

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1089 of 2011

BETWEEN:

DARIAN O'BRIAN CLARKE

CLAIMANT

AND

SOUTH PARK LIMITED

DEFENDANT

Before the Honourable Mr. Justice William Chandler, Judge of the High Court

2013: May 24

December 31

Mr. Omari Drakes of Messers Clarke Gittens and Farmer for the Claimant

Mr. Nigel Whitehall of Legis Chambers for the Defendant

DECISION

[1] This is an application by the Defendant for an order to set aside or vary a court order dated 2 March 2012, by virtue of which the Defendant was ordered to “pay the Claimant damages and interests thereon to be assessed along with the Claimant’s costs in this matter also to be assessed.”

[2] The grounds upon which the application is brought are as follows:

1. The Defendant has a real prospect of successfully defending the claim;
2. The Agreement which forms the basis of the claim provides that disputes be settled by arbitration; and
3. The valuation on which the Claimant relies has been incorrectly computed.

[3] The application is resisted on the basis that there is no merit in the Defendant's application.

Background

[4] On 22 June 2011 the Claimant initiated an action for damages, founded on the alleged breach of a written agreement dated 13 September 2007 ("the Agreement"). The Agreement stipulated that the Claimant agreed to pay the Defendant the sum of \$281,500.00 and the Defendant agreed to erect and build, or cause to be built, a dwelling house in the style called "Hilary" on Lot 7 at Bulkeley Meadows, St. George ("the House") by 6 June 2008 in accordance with the terms of that Agreement.

[5] Paragraph 14 of the Agreement contained the following arbitration clause:

"All disputes or differences whatsoever which shall at any time hereafter whether during the continuance in effect of this agreement or upon or after its discharge or determination arise between the parties hereto touching or concerning this Agreement or its construction or effect as to the rights duties or liabilities of the parties hereto or either of them under or by virtue of this Agreement or otherwise or as to any other matter in any way connected with or arising out of or in relation to the subject matter of this Agreement shall be referred to a single Arbitrator to be agreed upon by the parties hereto or in default of agreement in accordance with and subject to the provisions of the Arbitration Act Chapter 110 of the Laws of Barbados or any statutory modification or re-enactment thereof for the time being in force."

[6] Paragraph 4 of the statement of claim alleged that, in breach of the Agreement, the Defendant failed to complete construction of the House by the agreed date.

[7] The Claimant and the Defendant entered into a supplementary agreement dated 30 June 2010 ("the Second Agreement") which provided a new completion date of 26 January 2010.

[8] Details of the Second Agreement were set out at paragraph 5 of the statement of claim in which the Claimant pleaded that:

"Under the Second Agreement the Defendant agreed *inter alia*:

- a. To pay the Claimant liquidated damages consisting of a lump sum of \$20,000.00 together with the sum of \$1,00.00 for every month or part of a month during which the house remained uncompleted from November, 1 2009 until the date of actual completion;
- b. To pay the Claimant all bridging loan interest charges incurred by the Claimant as a result of the further delay in completion from the day immediately following the second agreed date until the date of practical completion;
- c. That the Claimant may but not unreasonably or vexatiously by notice, registered post or recorded delivery to the Defendant, determine the defendant's employment under the Agreement and the Second Agreement *inter alia* if the Defendant without reasonable cause fails to proceed diligently with the construction of the house or wholly suspends construction of the house before completion;
- d. To pay the Claimant interest at the rate of 8% per annum on the stage payment sum of \$70,395.00 from November 1, 2008 until the date of actual completion of the stage of the works for which the payment had been made;
- e. To pay the Claimant two-thirds of its *[sic]* legal costs which sums shall be set off from time to time against the next stage payment due; and
- f. That the Claimant shall be entitled to set off all sums from time to time agreed to be due from the Defendant to the Claimant from future stage payments due from the Claimant to the Defendant.

[9] In paragraph 7 the Claimant alleged that, in breach of the Second Agreement, and without reasonable cause, the Defendant failed to proceed diligently with the construction of the House and/or wholly suspended construction of the House prior to completion.

