvalued. It also alleges that while the issuance of an IPC prima facie gives rise to an obligation to pay the sums certified, the Picton contract expressly provides that the certificates may be reviewed and revised. Further, that the prima facie obligation to pay interim certificates is overridden by the basic contractual principle that a contracting party is not obliged to pay for works (and is entitled to abate the price for same) that were not actually carried out and/or have been carried out defectively and/or priced in excess of the contract rates and prices.

13. In relation to the Picton contract, given the claims being made by Namalco and the defects which had been visually identified in the works, EMBD engaged a consultant to carry out an audit review of the Picton project. The consultant provided a Project Audit Report dated the 9th November, 2016 ("Outridge report"). According to EMBD, the Outridge report found that in relation to all of the IPCs issued by the Engineer, no supporting documents were submitted as required by FIDIC conditions 14.3 and 14.6. EMBD avers that as found by the Outridge report, Namalco has been overpaid in relation to the Picton works and therefore, the claim for interest on delayed payment does not arise as alleged or at all. Further, that it is entitled to abate the sums owed to the Claimant in the Picton contract due to the defective work identified in same. Consequently, EMBD claims that $61,890,340.73 is owed by Namalco.

14. It is to be noted that in other proceedings before this court in the claim, EMBD has since indicted that they would not be relying on the Outridge report but would seek to have another expert appointed.

15. According to the Defendant, a letter dated the 4th November, 2014, (which Namalco alleged amounted to an admission of the debt) was not an admission but the letter was written to the Namalco's bankers at Namalco's request. It avers that if any admission was made (which is denied), the statement was made by reason of Namalco's misrepresentation as to the true state of the accounts between the parties and same is not binding on the Defendant.

16. Further, EMBD claims that the decision of the DAB is null and void and/or is capable of challenge by the Defendant and/or is open to review by the Court and/or Namalco is not entitled to rely upon it, in the circumstances where the Claimant either knowingly or recklessly made a misrepresentation to the DAB as to the true value of the work executed.

The ancillary claim

17. Having regard to the issues between the parties, the success or otherwise of the ancillary claim is contingent entirely upon the determination of the issue of whether the court can go behind the IPCs to consider the nature, quality and value of the work performed. If it is determined that the court can so do, the next issue will be a determination of whether as a matter of fact, the completed work fell below the required standard and whether therefore through negligence on the part of LYP, it was overvalued. The latter issue will of course by its nature involve the evidence of experts, in this case competing experts. The ancillary claim seeks an indemnity should EMBD be found liable for defective works and or over certification of works inter alia.

18. It is to be noted that the court has set aside a period of four weeks for trial during the months of June and July, 2018.

PROCEDURE

19. The application by LYP is brought under **Part 9.7 of the CPR**. It is necessary though to set out some of the other provisions of **Part 9** to dispose of this aspect of the application. **Part 9.1 CPR** reads;

(1*) This Part deals with the procedure to be adopted by a defendant who wishes to contest proceedings and avoid a default judgment being entered against him.*
(2) He does so by entering an appearance containing a notice of intention to defend.

Part 9.2 reads;

9.2 (1) If the defendant wishes—

(a) to dispute the claim; or

(b) to dispute the court's jurisdiction, he must enter an appearance giving notice of intention to defend.

(2) However he need not enter an appearance if he files a defence within the period specified in rule 9.3.

(3) If he fails to do so, judgment may be entered if Part 12 allows it.

(4) An appearance may be entered at any court office even though the claim was not issued from that court office.

(5) However, that does not mean that the claim is to be transferred to the court office at which the appearance is entered

Part 9.7 reads;

(1) A defendant who wishes—

(a) to dispute the court's jurisdiction to try the claim; or

(b) 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.

(2) A defendant who wishes to make such an application must first enter an appearance.

(3) An application under this rule must be made within the period for filing a defence.

