SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1997

SUIT NO: 695 OF 1997

Between:

ELLIS DON WEST INDIES LIMITED

PLAINTIFF

AND

THE URBAN DEVELOPMENT CORPORATION

DEFENDANT

Appearances:

Mr. Hilford Deterville and Miss Gillian French for the Defendant/Applicant

Mrs. Brenda Floissac-Flemming and Mr. Anthony Bristol for the Plaintiff/ Respondent

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1997: NOVEMBER 6 AND 11
DECEMBER 12

JUDGEMENT

FARARA J In Chambers

The Proceedings

This action was commenced by Writ of Summons indorsed with Statement of Claim issued 7th August, headed "Summary Proceedings Pursuant to Section 727 of the Code of Civil Procedure".

The Writ was served on the Defendant on 15th August, 1997 as appears from the indorsement of service thereon and the affidavit of service of Frederick Phillip filed 15th August, 1997.

I pause here to observe that the prohibition in Order 18 r.5 against service of pleadings during the Long Vacation, except with the leave of the court or consent of the Defendant, do not apply to a statement of claim indorsed on the Writ of Summons for although such a statement of claim is itself a pleading, a Writ of Summons is not caught by the definition of pleading. **Supreme Court Practice 1979 paragraph 18/5/1** and **Murray v Stephenson** [1887] 19 QBD 60.

On 26th August, 1997 there being no defence filed or served, the Plaintiff lodged with the Registry of the High Court of Justice a draft judgment in default of defence for liquidated sum. The draft was approved by the Deputy Registrar on 2nd September, 1977.

Also on 2nd September, 1977 the Defendant filed a Summons for stay of the action ("Summons for Stay") under the Arbitration Act. The affidavit of Walter Downes was filed 4th September, 1977 in support of the Summons for Stay which was fixed for hearing on 24th September, 1977.

On 17th September, 1977 the Plaintiff's solicitors filed the approved judgment in default of defence which was signed, thereby perfecting the said judgment for the sum of EC $5,581,931.00 and interest thereon at 2 percent per annum to date of payment and costs. The default judgment is headed or endorsed in this way: "Default Judgment in Action for liquidated demand (O.13, r1; O.19, r2; O.42 r1)." This clearly shows that, although the proceedings were brought pursuant to Article 727 of the Code of Civil Procedure of St Lucia, the default judgment purported to be entered-up pursuant to the Rules of the Supreme Court 1970.

On 22nd September, 1977, some 4 days after the entering of the default judgment, the Defendant's solicitors effected service of the Summons for Stay and affidavit in support on the Plaintiff's solicitors. According to Counsel for the Defendant, there was some delay in getting the Summons out of the Registry.

On 8th October, 1977 the Defendant filed a Summons to set aside the default judgment ("Summons to Set Aside Judgment") together with the affidavit of Joseph Alexander, General Manager of the Defendant Company, in support thereof. The Summons to Set Aside Judgment was fixed for hearing on 15th October, 1977.

The Summons to Set Aside Judgment and supporting affidavit were served on 9th October, 1977 on the Plaintiff's solicitors, along with a notice informing of the adjourned date of 15th October, 1977 for hearing of the Summons for Stay, as there was no sitting of the court on 24th September, 1977.

On 10th October, 1977 the Defendant filed and served the supplementary affidavit of Walter Downes in support of the Summons for Stay exhibiting a copy of a letter dated 18th September, 1977 from Don Smith, the Project Manager of the Plaintiff to the Defendant (**JA1**). Also attached to

the List of Exhibits, but not referred to in the supplementary affidavit, is a copy of a caution filed by the Plaintiff dated 22nd September, 1977 registered as instrument No.3687/97 at the Land Registry.

On 14th October, 1977 the Plaintiff filed two affidavits of Donald Richard Smith, General Manager of the Plaintiff Company, one in opposition to the Summons for Stay and the other in opposition to the Summons to Set Aside Judgment. Both affidavits, with exhibits, were served on Defendant's solicitors on 15th October, 1977.

