THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P169 of 2017

Claim No. CV-2016-01522

Between

LEE YOUNG AND PARTNERS

(A Partnership and/or Firm registered under the laws of Trinidad and Tobago and sued pursuant to Section 12 of the Partnership Act Chapter 81:02 and in accordance with Part 22.10 of the Civil Proceedings Rules 1998, as amended)

Appellant/4th Ancillary Defendant

And

ESTATE MANAGEMENT & BUSINESS DEVELOPMENT COMPANY LIMITED

Respondent/ Ancillary Claimant/Defendant

PANEL: **A. Mendonça, J.A.**

J. Jones, J.A.

P. Rajkumar, J.A.

APPEARANCES

Mrs. D. Peake SC, Mr. R. Heffes-Doon, instructed by Ms. M. Ferdinand on behalf of the Appellant

Ms. S. Barwise QC, Mr. C. Kangaloo, instructed by Ms. D. Nieves on behalf of the Respondent

Date Delivered: November 24th 2017

I have read the reasons for decision by Justice of Appeal Rajkumar and I agree with them.

A. Mendonça J.A.

Justice of Appeal

I also agree.

J. Jones J.A

Justice of Appeal

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Judgment

Delivered by P. Rajkumar J.A.

Background

1. The respondent, Estate Management and Business Development Company (EMBD), a State owned enterprise, entered into a contract with Namalco, a construction company, for works to be performed at Picton – (the Picton contract). In fact Namalco was contracted to undertake works under 6 contracts at different sites, and claims a total of $1,291,877,247.22 outstanding thereunder in the instant proceedings ("the court proceedings*"*). The appellant Lee Young and Partners (LYP) is the engineer, and the party entrusted with certification of claims under the Picton contract only[1].

2. EMBD instituted ancillary proceedings, (the ancillary proceedings), against LYP seeking contribution /indemnity against LYP in the event that it were to be found liable to Namalco in respect of Namalco's claim against it under the Picton contract. EMBD'S claim against LYP is based on negligence and breach of contract in respect of its certification of interim payment certificates (IPCs) submitted by Namalco. EMBD alleges that LYP wrongly certified amounts in excess of the amounts that would have been properly due under those interim payment certificates, resulting in EMBD having paid and having to pay excessive amounts to Namalco.

3. LYP sought a stay of the high court proceedings by EMBD, in relation to the ancillary claim against it, on the basis that the contract that it entered into with EMBD contained **an**

[1] The certifying authorities / engineers under the other 5 contracts which are the subject of the court proceedings are also the subject of ancillary claims. However this appeal is only in respect of LYP's claim to be entitled, as a matter of law, to a stay of the ancillary proceedings.

arbitration clause. It contends that it is therefore entitled to a stay of proceedings under s. 7 of the Arbitration Act as well as under the inherent jurisdiction of the court because that is what the parties to that contract had agreed. The arbitration clause itself is in terms of the 4th edition FIDIC White Book[2] clause 8 and provides for mediation to be attempted before arbitration. The trial judge refused to grant that stay.

4. The appellant appeals against the refusal of the trial judge to grant a stay of the court proceedings.

Issues

5. The broad issue is whether or not the arbitration clause in the contract between LYP and EMBD should be enforced by the grant of a stay of the ancillary proceedings between LYP and EMBD in the high court as requested by LYP. If granted this would require EMBD and LYP to instead resolve the subject matter of the ancillary claim by mediation , and in default of resolution , by arbitration.

6. This involves consideration of further issues as follows:-

i. Whether there is a risk of **substantial injustice** if the stay of the ancillary proceedings against LYP requested by it is granted:-

   a. because of the possibility of a **multiplicity of proceedings**:

   b. because of the risk of **inconsistent decisions** in an arbitration and in court proceedings, and

[2] Client /Consultant Model Services Agreement

c. because of the risk of EMBD **losing altogether.**

ii. Whether the mediation aspect of the arbitration clause ("FIDIC clause 8", "the ADR clause", or "the escalation clause") is insufficiently certain to be enforceable.

iii. Whether, if the mediation aspect of the arbitration clause is enforceable, this factor should weigh in favour of, or against, the exercise of the court's jurisdiction and /or **inherent jurisdiction** to stay EMBD's ancillary claim in the high court proceedings.

iv. Whether, because of the consensual nature of mediation, there is less risk of inconsistent decisions as a result of a stay because the risk of substantial injustice arising from inconsistent decisions is minimized. If so, whether there is less reason for the exercise of the court's discretion to refuse a stay of the ancillary claim in the high court proceedings in the context of an arbitration provision like FIDIC Clause 8, which also contains a pre requirement to mediate.

v. Whether EMBD is responsible for its own dilemma in facing the possibility of inconsistent findings in separate arbitration and high court proceedings by not insisting on enforcing the arbitration clause in its own contract with Namalco.

Conclusion and disposition

7. In the circumstances of this case the stay of the ancillary proceedings should be refused for the reasons set out below.

a. Multiplicity of proceedings

8. The grant of a stay of the ancillary claim by EMBD against LYP in the high court proceedings could result in a **multiplicity** of proceedings– an arbitration between LYP and EMBD, and high court proceedings between EMBD and Namalco.

b. Inconsistent decisions

9. An essential issue that would have to be determined in the **high court proceedings**, as it is a cornerstone of the **defence** of EMBD, is whether the works under the Picton contract were over certified by LYP- (that is, were IPCs certified for works in excess of their actual value). The same issue, the correctness of interim payment certificates issued by LYP in respect of the Picton contract, arises on the **ancillary claim** by EMBD against LYP.