20. It is clear that **Part 9** of the CPR sets out a procedure for matters in which a defendant is either alleging that the court has no jurisdiction to hear the claim, for example in the case where a contract has been made outside of the jurisdiction of Trinidad and Tobago, or in the case where the defendant is asking the court not to exercise its jurisdiction to move forward with the claim against it. In both cases, the issue of actual jurisdiction is the substantive issue and the rules provide for an application to be made within the time limited for a defence to be filed in place of the filing of a defence. Should the court determine the application unfavourably the court is empowered to extend the time for the defendant to file and serve a defence. The court understood the application pursuant to Part **9.7** to have been brought by LYP as a **9.7 (1)(b)** application (supra) in that the court was being asked

not to exercise its jurisdiction to proceed with the claim on the basis set out in the substantive application, namely pursuant to section 7 of the Act and/or under the inherent jurisdiction of the court. In other words the court understands the contention of LYP to be that the jurisdiction of the high court to hear the ancillary claim cannot be invoked so long as the parties had not attempted a resolution by way of ADR.

THE APPLICATION PURSUANT TO SECTION 7

21. Section 7 of the Arbitration Act provides as follows;

"If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

22. In exercising its discretion to stay proceedings under section 7 of the Act, Mendonca JA in ***LJ Williams v Zim American Shipping Services CA P059/14*** 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."

Threshold requirements

Concluded agreement to arbitrate

23. According to the evidence before the court on the application, there is no dispute that the contract between the parties contain a clear and certain Alternative Dispute Resolution clause which requires the parties to engage the process of meetings in good faith, mediation and then arbitration in that order, prior to the commencement of litigation. This is common ground between the parties. In this regard the contract incorporates the Client/ Consultant Model Services Agreement set out in FIDIC, in particular clause 8 which provides for ADR. It is admitted that there has been no attempt to engage any ADR process and further, on the evidence of LYP, EMBD has never raised any allegation of overvalue or any other dispute with it after the contract concluded but only did so after the claim was filed. In fact they say that EMBD proceeded to pay several IPCs without issue. There is therefore clearly a concluded agreement to arbitrate.

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

24. There is no dispute between the parties that these two requirements have been met as the ancillary claim, a claim on its own, has been commenced by a party to the arbitration, EMBD against another party to the arbitration LYP.

The application for the stay must be made at any time after appearance but before delivery of pleadings or the taking of any other steps in the proceedings

25. This is not in issue as LYP has brought this application after it has filed an appearance to the ancillary claim but prior to the filing of a defence.

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

26. The determination of this final threshold requirement is dependent on two matters namely, the nature of the dispute before the court on the ancillary claim and the nature of the matters in respect of which arbitration was agreed by contract.

27. The issue before this court is to be found within the walls of the ancillary claim. The claim can be summarized as follows; EMBD seeks an indemnity or contribution from LYP in the event that EMBD is found liable to Namalco for negligence, over certification of works, breach of duty or breach of contract for defective works. It follows that EMBD claims that LYP was itself negligent and/or over certified works and/or performed defective works and/or were negligent and/or breached its duty under the contract but that the issue of whether LYP is liable only arises *in the event that* the court finds EMBD liable.

28. The detailed provisions of clause 8, provide for a three-stage process in relation to "any dispute" which may arise between the parties out of or in connection with the agreement. Clause 8.1.1 provides further that if any such dispute arises, there shall be a meeting within fourteen days of a written request being made by one party to the other in an effort to resolve the dispute. The language used by the clause is wide enough in the court's view to include most disputes between the parties including the present dispute for the reason that while the actual liability of LYP is contingent upon a finding of liability against EMBD, it does not mean that a dispute has not arisen between the parties as to the effect of the agreement in the event that EMBD is found liable so far as an indemnity by LYP is concerned. So that the dispute concerns the liability of LYP to EMBD in the event of a finding of liability. Further and quite separately, an indemnity is either founded on a contractual term expressed or implied. A successful claim for contribution however is dependent on a finding that the ancillary defendant was itself negligent. Both have been claimed in the ancillary claim. So that the dispute also involves issue of whether the ancillary defendant was negligent. The effect of a determination of this issue may be to reduce the liability of EMBD to the extent of the liability of LYP.