[10] In paragraph 8, the Claimant alleged that he was compelled to employ Grenville Barrow Building Services to prepare a valuation report on the House as of 31 May 2012.

[11] He further alleged that, as a result of the contractual breaches, he had suffered damage, incurred costs and expenses and had been put to much trouble and inconvenience.

[12] Particulars of loss and damage were set out at paragraph 14. The following relief was sought in the prayer for relief:

1. Damages in the sum of \$119,299.70 for breach of the Second Agreement;
2. Damages for inconvenience, discomfort and distress;
3. Interest pursuant to section 35 of the Supreme Court of Judicature Act, Cap. 117A of the Laws of Barbados;
4. Costs; and
5. Such further or other relief as this Honourable Court may deem fit.

[13] On 3 August 2011 the Claimant filed an affidavit of service in which Mr. Wilfred Hayde, a registered bailiff, deposed that on 6 July 2011 he served the Defendant with the claim form and statement of claim accompanied by the prescribed forms for acknowledgement of service, filing a defence and an application to pay by instalments which were all filed on 22 June 2011.

[14] As a result of the Defendant's failure to file an acknowledgment of service, the Claimant, on 3 October 2011, filed a request for default judgment, with a request for damages and interest thereon to be assessed along with the Claimant's costs which were also to be assessed.

[15] On 2 February 2012 the acting Registrar of the Supreme Court entered judgment in favour of the Claimant in the terms of the 3 October 2011 application.

[16] The Defendant then filed its application to vary or set aside the Default Judgment on 26 October 2012 ("the Defendant's application").

Setting Aside the Default Judgment – A Real Prospect of Success?

The Defendant's Submissions

[17] Mr. Whitehall, Counsel for the Defendant, contended that the Rules of the Supreme Court allow the Defendant to make an application to have the default judgment set aside and, further, that the Court ought to exercise its discretion in favour of the Defendant. Counsel relied on *Part 13.3(1)* of the *Supreme Court (Civil Procedure) Rules 2008* ("*the CPR*") which states that the Court may set aside or vary a judgment under this rule if the

Defendant has a real prospect of successfully defending the claim. He also relied on *Parts 13.3(2), (3)* and *Part 13.4 CPR* (hereinafter set out in this decision).

[18] He noted that, under *Part 13*, the Court had wide powers to set aside or vary a default judgment either as of right or under its discretion (*Evans v Bartlam* [1973] AC 473).

[19] He submitted that, in exercising its discretion, the Court must give major consideration to whether the Defendant disclosed a real prospect of successfully defending the claim. This consideration transcended any reason given by him for the delay in making the application. He relied on the principles established in *Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co Inc, The Saudi Eagle* [1986] 2 Lloyd's Rep 221 which were endorsed in *Smith v Medrington* (1997) Supreme Court, BVI No. 103 of 1995 (unreported) where Moore J said:

“The court is invested with the discretionary power [to set aside a judgment] in order to avoid injustice to either the [claimant] or the defendant. In considering the exercise of its discretion, the court must determine whether the defendant has merit to which the court should pay heed, not as a rule of law but as a matter of common sense. The court will also take into consideration...any explanation as to how it came about that the defendant found himself bound by a judgment...to which he could have set up some serious defence in proper time. The...applicant...must do more than show that he has an arguable case...He must, by potentially credible affidavit evidence, demonstrate a real likelihood that he will succeed.”

[20] Counsel submitted that the Defendant did indeed have a real prospect of success of defending the claim and referred the Court to the contents of the 23 October 2012 affidavit of Mr. Tyson Thompson, Managing Director of the Defendant company, and the draft defence, the contents of which are outlined at paragraph [22] and [23] below.

[21] Counsel acknowledged that a defendant who wished to set aside a default judgment should act reasonably promptly and, if there was delay in making the application, should explain the reasons for such delay in his affidavit of merit. He referred the court to the following principles as approved in *Thorne PLC v MacDonald* (1999) *The Times*, 15 October 1999:

1. While the length of the delay must be taken into account, any pre-action delay is irrelevant;
2. Any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account but it not always a good reason to refuse to set the judgment aside;
3. The primary considerations are whether there is a defence with a real prospect of success and that justice should be done; and
4. Prejudice (or absence of prejudice) to the claimant should also be taken into account.