10. If a stay of the ancillary proceedings is granted, so that that issue has to be determined in a separate arbitration, there is therefore the **risk of inconsistent decisions**, including the risk of (a) the possibility of a finding in an **arbitration** that LYP has **not** over certified some or all of the IPCS, while (b) there is the possibility of a finding **in the court proceedings** that LYP **has** in fact over certified some or all of the IPCS.

c. Losing altogether and substantial injustice

11. As a result of inconsistent decisions in the arbitration and the high court proceedings as identified above there is the risk of EMBD **losing altogether** if a stay of its ancillary claim were to have been granted, as it would, despite the court's finding of over certification by LYP, be

without recourse against LYP. There is therefore in that case a risk to EMBD of **substantial injustice**.

12. It was contended however that on analysis the risk of inconsistent decisions is insignificant because:-

a. If EMBD **fails in its defence to the claims in the high court** by Namalco on the basis that the IPCs were validly certified and binding, then there would be no basis for EMBD claiming the contrary in arbitration, namely that LYP had wrongfully over certified the IPCs.

b. If EMBD **successfully defends** the litigation by Namalco, even on the basis that over certification by LYP was established, there would be nothing for EMBD to pay to Namalco, and therefore nothing in respect of which EMBD could seek contribution against LYP.

13. However those are not the only possible outcomes. One possibility for example[3], could be that the IPCS are found to have been over certified by LYP, yet nevertheless EMBD fails in its defence to the claim by Namalco. This could occur for example (a) if the Dispute Adjudication Board decision (DAB) is found to be contractually binding 28 days after its receipt, or (b) if the court were to hold that payment under IPCs, and /or subsequent inaction after payment led to EMBD being held to have **waived** any requirement for further documentation prior to payment, or (c) if the court were to hold that EMBD were **estopped** from challenging the IPCs or resisting payment under some or all of the IPCs 42 days after their receipt.

[3] and it must be emphasized that we are speaking only of possibilities, nothing more

14. In such a case EMBD could not resist that aspect of Namalco's claim and could be liable to pay that claim in whole or in part. Logically in such a case recovery of EMBD's loss as a result of having to pay to Namalco under inflated IPCs should lie against LYP.

15. In such a case if a stay had been granted of EMBD's ancillary claim against LYP, then EMBD would need to pursue recovery in arbitration proceedings. Yet there remains the risk of an inconsistent finding by the arbitrator, namely, that LYP did not over certify the IPCs. In that scenario EMBD would have **lost altogether**, by having nevertheless to pay on Namalco's claim on inflated over certified IPCs, despite the court's finding of incorrect or improper over certification by LYP. This is an example of possible **substantial injustice** to EMBD if a stay of its ancillary claim against LYP were to be granted, and which would justify the **refusal** of a stay of EMBD's ancillary claim against LYP.

Whether the requirement to mediate is insufficiently certain to be enforceable

16. On the face of it the escalation clause appears sufficiently certain to be workable, providing as it does, default positions in the absence of agreement on key aspects of mediation, for example (a) the appointment of a mediator (b) the time frame for mediation, and (c) the option to proceed to arbitration after 90 days from a notice under Clause 8.2.2 in default of participation in mediation by any party, or termination of mediation without a result.

Whether, if the mediation aspect of the arbitration clause is enforceable, this factor should weigh in favour of or against the court's jurisdiction and /or inherent jurisdiction to refuse to stay the high court proceedings

17. Because of the consensual nature of mediation it is arguable that there is less risk of inconsistent decisions, and that as a result the risk of substantial injustice arising from such inconsistent decisions is minimized. If that is actually so there could be less reason for the exercise of the court's discretion to refuse a stay of the high court proceedings in the context of an arbitration provision like FIDIC Clause 8, which also contains a pre-requirement to mediate, than in the context of an arbitration clause simpliciter.

18. However, despite the consensual nature of mediation it cannot be assumed that in practice the risk of **inconsistent** decisions, even with a mediation component in the escalation clause, is thereby sufficiently reduced such that it outweighs the risk of EMBD **losing altogether** and resulting in **substantial injustice**.

19. As examined hereinafter, on further analysis it is apparent that under the FIDIC Clause 8 procedure there remains the risk – even if a reduced risk, of **inconsistent decisions** between the High Court and an **arbitrator**, and therefore a risk of EMBD losing altogether. This is because, as a party cannot be compelled to arrive at an agreement in mediation, the default position remains arbitration, in the absence of settlement 90 days after notice requesting mediation. The court's inherent jurisdiction to grant a stay could not therefore be required to be invoked automatically simply because of the requirement in the escalation clause to explore mediation as a precondition

to arbitration, as it is always "on the cards" that mediation will not be successful and that arbitration, with the attendant risk of inconsistent decisions, becomes the next step.

Own dilemma

20. Finally, it cannot be contended that EMBD is responsible for its own dilemma in facing the possibility of inconsistent findings in separate arbitration and litigation proceedings by not insisting on enforcing the arbitration clause in its own contract with Namalco. This is because even if it had done so it would still be faced with two separate arbitration proceedings. Further and in any event this is a factor which, even had it been applicable, is outweighed by the paramount consideration of **substantial injustice** to EMBD if there is the possibility of **losing altogether** if a stay of the ancillary proceedings were to be granted. The trial judge's analysis in this regard also cannot be faulted.