29. The court has also found that the agreement entered into was in fact one which contained an agreement to arbitrate. Clause 8.2.7 of the contract is clear in its terms and effect. It reads;

"No party may commence an arbitration of any dispute relating to this agreement until it has attempted to settle the dispute with the other party by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided, however, that either party may commence arbitration if the dispute has not been settled within ninety days of the giving of the notice under clause 8.2.2. (notice requesting a start to mediation after mediator has been appointed)."

30. In the court's view, the fact that the clause provides for other methods of dispute resolution prior to arbitration is reflective of an acknowledgment of several matters including but not limited to the fact that arbitration is usually the most expensive of the ADR processes and

therefore will be used as a last resort in an effort to settle. It also acknowledges that arbitration may not always be the go to method of dispute resolution in the first instance having regard to the nature of the dispute which may be such that it would be wholly disproportionate to resort to arbitration without attempting a resolution by other methods. This in the court's view demonstrates the pragmatic and common sense approach of the FIDIC ADR procedure but does not derogate from the fact that the contract does in fact make provision for arbitration prior to the institution of court proceedings. Clause 8 therefore falls to be considered as an enforceable arbitration clause within the ambit of the Arbitration Act notwithstanding its reference to other avenues of dispute resolution. See also ***International Research Corp. PLC v Lufthansa Systems Asia Pacific Pte Ltd.*** [2013] 1 L1 R 24 and ***Emirates Trading Agency LLC v Prime Mineral Exports Private Limited*** [2015] 1 WLR 1145, both relied on by LYP.

31. The ancillary claim therefore clearly relates to the dispute in respect of which there has been agreement to arbitrate and the court so finds. Additionally, it follows that all of the threshold requirements have been met.

The conditions

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

32. 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 proceedings and still remains ready and willing to do all things necessary to the proper conduct of the arbitration (see the dicta of Mendonca JA at paragraph 44 of ***LJ Williams*** supra). The undisputed evidence of Terrence Lee Young in support of the application of LYP demonstrates that no pre-action correspondence was sent by EMBD to LYP in relation to the ancillary claim and neither did it notify LYP in writing that a dispute exists, in keeping with the provisions of clause 8 of FIDIC. It is therefore clear that EMBD chose not to abide by its agreement to engage in the ADR process prior

to the institution of the ancillary claim. Lee Young deposes in his affidavit that had there been pre-action protocol correspondence, LYP would have brought the matters of ADR to the attention of EMBD, they having had no idea that a dispute between them existed. It therefore follows that having regard to the explanation provided by LYP and the fact that it has brought the application to stay it can be inferred that it remains ready and willing to do all things necessary to conduct the ADR process and the court so finds. Further, Mr. Lee Young has clearly and in any event deposed to this readiness at paragraphs 6 and 7 of his affidavit of the 2nd May 2017.

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

33. The parties disagree as to whether this condition has been met for several reasons.

Multiplicity of proceedings with a risk of inconsistent decisions

34. A multiplicity of proceedings is highly undesirable having regard to the possibility of different decisions on the same question. (See the well know dicta of Pearson L.J. in ***Taunton-Collins v Cromie and another*** (1964) 2 ALL ER 332, along with the dicta of Lord Denning MR). The undesirability is founded in several factors. First among them is the obvious confusion which may result from different decisions on the same issue. Second is that of unfairness to the party who would not have benefited from the certainty of a decision on the issue which results in injustice to that party. The mere fact of multiplicity of proceedings therefore is insufficient by itself. What is required is that the party resisting the stay demonstrates that he will suffer substantial injustice should he not be relieved from his contractual obligation. Thirdly there are the factors of the added costs and delay.

35. The competing well established principle is that parties should normally be held to their contractual arrangements. In that regard a court should be willing to say by its decision what the parties have already said by means of their agreement. These principles must be

balanced by the court when exercising its discretion whether to stay. Which principle prevails will of course depend on the facts of the case and the context in which the application is made.