At the hearing before me on 1th November, 1977 it was agreed by Counsel for the parties, that both summonses would be argued together, though not consolidated. The Summons for Stay was argued first.

Summons for Stay of Action

The Defendant seeks a stay of all further proceedings in the action pursuant to Section 7 of the Arbitration Act, Chapter 14 of the Revised Laws of Saint Lucia, 1957, on the basis that the Plaintiff and the Defendant had, by an agreement dated 6th September, 1995, agreed to refer to arbitration the matters in respect of which this action was commenced.

Section 7 of the Arbitration Act provides -

> *"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, 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 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."*

It is of importance to observe that Section 7 gives the Court a discretion whether or not to stay legal proceedings, and in order for that discretion to be envoked, the party applying for stay of proceedings must satisfy the Court of the following prerequisites:-

(a) both parties to the legal proceedings must be parties to an arbitration agreement or is claiming through a person who is a party thereto.

In the instant matter, the Plaintiff and Defendant are parties to the Agreement dated 6th September 1995 (**Exhibit DRS1**) which provides in Clause 11 for the settlement of disputes by reference to conciliation or arbitration.

(b) the legal proceedings must related to matters agreed to be referred to arbitration.

The Agreement dated 6th September, 1995 (**DRS1**) provides for the engagement of the Defendant, as building contractor, to carry out certain construction or building works in consideration of various payments which were to be made by the Defendant to the Plaintiff in accordance with certificates of practical and final completion issued by the engineer appointed by the Defendant.

Clause 11.1 of the Agreement provides for the settlement of any dispute or difference arising between the parties thereto (including a dispute as to any act or omission of the engineer) whether arising during or after completion of the works, in accordance with the other provisions of Clause 11.

This action pertains to a claim by the Plaintiff, as contractor, for various sums said to be owed by the Defendant under or pursuant to the Agreement and as certified by the engineer appointed thereunder by the Defendant.

(c) the application for a stay must be made after filing of an appearance in the action.

This prerequisite has also been satisfied by the Defendant, who first entered an appearance and subsequently filed the Summons for Stay.

(d) the application for stay must be made before delivery of any pleadings or the taking of any other steps in the action by the applicant.

The Defendant has not filed or served any defence or other pleading in this action, and the Summons for Stay was filed before any other step was taken by the Defendant, such as the filing of the Summons to Set Aside the Judgment. **Lane v Herman [1939] 3 AER 353 (CA)**.

This is to be contrasted with cases in which the plaintiff, having sued and taken out a summons under RSC Order 14, the defendant files an

affidavit asserting a defence and subsequently applies for a stay of the proceedings under the Arbitration Act. In those circumstances, the defendant, although not initiating the application, will be said to have concurred in an application by the filing of his affidavit, and to have thereby taken a step in the proceedings prior to applying for a stay, which will accordingly be refused on that ground.

Pitchers Ltd v Plaza (Queensbury) Ltd [1940] 1 AER 151.

Turner and Goudy v McConnell [1985] 2 AER 34.

(e) the court must be satisfied that "no sufficient reason" exists why the matter should not be referred to arbitration in accordance with the arbitration agreement.

This aspect of the matter will be examined in detail later in the judgment both as to its legal meaning and application to the facts as disclosed by the affidavit and documentary evidence.

(f) the court must also be satisfied that the party applying for a stay was, at the time of commencement of the legal proceedings, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.

The Acting General Manager of the Defendant Company, Mr Walter Downes, at paragraph 7 of his affidavit filed 4th September, 1977 states:-

> *"At the time when the action was commenced the defendant was, and still remains, ready and willing to do and concur in all things necessary for causing the said matter to be decided by arbitration under the said agreement, and for the proper conduct of such arbitration."*

This bare statement has not been supported by any steps, disearnable from the evidence, taken by or sought to be taken by the Defendant to bring to arbitration any of the matters the subject of this Suit.