Counter notice

21. The counter notice filed by the respondent deals with aspects of the reasoning of the trial judge in relation to the exercise of his discretion to grant or refuse a stay. The orders sought would involve a rewriting of the decision of the judge and would not be appropriate at this procedural stage, if at all. In so far as those aspects of reasoning may be relevant to the substantive issue of whether a stay should be granted, and in so far as they arise on the appellant's appeal, they have been dealt with herein.

Orders

22. The appeal is accordingly dismissed. The respondent's counter notice is also dismissed.

Analysis

Statutory Framework

23. The Appellant (LYP) sought *inter alia* an order staying the ancillary proceedings between EMBD and LYP pursuant to the inherent jurisdiction of the court and/or section 7 of the **Arbitration Act Chapter 5:01 (“**the Act**”).** Alternatively, an Order pursuant to Part 26.1(f) of the CPR that the proceedings of the Ancillary Claim as against the Appellant be **stayed pending the determination of the Claim** between the Claimant and the Respondent (the Defendant to the Claim); or, an Order pursuant to Part 26.1(j) of the CPR directing that the proceedings of the Ancillary Claim against the Appellant be **dealt with as separate proceedings**.

24. Section 7 of the Act provides as follows: (all emphasis added)

> *“* ***7.*** *If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court,* ***if satisfied*** *that there is* ***no sufficient reason*** *why* ***the matter should not be referred*** *in accordance with the arbitration agreement,* ***and*** *that the applicant was,* ***at the time*** *when* ***the proceedings*** *were* ***commenced,*** *and* ***still remains, ready and willing to do all things necessary*** *to the proper conduct of the arbitration,* ***may*** *make an order staying the proceedings.”*

25. Therefore, if an application is made under s. 7 of the Arbitration Act a court would ordinarily uphold an agreement to arbitrate 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). However, particularly in a case where there are proceedings involving more than two parties, there may be circumstances in which the risk of **substantial injustice** to the party resisting the stay would constitute **sufficient reason** why the matter **should not be referred** in accordance with the arbitration agreement. Such a risk of **substantial injustice** would weigh in favour of the court's exercising its discretion **not** to grant a stay.

26. The determination as to whether there is the risk of **substantial injustice** involves balancing several factors. The respondent's submission is that, in refusing to grant the stay, the trial Judge was **correct** in law "*in his application of the authorities for the proposition that **a sufficient reason** to **decline a stay** is that **granting the stay risked a multiplicity of proceedings** with the consequent **risk of inconsistent findings** which would cause **substantial injustice** to the party resisting the stay, namely, the **risk of that party 'losing altogether"**.*

27. The law in this jurisdiction on this point was analysed, summarised, and applied by the Court of Appeal in the case of **LJ Williams v Zim Integrated and Zim American – Civil Appeal No. P059 of 2014** delivered on June 4, 2014 per the Honourable Mendonça JA.

28. In the instant case the arbitration clause agreed between LYP and EMBD also required them to consider and explore mediation as a condition precedent to arbitration. It must therefore be considered whether, and if so how, this additional element affects the application of the principles in **Zim**.

29. The principles applicable are summarised at Paragraph 62 where the Honourable Mendonça JA **LJ Williams v Zim Integrated and Zim American – Civil Appeal No. P059 of 2014**, stated as follows:

> *62. These cases, it seem to me, to establish that where the objection to the stay is that it may result in separate or a* ***multiplicity of proceedings and a risk of inconsistent findings****, there are two principles at play.* ***One is that the parties should be held to their contractual arrangements to arbitrate*** *and the other that* ***multiplicity of proceedings is highly undesirable****. The cases however establish that the mere fact that there may be a multiplicity of proceedings and hence the risk of inconsistent findings is not by itself sufficient to grant a stay, or in other words permit a party to ignore or ride "rough shod" over his contractual commitment.* ***There must be something more from which the Court can conclude that the party resisting the stay or seeking to be relieved from his contractual obligation will suffer <u>substantial injustice</u> if the disputes are not all permitted to be litigated. <u>A sufficient basis to so conclude that there is substantial injustice is where the risk of inconsistent decisions by the different tribunals may result in the party seeking the stay losing altogether</u>.*** (**but this should probably be read as " resisting the stay" or** "seeking to litigate both disputes together" – the language used in Bulk Oil cited at paragraph 56 of **Zim)**.

30. Therefore in the instant case, whether a stay will be refused or not, depends primarily on:-

(i) Whether there is the possibility that the grant of a stay of the ancillary proceedings in the high court would result in a **multiplicity of proceedings** before different tribunals;

(ii) Whether there is the possibility of **inconsistent findings** by the high court and the arbitrator on the **same issues**;

(iii) Whether there is therefore the possibility that the party seeking to resist the stay (EMBD) may **lose altogether**.

31. If so, this would amount to substantial **injustice**, and, in the exercise of the court's discretion, a stay of EMBD's ancillary claim against LYP in the high court proceedings should not be granted.

32. Illustrations of the risk of **substantial injustice** that could arise from not granting a stay, leading to the risk of inconsistent findings in different proceedings before different tribunals/ fora, and the **possibility** of one party **losing altogether** are found in the cases that were considered in **Zim** at paragraphs 53-63. In each such case the possibility of such inconsistent findings before different tribunals raised the possibility of the party resisting the stay of the proceedings losing altogether.