[22] In this regard he urged the Court to accept the reasons for the delay given in the aforementioned affidavit of Mr. Tyson Thompson. The relevant parts of the affidavit are as follows:

1. ...
2. ...
3. ...
4. ...
5. The terms of the first Agreement provided for the Claimant to pay the Defendant the sum of \$281,580.00 for the construction of the dwellinghouse. The payments were to be made in stages as the dwellinghouse progressed.
6. The Claimant was late with his stage payment for the roof and ceiling in accordance with clause 3c of the Agreement dated 13th September 2007. The Architects SRM Architects Ltd. submitted the approved claim 24th September, 2009. A written request was made by the Defendant to the Claimant for the stage payment number 3 on the 25 day of September 2009. The Claimant payment [sic] in that sum on the 25th day of January 2012. Such actions by the Claimant created delays in the completion of the construction. Copies of the SMR Architects Ltd. certificate of stage 3 completion, [sic] The Defendant's letter of 25th day of September 2009 to the Claimant and receipt dated January 25,

2012 Defendant to Claimant are attached, exhibited and marked “TT2”-“TT4” respectively.

7. That as at the 24th day of January 2010 the Claimant had refused and or neglected to pay over to the Defendant the sum of \$70,395.00 which was due to the Defendant under the terms of the Agreement.
8. That at the time of the dispute the Claimant engaged the services of the builder/ quantity surveyor Grenville Barrow for the purpose of obtaining a valuation of the property and the Defendant obtained the services of quantity surveyors H. F. Toppin Associates Ltd for a valuation. The approach used by the Claimant’s builder was to compute was required [sic] to complete the construction of the dwellinghouse, whereas the approach used by the Defendant’s quantity surveyor was to value the existing works. Copies of the Claimant’s valuation and the Defendants valuation are attached, exhibited and marked “TT5” and “TT6” respectively.
9. The defendant objected to the approach of the Claimant in arriving at a valuation and suggested that the matter of the valuation be settled by arbitration in accordance to the terms of the Agreement. In such circumstances no defense [sic] was filed at the time.
10. The Claimant filed an action and the parties entered into negotiations. The parties were unable to reach a negotiated settlement. As such the Defendant again suggested settlement by way of arbitration. Clause 14 Of [sic] the Agreement dated 13th September 2007 provides for all disputes or differences whatsoever which shall at any time hereafter whether during the continuance in effect of this agreement or upon or after its discharge or determination arise between the parties hereto touching or concerning this agreement or its construction or effect as to the rights duties or liabilities of the parties hereto or either of them or by virtue of this agreement or otherwise or as to any matter in any

way connected with or arising out of or in relation to the subject matter of this Agreement shall be referred to a single Arbitrator to be agreed upon by the parties or [sic] in default of agreement in accordance with and subject to the provisions of the Arbitration Act Chapter 110 of the Laws of Barbados.

11. The Defendant was subsequently served with a notice to attend court on the 27th day of September 2012. It was at this hearing that the Defendant was informed that the claimant had applied for and taken up a Default Judgment.

[23] The most relevant portions of the draft Defence are as follows:

1. The Defendant admits paragraph 1, 2, 3, 5, 10, 11, 12
2. The Defendant denies paragraph 4 of the Claimants claim and asserts that the Defendant was not in breach of the said Agreement. The Claimant frustrated the attempts of the [sic] complete in a timely manner by refusing and or neglecting to pay over the stage payment related to architect certificate number 3 to the Defendant in a timely manner.
3. The Defendant denies paragraph 7 of the Claimant's Statement of Claim and asserts that the Claimant failed to make stage payments in a timely manner.
4. Save and except the receipt of the valuation of Grenville Barrow Building Services mentioned in paragraph 8 of the Claimant's Statement of Claim the Defendants [sic] denies that it was in breach of the Agreement. The Defendant asserts the valuation of the Claimant is fundamentally flawed in that the approach used is an incorrect approach and cannot be correctly applied to the circumstances of this matter. The Defendant has informed the Claimant the valuation is in dispute and the matter ought to be referred to arbitration for resolution in accordance with the provisions of Clause 14 of the agreement in writing dated 13th day

of September 2007 made between the Claimant and the Defendant.