It is clear from the authorities, that an applicant for stay must in his affidavit state and there must be some evidence to support the assertion that the applicant was and is ready and willing to have the matters in dispute referred to and determined by arbitration. Failure to do so may, in the absence of leave to file a supplementary affidavit, be fatal to the application for stay, although once a court is satisfied as to the bona fides of the applicant leave will be readily be granted. **Piercy v Young [1879] 14 Ch.D.200** Per Jessel, MR at 209 and **W Bruce Ltd v Strong [1951] 1 AER 1021.**

Dispute or Difference

Of central importance to the determination of this application is whether, in law, a dispute or difference existed between the Plaintiff and the Defendant, at commencement of this action, relating to the claims capable of reference to arbitration under the Agreement.

It is the contention of the Defendant/Applicant that the matters the subject of this action were, on a correct legal construction of the said term, in 'dispute' and, accordingly, the Plaintiff ought to have referred its claims to arbitration pursuant to Clause 11 of the Agreement. In support of this submission, Learned Counsel cited, **Tradax International SA v Cerrahogullari** [1981] 3 AER 344 at 350 b-g.

That first instance decision concerned a centrocon arbitration clause in a voyage charter party, which provided for the reference of all disputes, from time to time arising out of the contract, to arbitration. A period of 9 months was specified for appointment of an arbitrator, with failure to comply resulting in any claim being deemed waived and absolutely barred. The defendants admitted that the invoices were correct and did not dispute the claim for despatch money but they did not expressly admit liability for the claim and simply ignored it and all communication relating thereto. The plaintiff issued a writ claiming as liquidated sums, the despatch money. A defence was filed disputing a part of the claim on technical grounds which were later abandoned, and made no admission as to the rest of the claim. At the hearing the defendants admitted they had no defence to the action either on liability or quantum but relied on the arbitration clause. The plaintiffs asserted that the arbitration clause did not apply where the claim is undisputed, and they were entitled to summary judgment.

It was held in the *Tradax* case (page 345 f-g) that -

> *"where a claim was made by a party to a contract containing an arbitration clause similar to the centrocon clause, then, even though the claim was indisputable, there could only be said to be no 'dispute' between the parties, so as to make the clause inapplicable, if the other party had expressly admitted the claim and there was, therefore, in effect, an agreement to pay and thus no further basis for a reference to arbitration. Where, however, a claim had neither been admitted nor disputed by the other party, but had simply been ignored, a 'dispute' within the clause existed even though the claim was indisputable and, accordingly, the claimant was obliged to appoint an arbitrator within the time prescribed by the clause, subject to any extension of time. It followed that the arbitration clause applied to the plaintiff's claim."*

Kerr J at page 350 g referred to the decision of the Divisional Court in **London and North-Western Railway Co v Jones [1915] 1 KB 35** where Rowlatt J stated -

> *"It seems to me that we are bound to hold, firstly, that the only case in which the Court can be appealed to before arbitration is where the defendant has agreed the demand and merely refuses to pay; secondly, that whenever this cannot be shown and he has not paid, the case must be treated as one in which a difference has arisen . . ."*

The essential question for my determination is whether the sums claimed by the Plaintiff in this action were, at the commencement of the action, not in dispute in the sense that they had been expressly or impliedly admitted to be due and payable, in other words liability had been admitted so that, in effect, it can be said that there was an agreement by the Defendant to pay those sums as opposed to the Defendant simply ignoring the claims, or the Defendant demonstrably has no defence to those claims or any of them.

If the claims in the Writ were expressly or impliedly admitted as due and payable then the Plaintiff may proceed either by reference to arbitration or by legal proceedings or both (see **Tradax** case at 346 a-b and 351 e-h).

If the claims in the Writ are indisputable but liability to pay not expressly or impliedly admitted at commencement of the action, then the Defendant would be entitled to have the proceedings stayed under Section 7 of the Arbitration Act unless the Defendant demonstrably has no defence thereto.

In **Ellerine Brothers Ltd v Klinger** [1982] 1WLR 1375 at 1376, Templeman LJ at 1381 (first para.); and 1383 (last para.) opined -

> "Silence does not mean consent. If you can point to an express or implied agreement to pay a particular sum, then there is no dispute and the action can proceed. But the fact that the plaintiffs make certain claims which, if disputed, would be referable to arbitration and the fact that the defendant then does nothing - he does not admit the claim, he merely continues a policy of masterly in-activity - does not mean that there is no dispute. There is a dispute until the defendant admits that a sum is due and payable. There was in the instant case a dispute when the writ was issued and there remained a dispute and there still is a dispute and the judge had no choice but to refer the dispute to arbitration."