33. In **Zim** at paragraph 53 the dictum of Lord Denning in **Taunton Collins v Cromie and Ors.** [1964] 1 WLR 633 was considered in relation to the discretion to grant or refuse a stay under s.4 of the UK 1950 Arbitration Act[4]. *At pages 635-636 Lord Denning considered that apart from*

[4] which is in material terms similar to s. 7 of the local Arbitration Act

the possibility of inconsistent findings if the two proceedings should go on independently, "there would be much ***extra cost*** *involved in having* ***two separate proceedings*** *going on side by side, and there would be* ***more delay".***

34. **Taunton Collins** was applied in **Eschersheim Erkowit (Owners) v Salus (Owners)** [1975] 1 WLR 83 at 97-98 in relation to the UK 1950 Arbitration Act per Brandon J. as follows (all emphasis added):

> (It was accepted that the arbitration clause in that case gave rise to) *"a* ***prima facie case for a stay****, and that the* ***burden*** *was therefore on them (*owners*)* ***to show cause why a stay should not be granted****. It was said, however, that there were in this case* ***two good reasons against a stay:*** *first* ***the avoidance of multiplicity of proceedings****, and second the fact that difficult questions of law, or of mixed fact and law, were involved.*
>
> *First, as to* ***multiplicity of proceedings****. It was said that all the* ***main issues*** *raised by the claims* ***in the two actions*** *for negligent salvage* ***would*** *in any case* ***have to be decided****, as between the owners of the Erkowit and the owners of the Dortmund,* ***in the ship's collision action****, the result of which would also determine the cargo's collision action.* ……
>
> *….In these circumstances it was said that it would be* ***much better for the court to retain*** *the two actions for negligent salvage and* ***try them at the same time*** *as the ship's collision action,* ***rather than to try the latter action only and leave the claims raised***

in the other two actions to be decided by arbitration. It would be better, because it would avoid duplication of hearings, save costs, minimise delay, and avoid the risk of conflicting decisions".

35. In **Berkshire Senior Citizens Housing Association v McCarthy E Fitt Ltd.** 15 B.L.R. 27 (1979)[5] ***Taunton Collins*** *(supra)* was applied by the English Court of Appeal). Lord Goff, stated at Page 33 as follows (all emphasis added):

There are, in my view, two conflicting principles, as clearly stated by Pearson LJ in ***Taunton-Collins v Cromie*** *and others [1964] 1 WLR 637 thus:*

"In this case there is a conflict of two well-established and important principles. One is that parties should normally be held to their contractual agreements …The other principle is that a multiplicity of proceedings is highly undesirable for the reasons which have been given. It is obvious that there may be ***different decisions on the same question and a great confusion may arise."***

In my judgment, where, as here, the plaintiffs (assuming they can prove their case) are innocent and have suffered through the wrong-doing of one or more of the people they employed, the ***second of those principles*** *becomes of* ***paramount importance*** *because,* ***if there were separate proceedings****,* ***they may lose altogether*** *not by reason of separate defences but* ***because the different tribunals reached different conclusions on the same facts*** *and* ***that****, if it happens, must be* ***a substantial injustice****.*

[5] also in relation to the UK 1950 Arbitration Act - considered in **Zim** at paragraph 58

I refer to what Kerr J said in ***Bulk Oil (Zug) AG v Trans Asiatic Oil Limited*** *[1973] 1 Lloyd's Rep at p. 137:*

"Secondly, as pointed out by Mr Libbert, the multiplicity of proceedings relating to the same issue was in these cases liable to result in ***substantial injustice*** *to the* ***plaintiffs****, because they were* ***making alternative claims which might both be defeated if different conclusions were reached by two different tribunals****. It therefore follows that in both cases the effect of* ***granting a stay in favour of the party seeking to rely on the arbitration clause*** *and* ***the consequent risk of inconsistent conclusions*** *in* ***two different proceedings*** *were* ***liable to cause substantial injustice*** *to the plaintiffs."*

Also per Sir David Cairns at page 35[6]

"I agree that this appeal should be allowed. This is a strong case for the application of the doctrine of such cases as Taunton-Collins v Cromie, that the desirability of avoiding several arbitrations ***so that issues between all concerned can be resolved in one action may be a proper ground for refusing a stay****. It is a strong case because of the risk that* ***if there were two arbitrations****, or* ***an arbitration and an action****,* ***the result might be that an innocent plaintiff, or claimant, might fail to get damages against anybody because of inconsistent findings in two different sets of proceedings."***

(See also Lord Roskill at page 36 to the same effect).