The Claimant's Submissions

[24] The Claimant filed written submissions on 28 November 2012. Counsel, Mr. Drakes, submitted that the issues to be determined were:

- i. Whether the Defendant delayed in bringing its application to set aside the default judgment;
- ii. Whether the Defendant had a good explanation for its failure to file an acknowledgement of service;
- iii. Whether the Defendant had a real prospect of successfully defending the claim; and

If the default judgment was set aside

- iv. Whether it should be set aside on conditions.

[25] Counsel referred to *Part 13 CPR* which distinguishes between cases where the Court must set aside judgment and cases where the Court may set aside judgment. He relied on *Part 13.2 CPR* which states that the Court must set aside judgment entered under *Part 12 CPR* if judgment was wrongly entered because of:

- (a) A failure to file an acknowledgment of service – any of the conditions in rule 12.4 was not satisfied; or
- (b) Judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied.

[26] He sought to bolster this submission by relying on **Note 11.3** of the *Caribbean Court Civil Practice 2011, 2nd Ed. by David di Mambro*, at **page 137** which restates the principles outlined in *Part 13.2 CPR*.

[27] Counsel submitted that the requirements of *Part 12.4 CPR*, which concern the conditions to be satisfied in order to obtain default judgment, had been complied with. The Claimant, he said, had proven and satisfied these conditions, and this was evidenced by the Claimant's filing and service of his affidavit of service, claim form and statement of claim. Furthermore, he argued, the Claimant waited for the period for filing the acknowledgement of service to expire before making his application for default judgment.

- [28] He submitted that the Defendant ought to have filed and served its acknowledgement of service within 14 days of service of the claim form but failed to do so and remained in default up until the date of filing of the submissions.
- [29] Mr. Drakes urged that the application for default judgment was properly entered, the default judgment was properly obtained and, consequently, the instant case was not one where default judgment must be set aside.
- [30] In relation to judgments which the Court may set aside, Counsel relied on *Part 13.3 CPR* and the ECSC decision of *Kenrick Thomas v RBTT Bank Caribbean Limited, Civil Appeal No. 3 of 2005 (date of decision 13 October 2005)*.
- [31] With respect to the Defendant's delay in filing its application, Counsel admitted that the Defendant advised its Attorneys-at-Law that it was unaware of the fact that a default judgment had been entered. The Defendant then, under cover of a letter dated 1 October 2012, enclosed a copy of the default judgment to Mr. Thompson, one of the principals of the Defendant's company.
- [32] The application to set aside or vary the default judgment was filed on 26 October 2012. Counsel submitted that the Defendant was made aware of the default judgment, at the latest, on 27 September 2012. He further submitted that by waiting a month before applying to set aside a default judgment the Defendant's had not acted promptly. Thus, he argued, the Defendant failed on the first limb of the application.
- [33] Under the heading "A Good Explanation For The Failure", Counsel contended that the Defendant had not provided any good reason for its failure to make prompt its application to set aside.
- [34] Mr. Drakes submitted that it was not enough to show an arguable case; it was incumbent on the Defendant to show a case that had a real prospect of success and carried some degree of conviction. He referred to the unreported decision of **Reifer J** in *Colmenares v Fields, Civil Suit No. 208 of 1998 (dated 10 October 2005)*. Counsel contended that the draft Defence did not show a real prospect of successfully defending the action. Further, the Defendant's affidavit did not suggest a defence, but seemed to address quantum which, he argued, was not a relevant factor to be considered when seeking to set aside a default judgment. He further argued that, in any event, the Claimant would have an opportunity to make submissions on this point even if judgment was not set aside.

[35] Analogously, Counsel also rebutted the Claimant's submissions that the issue of notice of termination of the Agreement was a relevant factor for the Court's consideration as to whether to set aside the default judgment. Mr. Drakes denied that there was a breach on these grounds and submitted that the Claimant had complied with the notice requirements under Clause 6 of the Agreement.