36. Attorney for EMBD has highlighted the issues in respect of which there may be inconsistent decisions and submitted that such an outcome would result in injustice to EMBD. The first and obvious difference would be that of a finding by the arbitrator that LYP is not liable for negligence and so is not liable for contribution in the face of a finding by the court that EMBD is liable for negligence. In such a case, EMBD argues that it would be deprived of a remedy against LYP. The second is that it may be the case that the court finds that the DAB is binding and that as a consequence EMBD is liable to satisfy the amount certified thereunder but the result of the arbitration is that LYP is liable in which case EMBD has no recourse against LYP. Thirdly, the court may find that the IPCs were improperly issued and EMBD is not liable to satisfy them whereas the arbitrator may find that they were properly issued. In the court's view, the arguments of EMBD in that regard hold much merit. As set out above, the issue of whether LYP is liable for negligence and therefore liable for a contribution should a finding be made against EMBD is a live and material one for the trial court. The issue before the arbitrator will essentially be the same having regard to the ancillary claim as pleaded. Should there be inconsistent outcomes in the manner set out above, the result in turn may be that of effective bar against contribution by LYP or the institution of further litigation in an attempt to have a court set aside a binding decision by the arbitrator. Viewed from this perspective, this court has no hesitation in finding that such an outcome or outcomes would be manifestly unfair and unjust to EMBD.

37. In so finding, the court is cognizant of the fact that the issues which ultimately go before an arbitrator may be somewhat different to the strict legal issues to be decided by the court. The extent and remit of the arbitrator would no doubt depend on an agreement between the parties as to the issue which is to be the subject of arbitration. This agreement may have been fostered during other ADR proceedings such as mediation which would have narrowed and defined the issues. The court must however examine the issue in the context

of what may reasonably fall within the remit of the arbitrator at the highest having regard to the matters set out in clause 8. To do otherwise would be to speculate.

38. LYP has submitted that the claim against it being contingent upon the outcome of the original claim, the submission of EMBD that the ancillary claim is intertwined with the original claim is an improper one. The court is unable to agree with that argument having regard to the cause of action on the ancillary claim of contribution as a consequence of the negligence of LYP. The court understands a material facet of the defence to be that EMBD is not liable to pay the outstanding amounts for several reasons including the following. Firstly, the IPCs ought never to have been issued and paid as the value of the works performed were below the values certified. Those works were overvalued because of the negligence of LYP in the performance of its duties and obligations to EMBD. As a consequence, the issue of whether there was negligence on the part of LYP directly relates to the issues in this case and more so on the issue of contribution.

39. Additionally, the court considered the extent to which LYP is responsible for the multiplicity of proceedings. In so doing it is abundantly clear that LYP bears no responsibility in that regard. The court accepts the submission of LYP that it would have been unaware that a dispute existed between it and EMBD in relation to overvaluation and allegations of negligence the contract long having been completed and no notice of dispute having been given to it by EMBD. No fault can therefore properly be ascribed to LYP and the court ascribes none. This is of course is but one factor that the court would have considered in the round in making its determination.

40. In this particular case therefore, the court is of the view that the injustice which may be suffered by EMBD should there be a multiplicity of proceedings, having regard to the quantum of damages likely to be involved, the fact that EMBD is a state enterprise with responsibility for the oversight of state projects and the disbursement of state funds, outweighs the consideration or any strong public interest that parties ought to be held to their bargains made at arm's length that they attempt to resolve issues by alternate methods as agreed before turning to the courts for a resolution. The court will therefore not grant a

stay of proceedings under section 7 of the Arbitration Act as EMBD has demonstrated sufficient reason why the matter should not be referred to arbitration in accordance with the agreement.

41. Before moving on, the court notes that LYP relied on a decision of this court in ***Executive Bodyguard Services Limited v National Gas Company of Trinidad and Tobago Limited CV2016-01683*** and argued that the present case falls squarely to be considered within the walls of that decision. The court does not agree with that submission. Of course the principles remain the same but the factual matrix in that case is distinguishable from that of the present case. The Executive Bodyguard Case was one in which the application was made for a stay of proceedings by the defendant on the basis of the existence of an arbitration clause. There was no ancillary claim which was connected or related to the original claim. Therefore in considering the exercise of the discretion, the court was not concerned with the different decisions in relation to the same claims. Each claim in that case stood on its own so that there was no risk of injustice resulting from a collateral decision of an arbitrator on the same claim at the same time as a decision by the court on that claim. In that case therefore the party seeking the stay could show no sufficient reason as to why the matter should not be referred to arbitration in keeping with the agreement of the parties to arbitrate. The position in the present claim is quite different. Of fundamental impact in the present case is the injustice which may be suffered by EMBD in this case as a consequence of varying decisions ***on the same issue***.