[6] referred to at paragraph 58 of **Zim**

36. In ***Palmers Corrosion Control Ltd. v. Tyne Dock Engineering Ltd*** All England Official Transcripts (1997-2008) [1997] at pages 5-6, the cases of ***Taunton-Collins and Berkshire*** were again considered in relation to the grant of a stay pursuant to section 4 of the UK 1950 Arbitration Act as follows per Hirst LJ *:(*all emphasis added*)*[7]

> *Secondly… I do not think that the* ***judge's inference that there never would be a second set of proceedings was one which he was entitled to draw****, because* ***it must be on the cards****, to put it no higher, that* ***if Celtic were successful in the arbitration****, in which ex hypothesi* ***Palmers would not be represented****,* ***the latter would not meekly lie down and accept the result****.* ***It is by no means unlikely that if they were dissatisfied, they would want to take proceedings where they would be dominus litis and be able to call their own witnesses and present the arguments themselves.*** *Moreover, as my Lord, Lord Justice Potter pointed out in the course of the argument, this particular factor would* ***apply in any case of the present kind*** *and is n****ot some peculiar and special feature of this particular case****.*
>
> ***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.***
>
> ***……I would therefore, in the exercise of my discretion, refuse a stay because of the overwhelming importance of avoiding contradictory findings****."*

[7] *"I therefore turn back to evaluate the rival argument on the main points. First of all, it seems to me that the* ***Taunton-Collins*** *case and the* ***Berkshire*** *case, while perhaps not going quite so far as to lay down* ***the multiplicity of proceedings point*** *as a rule of principle, do very* ***clearly and positively establish*** *that this* ***is a paramount consideration****.*

37. That point was emphasised by Lord Justice Potter as follows (all emphasis added):-

"I agree. I consider that the ***preponderance of authority*** *in cases of this kind* ***weighs against an exercise of discretion in favour of a stay which may lead to a multiplicity of proceedings concerned with identical issues****. The vice of such multiplicity is that it gives rise to (a)* ***a duplication of the task of investigating*** *and* ***determining the issues*** *and (b)* ***a risk of inconsistent findings".***

It seems to me that the judge did not apply his mind to (b) in any sense other than by paying lip service it. He was prepared to assume (a), in the sense that he accepted that duplication of the issues would be involved if the proceedings continued. But, having done so, he avoided giving any weight to (b) ***by making an assumption about what would be the likely conduct of the parties following a decision in the arbitration proceedings.***

38. Those observations are relevant here as Namalco will not in the usual course of events be represented in an arbitration between LYP and EMBD. Further, it cannot simply be assumed or inferred that any arbitration between LYP and EMBD would await the outcome of, or completion of, the litigation between Namalco and EMBD.

Possibility of inconsistent findings - the factual position

39. EMBD's defence to Namalco's claim to be paid on the amounts outstanding on the IPCs is based on its assertion that the IPCs do not represent actual value of work, as the work recorded thereon as having been certified by LYP was in excess of the actual value of the work performed.

40. That defence involves a determination in the high court proceedings as to whether the IPCs were actually overvalued and incorrectly over certified, and necessarily therefore whether LYP in fact acted improperly or incorrectly in over certifying the work on those IPCs.

41. In substance that is the same issue that would need to be determined by an arbitrator in any arbitration between LYP and EMBD for recovery by EMBD of its loss in having to pay based on inflated IPCs.

42. There is therefore a risk that the findings by the court may be different from those by the arbitrator. This is illustrated by reference to the pleadings and examination of the issues which are raised in relation to LYP in Namalco's defence, and in its ancillary claim against LYP.

Issues on the pleadings

43. Examples of the issues which are raised in the **defence** of EMBD to Namalco's claim **in relation to over certification of IPCs** were provided in the written submissions of the respondent and, (with corrections), are set out as follows:-

Issues raised in EMBD's defence to Namalco's claim

44.

i. Paragraph 156 of **Amended Defence** Lines 3 to 4:

"*However, it is expressly denied that the IPCs issued* ***certified*** *the amounts* ***properly due*** *to the Claimant under the Contract*."

ii. Paragraphs 168 to 171 of Amended Defence contain averments as to the **defective work** which was **certified** by LYP in the amount of **$24,870,843.86**.

iii. Paragraphs 172 and 173 of **Amended Defence**:

a. **Over-certification** of provisional sums;

b. Issuance of IPCs when **no supporting documents** were submitted by contractor as is mandatory under the provisions of FIDIC 14.3, 14.6;

c. **Incorrect calculation** and **certification** of financing charges using a formula for compound interest which was inapplicable; (Paragraph 175).

d. **Incorrect approval** of Contractor's claims;

e. Paragraph 173 avers that the value of these **over certifications** was **$39,373,533.55.**

Issues joined on Namalco's Reply

45. In the Amended Reply and Defence to Counterclaim Namalco denies **over certification** by LYP (paras. 142(ii), 148, 149), denies **incorrect approval** by LYP of the work which was the subject of the IPCs, and denies that no supporting documents were supplied to (LYP) (Paragraph 141(i)) of the Reply and Defence to Counterclaim.

Issues raised in the **Ancillary Claim by EMBD against LYP**

46. The issues raised in EMBD's defence to Namalco's claim on the IPCs are raised by EMBD against LYP in the **Ancillary Claim.** These are correctly listed in the respondent's submissions as follows:-

i. **Improper certification** of IPCs, Paragraphs 336 to 338

ii. **Incorrect calculation** and **certification** of **financing charges**: Paragraphs 339 to 344

iii. **Certification of defective** works: (equivalent to incorrect approval) Paragraphs 345 to 354

iv. **Over-certification of preliminary sums**: Paragraphs 355 and 356

v. **Over-certification of drainage works**: Paragraphs 357 to 362

vi. **Over-certification of contractor's claims**: Paragraphs 363 and 364

47. These issues, which are the same, or substantially overlap with, the issues raised in Namalco's defence, would have to be decided by a separate mediator / arbitrator if a stay of the ancillary proceedings were to be granted.

Possible inconsistent decisions on the issues

48. Possible inconsistent decisions were identified by the trial judge as follows (all emphasis added):

> *"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**."*
>
> *"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."* (For the purpose of this analysis it is not necessary to consider the third scenario identified by him).