The Effect of the Arbitration Clause

The Defendant's Submissions

[36] Counsel urged that the Court should have regard to the fact that the Agreement provided for arbitration in the event of dispute. In this regard he contended that the Claimant had refused to adhere to the terms of the Agreement and has prematurely proceeded to the High Court. Counsel relied on *National Housing Corporation v Barrack Construction Limited Civil Suit No. 1418 of 2002 (date of decision 25 July 2002)* ("*Barrack*") and claimed that the ruling of **Kentish J** established that, where a contract provided for arbitration, the parties must exercise that option before instituting an action before the court.

[37] Mr. Whitehall also contended that Court should have regard to the dispute that arose between the parties, that is, the methodology used to compute the valuation of the property. The Claimant's method, he said, sought to compute the amount of money it would take to complete construction for the purpose of determining what amounts, if any, were owed by the Defendant to the Claimant. The Defendant's method of valuation, he submitted, sought to place a value on the work completed on the House. Therefore, he said, the determination of the most appropriate method of valuation is critical to the Claimant's claim and that matter is best determined by arbitration.

[38] Counsel submitted that the Court should also consider that the Agreement was terminated without notice to the Defendant. Mr. Whitehall noted "The Claimant made a "Supplemental Agreement" with the Defendant dated 30th June 2010 and terminated the principle [sic] and supplemental agreement by letter dated 26 July 2010. In so doing failed to comply with the implied terms of the agreement to give notice of intention to terminate."

The Claimant's Submissions

[39] In relation to the arbitration clause, Counsel submitted that the Defendant was required to make an application to stay the proceedings under *Parts 10.3(3), (1) or (2) CPR*. He contended that the CPR makes express provision for the procedure to be adopted in circumstances where there is a binding arbitration agreement to submit to arbitration. Consequently, the failure Defendant's failure to acknowledge service and comply with those rules entitled the Claimant to a Default Judgment.

[40] He relied on the Jamaican Court of Appeal decision *Sommerville v Coke et al Civil Appeal Nos. 73 and 80 of 1989 (date of decision 18 December 1989) ("Sommerville")* which Counsel contended considered similar facts in relation to default judgments, stays of proceedings and arbitration clauses. He referred the Court to the following passage of Forte JA's judgment:

“In such a case the arbitrator would be asked to adjudicate on a matter already adjudicated on by the Court, a situation which in my view would be untenable. It follows then that the provisions of section 5 of the Arbitration Act cannot be applicable to the circumstances of this case, and can only become so if the judgment be set aside.”

[41] Therefore, Counsel submitted, in light of the fact that judgment had already been obtained against the Claimant, it would be untenable to have the claim stayed pending arbitration unless the default judgment was set aside. However, he argued that the existence of the arbitration clause was not a relevant factor in the application to set aside the default judgment.

[42] Furthermore, in his oral submissions, he argued that a reference to arbitration after the entry of a default judgment would constitute a backward step in the resolution of the issues.

The Issues

[43] The issues for the Court's consideration are as follows:

1. Whether the Default Judgment should be set aside; and
2. What is the effect, if any, of the arbitration clause on the application to set aside the default judgment?

These issues shall be addressed in turn.

Discussion

- [44] The principal issue in this case is whether the default judgment ought to be set aside or varied. The parties are not at odds on the applicable legal principles. A defendant must advance a compelling reason why he should be permitted to defend an action in which a default judgment has already been obtained. In normal circumstances he must show a real prospect of success in defending the claim.
- [45] Whilst the thrust of the arguments advanced by learned counsel focused on this point, a second but more important issue also arises. It is the opinion of the Court that due consideration must also be given to the agreement of the parties to refer disputes arising under the contract to arbitration. The law provides that where parties have, in a written agreement, agreed to submit their disputes to arbitration that it is a condition precedent to the commencement of court proceedings that the arbitration procedure be followed. In each case it is a question whether, on a true construction of the arbitration clause, a reference to arbitration is required.
- [46] The Defendant relied upon *Barrack* in support of its contention that the matter ought to be referred to arbitration. I do not agree that the *Barrack* decision is good authority this point, since the learned trial judge was not called upon to decide the issue of such a reference. In that matter, the parties entered into a contract under which disputes were to be submitted to arbitration. The plaintiff initiated court proceedings and claimed relief by way of declarations and an injunction. **Kentish J** was called upon to determine whether the court had the power to grant an interlocutory application under section 14(5)(h) of the Arbitration Act and, if so, whether that injunction should be granted. Paragraph 68 of the decision falls under the heading “A STAY OF THE ACTION”. Here it is stated that “It has been conceded by counsel for the plaintiff that the defendant is entitled to have all further proceedings in this action stayed pursuant to section 6 of the Arbitration Act Cap 110...” It is clear that the parties never founded their applications on the right to stay proceedings. The learned judge did not consider the merits of an application under *section 6* of the *Arbitration Act* as no such application existed.
- [47] Analogously, I agree with Counsel for the Claimant’s rebuttal submission that *Barrack* can be distinguished from the instant case as, in that case, there was no application to set aside default judgment and, in fact, no judgment had yet been entered.