INHERENT JURISDICTION

42. The court may exercise its discretion to stay a claim under its inherent jurisdiction. In so doing, the factors which a court may consider are wider in ambit that those to be considered under an application pursuant to section 7 of the Act. Further, there is as a matter of law some overlap between the considerations for the exercise of the discretion under section 7 of the Act and under the court's inherent jurisdiction so that the two grounds are not mutually exclusive of each other in that regard. LYP has asked that the claim be stayed

pending the determination of the claim between Namalco and EMBD. Part **26.1(f)** CPR reads;

"(1) The court (including where appropriate the court of Appeal) may—
(f) stay the whole or part of any proceedings generally or until a specified date or event…"

43. In considering whether to grant a stay pending determination of the original claim, the court has considered the relevant issues under the following additional headings inclusive of the matters already considered under the exercise of the discretion pursuant to the Act. They are, delay, fairness, prejudice, convenience, public interest. Further, the court is also cognizant that recourse must be had to the overriding objective of the CPR as it relates to the exercise of the discretion in that the application and by extension the case must be dealt with justly. Part 1.1(2) CPR sets out that dealing with cases justly case includes—

"(a) ensuring, so far as is practicable, that the parties are on an equal footing;
(b) saving expense;
(c) dealing with cases in ways which are proportionate to—
(i) the amount of money involved;
(ii) the importance of the case;
(iii) the complexity of the issues; and
(iv) the financial position of each party;
(d) ensuring that it is dealt with expeditiously; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Convenience, delay and fairness

44. LYP submits that it would be both inconvenient and unfair for it to be put through a trial in relation to six contracts when in fact it was only party to one of those contracts. To so do would be to cause it to incur expenses in relation to a trial that is likely to last for about

three weeks. Further, that it will be forced to sit through and endure evidence and legal arguments on matters which do not concern it on a $1.3 billion dollar claim thereby increasing its costs. It therefore asks alternatively that the trial of the ancillary claim be dealt with separately. In this regard there are several matters worthy of consideration.

45. Firstly, the CPR provides for the joinder of claims by way of having the ancillary claim tried together with the original claim for good reason. It makes good sense that both costs and judicial time are saved by the determination of claims in which there are common issues in one proceeding instead of two. The convenience of so doing is clear and need not be repeated. Whether this is in fact the case is dependent on the facts, circumstances and context of each individual case. One can reasonably conclude that there may be cases in which the decision to treat with both the original claim and the ancillary claim together may be inconvenient and unfair. However, the court is of the view that this is not one of those cases. In fact to the contrary, it appears to the court that having regard to the common issues between the parties set out above, it makes good sense that the original claim and the ancillary claim be heard together. Otherwise, should the defendant be held liable on the claim, it would then have to commence fresh proceedings against the ancillary defendant. This would of course incur separate costs and expenses by at least one of the parties, EMBD, occasioned by a new timeline commencing with case management proceeding all the way to trial should the claim still be unresolved. It would also mean a substantial period of delay in the resolution of the ancillary claim. Such delay would be disadvantageous to both EMBD and LYP in whose interest it lies to have their litigation resolved sooner rather than later.

46. Additionally, the court has to consider that to order a separate trial will be to use the resources of the court in a manner that is not optimal. The separate trial of a claim that can validly be tried in the original claim, would in the usual course of events be to deny another litigant of the opportunity to have his case tried sooner than later. In this case the convenience of trying the ancillary claim at the same time as the original claim outweighs the benefits of separate trial. In so saying the court has also considered that the case is not

a particularly complex one despite the fact that the amount of money involved is substantial.