49. The second scenario is relevant, where a stay is granted of the ancillary claim by EMBD against LYP. It raises frontally the prospect of inconsistent findings. For example, if (1) **the court** also finds that **over certification** by LYP has occurred, but nevertheless that the DAB decision is binding[8], this would be inconsistent with (2) a finding by an **arbitrator** that LYP did not cause loss to EMBD by **over certifying**. In such a case EMBD, despite a finding by the court of **improper or incorrect certification** by LYP, in the face of an **inconsistent finding** to the contrary by the **arbitrator**, would be without recourse to LYP. If a stay were to have been granted of the ancillary claim by EMBD against LYP, the court could grant no relief to EMBD on its ancillary claim, having left it to an arbitrator to do so. However, if the findings by the arbitrator on the issues of over certification differ from that of the court, EMBD would be at risk of losing altogether, with the consequent risk of substantial injustice.

50. Another basis for such inconsistent findings could occur if, for example,

(1) the court were to decide that payment under IPCs, and /or subsequent inaction after payment thereon, led to EMBD being held to have **waived** any requirement for further documentation prior to payment, or,

(2) if the court were to hold that EMBD were **estopped** from challenging the IPCs, or resisting payment under some or all of the IPCs 42 days after their receipt[9].

51. It is clear from paragraph 38 of the Judgment that the trial Judge appreciated this[10].

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[8] see paragraph 143 (ii) of the reply and defence to counterclaim

[9] Paragraph 141(ii) and paragraph 75(i) b of the Reply and defence to counterclaim

[10] *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*

52. It makes no difference whether the issue in the high court proceedings was negligence or improper or incorrect certification on the part of LYP as the factual analysis would necessarily be similar.

Whether prejudice to the Appellant

53. The issue has been raised as to prejudice to the Appellant by being constrained to participate in a 4 week trial, the majority of which involves contracts and ancillary defendants which do not concern it.

54. The claim against LYP is found in discrete portions of the Ancillary Claim in forty (40) paragraphs 326 to 366 and Paragraphs 151 to 179 of the Amended Defence. Even in the case where there may be other matters of general application in other parts of the pleadings, the high court is invested with sufficient case management powers to ensure that, in so far as LYP is only involved in the Picton contract, that (i) the portion of the case brought by Namalco against EMBD, (ii) EMBD's defence to it, and (iii) the ancillary claims against the ancillary party, in relation to the Picton contract, are segregated from the other 5 contracts.

55. It is certainly not the case that LYP would necessarily be forced to participate in the entire 4 week trial on additional contracts which do not concern it, and to which it is not a party. Appropriately drafted case management directions, possibly with the input of LYP and EMBD, are quite capable of avoiding such a result.

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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.

Whether the mediation aspect of the arbitration clause ("FIDIC clause 8", "the ADR clause" or "the escalation clause") is insufficiently certain to be enforceable

56. On the face of it the escalation clause appears sufficiently certain to be workable, providing as it does, default positions in the absence of agreement on key aspects of mediation, for example (a) the appointment of a mediator, (b) the time frame for mediation, and (c) the option to proceed to arbitration after 90 days from a notice under Clause 8.2.2 if the mediation terminates or in default of participation in mediation by any party.

57. Clause 8.1.1, as set out hereunder (all emphasis added), requires that, in the case of a dispute arising in connection with the agreement between LYP and EMBD, the parties' representatives:

> *"…will, within 14 days of a written request from one Party to the other,* ***meet*** *in a good faith effort to resolve the dispute. If the dispute is not resolved at that meeting the Parties will* ***attempt to settle it by mediation*** *in accordance with clause 8.2.*
>
> 8*.2.1* ***Unless otherwise agreed between the Parties or stated in the Particular Conditions****, the Parties shall* ***attempt to agree*** *upon a neutral mediator from a panel list held by the independent mediation centre named in the Particular Conditions. Should the Parties be* ***unable to agree within 14 days of a notice*** *from one party to the other requesting mediation then* ***either party*** *may request that a mediator be* ***appointed by the President of FIDIC****. The appointment by the President shall be* ***binding*** *on the parties* ***unless they agree*** *to another named mediator* ***at any time****.*
>
> *8.2.2. When the mediator has been appointed on his terms and conditions of engagement,* ***either Party can initiate mediation*** *by giving the other Party* ***a notice*** *in*

writing requesting a start to the mediation. The mediation will ***start not later than 21 days after*** *the date of the notice.*

8.2.3 The mediation shall be conducted in accordance with the procedures required by the appointed mediator unless stipulated otherwise in the Particular Conditions. If the procedures are stated in the Particular Conditions, then the appointed mediator shall be required to follow those procedures but shall at any time be able to propose to the Parties for their joint approval any alternative procedures.

[8.2.5]- (option if no agreement is reached)

8.2.7 ***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 90 days of the giving of the notice under Clause 8.2.2****.*

58. The clause provides procedures for:-

a. appointment of a mediator either by agreement or by the President of FIDIC;

b. the initiation of mediation after the appointment of a mediator "on his terms and conditions of engagement;"

c. a time frame of such initiation;

d. in the event that the mediation has terminated or that a party fails to participate in mediation, a default provision permitting arbitration after 90 days from the notice by a party under Clause 8.2.2 requesting a start to mediation.