[48] I do not agree that had judgment been entered in that case, it could be properly relied on by the Defendant. Simply put, the matter was not canvassed and decided upon.

[49] Mr. Drakes relied upon *Parts 10.3(3)(1) and (2) CPR* to ground his submission that the Claimant wholly failed to comply with the requirements of filing an acknowledgment of service. This is not in dispute. *Parts 10.3(3) and (2) CPR* refer to the procedural requirements for filing a defence in the event that an application for stay of proceedings is made and extends the time period for filing a defence to 14 days after the determination of that application. It must be remembered that the application for stay must be made before the Defendant delivers any pleadings or takes any steps in the proceedings.

Staying the Proceedings – Section 6 of the Arbitration Act

[50] Under *section 6* of the *Arbitration Act* a party to an arbitration agreement may apply to the court for a stay of proceedings in favour of arbitration where the other party to that agreement has initiated proceedings in the high court. The provision reads as follows:

“Where any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the 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.”

[51] The provision mandates that the party requesting arbitration may “apply to [the] court to stay the proceedings”. The Defendant’s application and supporting affidavit made no mention of such an application, but rather focussed on the arguments that it had a good defence to the initial claim and a likelihood of success at trial. Therefore no formal application to stay the current proceedings in favour of arbitration had been made.

[52] The Defendant first made mention of arbitration in his written submissions of 27 November 2012 (see paragraphs [36] and [37] above). In summary, Counsel for the Defendant argued that the Claimant had breached the Agreement by moving prematurely to court and, that, had the matter proceeded to trial, the trial judge should have rightly referred the dispute to arbitration. Mr. Whitehall in his submissions and Mr. Thompson, in his affidavit, referred to the Defendant's many requests that this matter be referred to arbitration before Court proceedings.

[53] Despite the fact that there was no application to stay the proceedings. Counsel's written submissions make such an inference.

[54] However, this Court would not normally grant a stay of proceedings under *section 6* of the *Arbitration Act* in the absence of a formal application to stay. That relief ought to have been applied for in the application to set aside the default judgment.

Staying Proceedings under the Court's Inherent Jurisdiction

[55] It is, nonetheless, open to this Court to stay proceedings in favour of arbitration under its inherent power to control court proceedings notwithstanding the failure to formally apply for a stay. This power is derived from the court's duty under *Part 25 CPR* to actively manage cases in furtherance of the overriding objective and its general powers of management under *Part 26.1 CPR*. The overriding objective is set out in *Part 1 of CPR* and provides as follows:

The Overriding Objective

1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing justly with a case includes, so far as is practicable,

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case 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 fairly; 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.

Application of the overriding objective by the court

1.2. The court must seek to give effect to the overriding objective when interpreting these Rules or exercising any powers under these Rules.

[56] In this regard the Court refers and gives effect to *Part 26.1(2)(u) CPR* which states that the court may “take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.” This power was confirmed by the House of Lords in *Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others* [1993] 1 All ER 664.

[57] There is no doubt that paragraph 14 of the Agreement constitutes a valid arbitration agreement. There is similarly no doubt that the relief the defendant desires is a stay of proceedings.