47. The court has also considered that there are sufficient case management powers vested in it to ensure that as far as possible, the ancillary claimant's involvement is narrowed so that its presence and participation at trial is not unduly extended to matters with which it is not concerned. Likewise, the court's remit in relation to the discretion to award costs is broad enough to ensure that the discretion is exercised in manner so as to achieve a just result on any order for costs having regard to the involvement of LYP only in the ancillary claim that relates to LYP. These are all powers which can be used to assuage the potential effects of inconvenience which may be experienced by LYP.

48. In that regard the court has found that in the circumstances of the present case, the argument of LYP that it will be involved in a trial in which liability will first have to be decided is not a justifiable reason to stay or separate the claims. The circumstance of liability of one party being contingent upon a finding of liability of another is nothing new to the courts and one only has to look at road traffic accident (RTA) claims to discern prime examples. More often than not, the RTA claims in this jurisdiction require the court's findings on liability in relation to the owners and/or drivers of motor vehicles at the time of collision before the issue of liability between the policy holder and the insurer can be decided. The insurer in that circumstance is a party to the original claim. Quite often the insurer is also an ancillary claimant or defendant depending on the circumstances. Useful examples are to be found in cases where the insurer's defence as co-defendant is that the policy is not a valid policy or where one or more defendants allege that they were not liable for the collision but that a third party was in fact so liable in which case the defendant sues the third party and his insurers by way of ancillary claim. These matters are routinely dealt with together even though liability of one party may be wholly dependent on liability of another. While the present case may have more parties than the average RTA claim, the general principles in managing the case remains the same.

49. As a consequence, the court is of the view that it is convenient to have the ancillary claim tried together with original claim. The court is also of the view that adopting that process will not be unfair to LYP. Further, if the court is wrong in that some unfairness may occur, the court is of the view that that the degree of unfairness can be adequately assuaged by the effective and timely use of its case management powers. Additionally, the court finds that the factors against the exercise of the discretion including the benefits to the parties and to the process far outweighs any unfairness which may beset LYP.

50. Before moving on there is another aspect of unfairness which was raised and which must be dealt with. LYP submitted that it would be unfair for EMBD to seek to deny LYP its entitlement to the ADR process under the contract, EMBD having found itself embroiled in court litigation through its own fault in not seeking to enforce its own agreement to arbitrate made between Namalco and EMBD. This submission can be dispensed with in short measure. The court agrees that it is a factor to be considered. However, the court adopts the approach set out by Hirst LJ in ***Palmers Corrosion Control Ltd v Tyne Dock Engeneering Ltd and another*** (1997) APP. L.R. 11/20, a case relied on by EMBD and finds that while fault may be a factor, in the circumstances of this case it is outweighed by the risk of injustice by the institution of a multiplicity of proceedings. In that case Lord Justice Hirst opined;

"I have already stressed what to my mind is the paramount consideration here, namely the multiplicity of proceedings and the consequent risk of injustice through inconsistent findings. How does the other consideration, which weighed heavily with the judge and is strongly pressed by Mr Croall, fit into the picture, having regard to the Bulk Oil decision on which Mr Croall so strongly relies? I accept that this may be a factor but it does not seem to be a very strong one in relation to a standard arbitration clause containing standard terms and conditions, which is a perfectly normal feature of a contract of this kind. Also I think it is pertinent to point out that the weight to be given to it will depend upon the circumstances and in ***Bulk Oil*** *it naturally weighed quite heavily with Kerr J because in that case the two sets of proceedings were respectively an English action and an arbitration in Geneva, whereas here we are dealing with a choice between court*

proceedings in England and a domestic arbitration. In my judgment it does not carry very heavy weight in the present circumstances."

Public interest

51. The court understands the argument of LYP in this regard to be that where parties agree to resolve disputes in commercial contracts they should be held to their agreement. LYP argues that the claim should be stayed under the court's inherent jurisdiction on that basis. In support, LYP has relied on the case of ***Channel Tunnel Group Ltd v Balfour Beatty Construction Limited*** (1993) 1 All ER 644, in particular the dicta of Lord Mustill at page 678c which reads as follows;

"My Lords, I also have no doubt that this power should be exercised here. This is not the case of a jurisdiction clause, purporting to exclude an ordinary citizen from his access to a court and featuring inconspicuously in a standard printed form of contract. The parties here were large commercial enterprises, negotiating at arms length in the light of a long experience of construction contracts, of the types of disputes which typically arise under them, and of the various means which can be adopted to resolve such disputes. It is plain that clause 67 was carefully drafted, and equally plain that all concerned must have recognised the potential weaknesses of the two-stage procedure and concluded that despite them there was a balance of practical advantage over the alternative of proceedings before the national courts of England and France. Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking quite beside the point."