59. There is no time limit for the written request for a meeting between the parties. This is a precursor to the mediation process. However, the absence of such a time limit could not render the process uncertain, given that the time frames for commencement of mediation, (and in fact, completion of mediation), could easily be rendered certain - by the action of any party making a request in writing for such a meeting.

60. Furthermore in **Cable and Wireless v IBM** [**2002] 2 All E R 1041** Colman J emphasized the need for the court not to decline references to ADR, especially given the recognition afforded in the CPR[11] to the importance of ADR procedures. See at Paragraph 25 *"... **the English courts should nowadays not be astute to accentuate uncertainty and therefore unenforceability in the field of dispute resolution references***. See also (at Paragraph 28*) Furthermore, **for the courts to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in CPR** 1.4(2)(e and as reflected in the judgement of the Court of Appeal in Dunnett v Railtrack plc (in railway administration)[12]*. See also paragraph 34 as to the discretionary nature of a stay.

61. Therefore there is no proper basis in fact to conclude that the mediation aspect of the arbitration clause is insufficiently certain to be enforceable. Further, as a matter of policy a court would not be astute to adopt such a course.

[11] see, for example, the local Civil Proceedings Rules **25 (1)c and 27(8)(2)**
[12] *[2002] 2 All ER 850*

Whether, if the mediation aspect of the arbitration clause is enforceable, this factor should weigh in favour of or against the court's jurisdiction and /or inherent jurisdiction to refuse to stay EMBD's ancillary claim against LYP in the high court proceedings

62. Because of the consensual nature of mediation it is arguable that a court should be more willing to defer to the parties agreed dispute resolution procedure, especially because:-

(i) in the context of an arbitration provision like FIDIC Clause 8, which also contains a pre-requirement to explore mediation, there is less risk of inconsistent decisions than in the context of an arbitration provision simpliciter, and;

(ii) as a result the risk of substantial injustice arising from such inconsistent decisions is minimized.

If that is actually so there could be less reason for the exercise of the court's discretion to refuse a stay of the ancillary claim by EMBD in the high court proceedings.

63. However, even on the assumption that the mediation portion of the clause is a condition precedent to arbitration, on further analysis, there is still the risk – even if a reduced risk, of **inconsistent decisions** under the FIDIC Clause 8 procedure for the following reasons.

i. Even if the mediation precondition is given effect, it is necessarily a consensual process. As mediation is a voluntary process, neither EMBD nor LYP can be compelled to arrive at a consensual position in mediation. There is no certainty therefore that mediation would be effective, or that a consensual resolution would be achieved. In that event the clause provides that 90 days after the giving of notice requesting mediation under Clause 8.2.2, either party may commence arbitration, and the arbitration provision therefore comes into effect.

ii. Practically therefore, there is a real possibility that the voluntary mediation provision is bypassed without result. In that case the **arbitration** aspect of the escalation clause 8 would be triggered.

iii. This is not speculation as to the outcome of any mediation – merely a recognition that in practice one such possible outcome is no outcome, leading to arbitration.

Notwithstanding the requirement to explore mediation, the analysis of the likelihood of inconsistent decisions, and the possibility of EMBD losing altogether with resulting substantial injustice, is not avoided. Therefore, despite the consensual nature of mediation, the default position remains arbitration. It cannot therefore be assumed that, as a practical matter, the risk of inconsistent decisions, (even with a mediation component in the arbitration clause), is thereby sufficiently reduced such that it outweighs the risk of EMBD **losing altogether** resulting in **substantial injustice**.

Inherent jurisdiction

64. In **Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others [1993] 1 All ER 664**

In **Channel Tunnel** the House of Lords emphasised that "*the court had power pursuant to its inherent jurisdiction to grant a stay of an action brought before it in breach of an agreed method of resolving disputes by some other method*". In that case the agreed method was referral to a panel of experts and, failing resolution, reference to arbitration in Brussels. The court's **inherent jurisdiction** to grant a stay had to be invoked as the court's statutory jurisdiction to grant a stay under the 1975 Arbitration Act U.K could not apply to an arbitration whose seat was not the U.K. Lord Mustill made it clear that the grant of a stay under the court's inherent jurisdiction was

discretionary. Similarly, in this jurisdiction the court's inherent jurisdiction is equally discretionary.

65. The escalation procedure in the instant case contemplates firstly exploring less time and resource intensive methods of dispute resolution, namely, meeting in good faith and then mediation, and then the more resource intensive method of dispute resolution, namely arbitration. However this would not, by itself, be a reason why the foregoing analysis as to whether there exists the risk of **substantial injustice** should not be similar in relation to the application under the court's inherent jurisdiction.

66. The mere existence of the escalation clause is not a sufficient basis for the High Court to grant a stay under its inherent jurisdiction, and require the parties instead to mediate or arbitrate, given that there is still the risk, even if a reduced risk, of **inconsistent decisions** under the Clause 8 procedure. Such risk, capable of creating substantial injustice because of the possibility of EMBD losing altogether, may be sufficient to also weigh against the grant of a stay under the court's inherent jurisdiction.

67. In the instant case the trial judge went even further and considered numerous additional factors before concluding that he should exercise his **discretion** under his inherent jurisdiction not to grant a stay. He considered the argument that was raised in **Channel Tunnel** that it would have been appropriate to exercise the inherent power of the court to stay proceedings brought before it in breach of an agreement to decide disputes in some other way. He held, nevertheless, that it

would not be appropriate in the circumstances of the case before him to exercise his inherent discretionary jurisdiction to grant a stay.