[58] It has long been accepted that parties are free to contract to settle their disputes by non-litigious means such as arbitration. Where disputes fall within the scope of an arbitration clause the court should uphold the parties' contract to arbitrate and make the necessary reference to arbitration unless the parties have advanced sufficient reasons to oppose such reference. I am guided by the principles outlined by the judgment of Lord Macmillan in *Heyman and Another v Darwins Limited* [1942] AC 356, at page 370, which states:

“...the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause, and the clause having being found to be still effective, there remains for the court the question whether

there is any sufficient reason why the matter in dispute should not be referred to arbitration.”

- [59] In the matter at bar, the Claimant has identified the nature of the issues arising from the contract as raising questions of the valuation of the House and the calculation of quantum. The Defendant has raised the issue of the validity of the termination of the contract due to non-completion with the provisions for notice. It has also raised the issue of non-compliance with the contractual provisions for stage payments. These are all triable issues.
- [60] Having identified the issues, it is now necessary for me to determine whether they fall within the scope of the arbitration clause. The clause stipulates that “All disputes or differences whatsoever which shall at any time hereafter whether during the continuance in effect of this agreement...or concerning this Agreement or its construction or effect as to the rights duties or liabilities of the parties hereto or either of them under or by virtue of this Agreement” shall be referred to arbitration.
- [61] The Court is of the opinion that, on a proper construction of this clause, the dispute between the parties in relation to the issues of (1) notice of termination valuation; (2) quantum; and (3) timely payment or non-compliance with stage payments are matters relating to disputes which come within the ambit of the arbitration clause. It is also clear that the difference between the parties in terms of the methodology of calculating damages, if liability is found, is also a matter in dispute requiring an interpretation of the terms of the Agreement.
- [62] Finally, I must ask myself whether there is sufficient reason why those disputes should not be referred to arbitration. Counsel for the Claimant, in his oral arguments, advanced a submission that the matter should not be referred to arbitration as default judgment has already been entered against the Defendant. Therefore, he said, a reference to arbitration would re-open an already settled matter and, in his opinion, would constitute a backwards step in the resolution of the matter.
- [63] I believe Counsel’s argument would have had more weight had judgment against the Defendant been awarded on the merits and not in a case of default judgment. As matters stand, the Defendant has not been afforded the opportunity to ventilate and argue the issues advanced. This, however, is no fault of the Claimant. The Defendant could have

applied for a stay of proceedings under *Section 6* of the *Arbitration Act* upon being served with the claim form. His failure to do so has robbed him of the opportunity to make such an application, but it is the opinion of this Court that he should not be prevented from arguing his case in the contractually agreed forum.

Setting Aside or Varying the Default Judgment – A Necessity for Stay?

[64] I now turn to the argument of Counsel for the Claimant that the Default Judgment must be set aside as a precondition to the grant of stay of proceedings. In *Sommerville* default judgment was entered against the defendant for failure to make an appearance. The defendant subsequently sought to enter appearance and, at the same time, filed an application to stay the proceedings by virtue of section 5 of the Arbitration Act of Jamaica. Referring to that provision, Forte JA said:

“It is obvious in perusing this section that the whole purpose of its provisions is to enable a party to respond to the claim by entering an appearance, but taking no further step in the action before applying to the Court for a stay of proceedings so that the matter in dispute can be dealt with in arbitration, as provided for in the agreement between the parties. **In my view the section does not and could not have been intended to relate to circumstances where final judgment has already been entered in the action.** (Emphasis mine)

If this were so, the resulting situation would be that a defendant could succeed in entering appearance after judgment, successfully apply for a stay of proceedings and have the matter referred to arbitration. **In such a case the arbitrator would be asked to adjudicate on a matter already adjudicated on by the Court, a situation which in my view would be untenable. It follows then that the provisions of section 5 of the Arbitration Act cannot be applicable to the circumstances of this case, and can only become so if the judgment be set aside...**” (My emphasis)

[65] *Sommerville* may be distinguished from the instant case on the following ground: in this matter, the judgment is a default judgment as distinct from a final judgment; there has

been no adjudication on the merits. Our law has always preserved the discretion of the court to set aside a rightly obtained default judgment.