52. The court understands this argument to be founded on two principles. Firstly, there appears to be a public interest element espoused by the actions of the courts in ensuring that parties to commercial contracts who have reached an agreed method of dealing with disputes by

way of ADR not be permitted to resile from that which they have agreed to and achieved by way of bargain unless of course there is good reason for so doing and the courts will strive so far as is possible to give effect to that principle. Secondly, this argument encompasses a component of fairness, in that it would be unfair to permit EMBD to resile from its agreement and circumvent the ADR process.

53. This court accepts that as a matter of principle, the dicta set out in the Channel Tunnel case reflects in large measure the approach that the courts will apply in the usual course of events. However, as with most cases, whether the principle is applied in any given case is dependent on several factors which may be both generally applicable to the given case or specifically applicable depending on the facts and circumstances of that case. In so saying the court observes that the dicta of Lord Mustill must be taken in the context of the claim in the ***Channel Tunnel*** case. In that case, it was argued that the process of mediation and arbitration on the whole would have been a slower than recourse to the court. The competing factors to be weighed by the court in making its determination would no doubt have been remarkably different to the facts of the present case. The court is of the view that the considerations in the present case being different to those in the Channel Tunnel case, to apply the dicta without recourse to the other principles set out above would be to do an injustice to EMBD. While it is in the public interest that parties to commercial agreements abide by that which they have agreed it is also in the interest of the public that matters which touch and concern like issues be heard together for the reasons set out above in this decision but also particularly in the case where failure to so do may result in demonstrable injustice to a party. The latter therefore outweighs the former in the court's view.

Prejudice

54. EMBD has not sought to demonstrate any prejudice either to its defence of the original claim or to its ancillary claim as a consequence of the grant of a stay pending determination of the claim or the separation of the trials above beyond submitting on the issue of expense

and delay. The added expense which may be incurred by a stay pending determination of the original claim or the separation of trials is in the court's view insufficient to amount to real prejudice on the part of EMBD. Further, in respect of the issue of delay, EMBD has also failed to demonstrate any likelihood of real prejudice to their case on the original claim or on the ancillary claim. In the court's view, LYP has likewise failed to demonstrate that they are likely to suffer real prejudice should the stay or an order for a separate trial not be granted. The issue of prejudice does not loom large as a factor in the exercise of the court's discretion pursuant to its inherent jurisdiction. In so saying, the court accepts that the there is an element of unfairness in LYP possibly having to incur some added expense in what is likely to be a relatively long trial but in the court's view this does not amount to prejudice. In any event as set out before, the adoption of efficient and timely case management will assuage most of the effect of the unfairness.

Disposition

55. The grant of the application will not be just in all the circumstances and the court will therefore dismiss the application of the 11th April 2017. The parties shall be heard on the issue of costs.

Dated the 1st day of June, 2017.

Ricky Rahim

Judge

ERRATA/CORRECTION TO WRITTEN DECISION OF THE 1ST JUNE 2017

Issued pursuant to Part 43.10 CPR in respect of two clerical errors;

[1] Second sentence of **paragraph 36,** substitute "LYP" in place of "EMBD" so that the sentence is to read:

The first and obvious difference would be that of a finding by the arbitrator that LYP is not liable for negligence and so is not liable for contribution in the face of a finding by the court that LYP is liable for negligence.

[2] Fourth sentence of **paragraph 36,** insert the word "not" after the words "LYP is" first appearing in the sentence so that the sentence is to read:

The second is that it may be the case that the court finds that the DAB is binding and that as a consequence EMBD is liable to satisfy the amount certified thereunder but the result of the arbitration is that LYP is not liable in which case EMBD has no recourse against LYP.

Dated the 27th day of June 2017.
Ricky Rahim
Judge