68. The circumstances in which an appellate court would consider it appropriate to revisit and overturn the exercise of a trial judge's discretion are too well known to justify burdening this judgement with their unnecessary rehearsal. Suffice it to say that in summary, the trial judge has not been shown to have been plainly wrong in that exercise. Given that he considered, analysed, and weighed, inter alia, (at para. 42 et seq.) the additional factors of:-

i. convenience,
ii. fairness,
iii. delay,
iv. public interest,
v. both the **Channel Tunnel** case, and
vi. the matters which distinguished it from the instant case, and given that
vii. he considered in detail the issue of demonstrable **injustice** in this case outweighing the parties' commercial agreement on their dispute resolution procedure, and that he further adverted to the other matters that he had already considered earlier in his judgement, namely,
    i. the possibility of the party resisting the stay, EMBD, **losing altogether**, and
    ii. the **multiplicity of proceedings**,
    iii. the **extra time, and**
    iv. **costs**, (resulting from duplication), and

v. the possibility of **inconsistent findings** on the same or substantially the same issues that could arise if a stay were granted, and

vi. the fact that Namalco would not be represented, and therefore would not necessarily accept any finding adverse to it in arbitration between EMBD and LYP,

it cannot be said either (a) that the trial judge was plainly wrong in the exercise of his discretion under the inherent jurisdiction not to grant a stay, or (b) that there is any special reason why, when exercising the inherent jurisdiction, that the form of the escalation clause should displace the weight of those additional multiple factors that he did consider.

69. Further, the requirement to explore mediation, as examined above, does not eliminate the possibility that a party who explores mediation without success could nevertheless by default need to proceed to the next stage and engage in arbitration. In that event the analysis in the line of authorities beginning with **Taunton Collins**, and considered and applied in **Zim** would equally apply. This line of authorities was also carefully considered and applied by the trial judge.

70. It is the multiparty nature of the dispute in this case that distinguishes **Channel Tunnel** and **Cable and Wireless**. This is what introduces the additional element of inter alia, a multiplicity of proceedings and risk of inconsistent findings, with the possibility of **substantial injustice** in the event that a stay is granted.

71. Despite a requirement to explore mediation, the court's inherent jurisdiction to grant a stay could not therefore be required to be invoked automatically. There is no basis therefore for

concluding that the exercise of the discretion of the trial judge to refuse a stay of the ancillary claim, either under his inherent or under his statutory jurisdiction, was plainly wrong.

Whether Party resisting stay was responsible for his own dilemma, namely the situation giving rise to risk of inconsistent findings

72. In **Zim** at Paragraph 62 it was stated:

> *A sufficient basis to so conclude that there is substantial injustice is where the risk of inconsistent decisions by the different tribunals may result in the party seeking the stay losing altogether. In that event the Court will also consider the extent to which the party seeking the stay*[13] *is an innocent party or in other words the extent to which he is responsible for the multiplicity of proceedings*."

73. It was contended that EMBD has created its own dilemma by a. not itself seeking a stay of proceedings pursuant to the arbitration clause in its own contract with NAMALCO when it was sued by NAMALCO. However even if it had done so and successfully proceeded to arbitration, it would still be engaged in a process where LYP was not a party.

74. Its defence of over certification, in such an arbitration between EMBD and NAMALCO, would still have to be conducted without LYP being a party. If a stay of EMBD's ancillary claim were to be granted, any claim for contribution against LYP in an arbitration between LYP and EMBD would be conducted in arbitration proceedings separate from that between EMBD and

[13] **but this should probably be read as " resisting the stay" or** "seeking to litigate both disputes together" – the language used in Bulk Oil cited at paragraph 56 of **Zim**.

NAMALCO. The risk of inconsistent decisions in each would still remain. That risk could not have been avoided by EMBD insisting on arbitration of the claim against it by NAMALCO.

75. Apart from this the consideration of whether EMBD is responsible for its own dilemma was a matter for the trial judge in the exercise of his discretion. The trial Judge's analysis at paragraph 50 of the Judgment of the appropriate weight to be ascribed to this consideration cannot be faulted.[14]

Alternative orders sought

76. In the alternative, orders were sought as follows:-

(i) an Order pursuant to Part 26.1(f) of the CPR that the proceedings of the Ancillary Claim as against the Appellant be **stayed pending the determination of the Claim** between the Claimant and the Respondent (the Defendant to the Claim); or,

(ii) an Order pursuant to Part 26.1(j) of the CPR directing that the proceedings of the Ancillary Claim against the Appellant be **dealt with as separate proceedings**.

77. However, in the event that LYP is found to have over certified the IPCs in the hearing of the matter between EMBD and NAMALCO, each of those orders would have the effect of

[14] *"50. …. However, the court adopts the approach set out by Hirst LJ in* ***Palmer's Corrosion Control Ltd v Tyne Dock Engineering 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****……. 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 [1973] 1 Lloyds Rep 129 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."*

potentially duplicating the time and costs involved. The justification for **then** embarking on the hearing of that issue as between EMBD and LYP is not at all apparent given that duplication of costs and judicial time.

Conclusion and disposition

78. In the circumstances of this case the stay of the ancillary proceedings should be refused for the reasons set out above.

Orders

79. The appeal is accordingly dismissed. The respondent's counter notice is also dismissed.

Peter A. Rajkumar

Justice of Appeal