[66] In *Evans v Bartlam* [1937] AC 473 the court outlined the nature and scope of the court's discretion to set aside a regularly obtained default judgment. Lord Atkin said at **page 480**:

“The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.”

[67] This principle was applied in *Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc. (The Saudi Eagle)* [1986] 2 Lloyd's Rep. 221, Ca; *Bank of Nova Scotia v Emile Elias & Co. Ltd.* (1995) 46 WIR 33 and in the local cases *Theresa Hawkins v Kenneth Arthur and Arthur Construction Incorporated* (No. 302 of 2003, date of decision 30 October 2003) *Cheryl Diana Patricia Clarke v Ivan Hinds and Neville Edwards* (Civ. App. No. 20 of 2003, date of decision 4 June 2004).

[68] Whilst these authorities were decided before the commencement of the CPR, it is my opinion that setting aside the default judgment in these circumstances is in keeping with the overriding objective of the CPR to deal with cases justly, which includes ensuring that the parties are on equal footing. Again, these powers may be exercised under *Part 26.1(2)(u) CPR*. A reference to arbitration will allow the parties to ventilate their issues and settle their disputes in the forum contractually agreed upon.

[69] In these circumstances I must consider the argument that, in order to have the default judgment set aside, the Defendant must show that it has a reasonable prospect of success. This is the law, however, the present situation cannot be described as the norm. If this Court was to decide on the issue, it would have the effect of encroaching upon the domain of the Arbitrator. I consider it unnecessary to decide this point given the position I have taken in relation to the arbitration clause.

The Timing of the Application

[70] I now turn to the Claimant's prayer that should the default judgment be set aside, that it be set aside on conditions. This power was confirmed by Lord Wright in *Evans* where he said at page 489:

“The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose.”

[71] It is now encapsulated in **Part 26.1(3) CPR** which states “When the court makes an order or gives a direction, it may make the order or direction subject to conditions.” Specifically, **Part 26.1(3)(d) CPR** empowers this Court to require that a party pay all or part of the costs of the proceedings.

[72] I have given consideration to the Defendant’s failure to make a timely application for a stay of proceedings in favour of arbitration, and its failure to make a timely application to set aside the default judgment. At this juncture it is useful to interpret **Part 10.3(3) CPR**. That provision reads:

Part 10.3(3) CPR: Where the defendant within the period set out in sub-rule (1) or (2) makes an application under any relevant legislation relating to arbitration to stay the claim on the ground that there is a binding agreement to submit to arbitration, the period for filing a defence is extended to 14 days after the determination of that application.

[73] It is this Court’s opinion that the proper interpretation of this provision is that any application for a stay of proceedings under **section 6** of the **Arbitration Act** must be made within the time period for filing a defence, as set out in **Part 10.3(1)**. This would render it impossible for the Claimant to apply for a judgment in default of defence. It is also consistent with **section 6** of the **Arbitration Act** since the application for stay must be filed before the party takes any further step in the proceedings, namely filing a defence. Filing an acknowledgment of service is not a step in the proceedings.

[74] It is acknowledged that the filing of a defence would have constituted a step in the proceedings and, had the Defendant filed a defence in this matter, it would have been

barred from making a *section 6* application (see *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357).

Costs

[75] In the circumstances the Claimant has acted properly pursuant to the CPR.

[76] The Defendant's default has made this application necessary. The Claimant's Counsel has been gracious in conceding that if arbitration was ordered, the default judgment could not be maintained.

[77] I find that failure to order costs in these circumstances would be prejudicial to the Claimant.

Disposal

[78] In the circumstances, it is ordered as follows:

1. All further proceedings in this claim are hereby stayed.
2. The 2 February 2012 Order of the acting Registrar of the Supreme Court which entered Default Judgment against the Defendant be set aside with immediate effect;
3. The parties to agree upon a chosen arbitrator by 15 January 2014;
4. Arbitration proceedings are to commence no later than 31 March 2014;
5. That the Defendant pay the Claimant's costs of this application in the sum of \$5,000.00 plus disbursements of \$155.00 to be paid on or before 31 March 2014.

William J. Chandler
Judge of the High Court