Learned Counsel for the Plaintiff, in her oral and written submissions, argued forcefully that there is in fact no dispute between the parties with

regard to the sums claimed in the Writ, except the amount for "additional costs"claimed in paragraph 10 (iii) of the Statement of Claim, the Defendant's liability to pay the contractual sums in paragraphs 7, 8, 9 and 10 (i), (ii) and (iv) of the Statement of Claim, as determination and certified by the engineer, having been expressly admitted by the Defendant, in that all invoices were approved by the Defendant under the signature of the then General Manager, who is the same person that executed the Agreement of 4th September, 1995 on the Defendant's behalf. In other words, the Defendant has admitted liability, has no defence but is simply withholding payment. **London and North-Western Rly Co v Jones [1915] 3 KB 35** and **Nova (Jersey) Knit Ltd v Kammgarn Spinnerei Gmbh [1977] 2 AER 463.** (defence unarguable).

In support of this submission, Learned Counsel referred to Halsbury's Laws of England 4th Ed. Vol.2 paragraphs 602 and 614. The principle was framed this way at paragraph 614 -

> *"A dispute or difference arises where there is disagreement about central issues: no claim need be formulated, and the cause of action need not be fully constituted. However, the mere making of a claim does not necessarily constitute a dispute or difference. There is no dispute or difference if one party's claim has been expressly or impliedly admitted, or if the other party demonstrably has no defence. There is a dispute or difference if the amount of damages remains in issue although liability is not contested."*

Learned Counsel also submitted that, on the facts as disclosed in the documentary evidence, the court's discretion to stay the proceedings is limited to the sum claimed in paragraph 10 (iii) of the Statement of Claim as additional costs and ought to allow the action to proceed on the other claims. **Halsbury Laws of England** 4th Ed. Vol. 2 paragraph 639; and **Bristol Corporation v John Aird & Co [1913] AC 241 HL** Per Lord Parker at 261.

It is well settled that where there is an agreement to refer certain types of matters, be they disputes or differences, to settlement by arbitration or some other alternative method of dispute resolution, and claims relating to such matters have been made the subject of litigation without first resorting to any of the agreed methods of dispute resolution, the onus is on the party arguing against a stay to show good reason why he ought not to be made to abide by the arbitration or alternative dispute resolution agreement. **Forde v Clarkson Holidays Ltd [1971] 3 AER 454 at 455 a.**

The practice of staying proceedings under the Arbitration Act in respect of those claims only which are in dispute and allowing the action to proceed as regards the claims not in dispute, is undoubtedly well settled. But are the amounts claimed in paragraphs 7, 8, 9 and 10 (i), (ii) and (iv) of the Statement of Claim expressly or impliedly admitted by the Defendant to be due and payable?

Counsel for the Defendant relied on the invoices and certificates of practical completion issued by the engineer, exhibit **DRS2**, as demonstrative of the Defendant's admission of liability to pay the aggregate amount claimed in paragraph 7 of the Statement of Claim. However, there is no affidavit or other evidence as to whose signature is on those documents and whether it is indeed that of the same person who executed the Agreement on the Defendant's behalf and, in the absence of any admission by the Defendant, the Court cannot, without more, assume that both signatures are indeed that of the same person to wit the ex-General Manager of the Defendant company. This is a matter which the Plaintiff, who has the burden of showing that the amounts claimed were admitted by the Defendant as being due and payable, ought to have conclusively established. Moreover, the mere appending of one's signature to the invoices and certificates after the word "approved", may not be solely consistent with an admission of liability or an agreement to pay the stated amount, so as to lead to the conclusion that there exists no dispute as to those matters.

Counsel for the Defendant relied on exhibit **DRS3** comprising two of the Plaintiff's documents, one headed - "Summary of Invoices for Financing and Interest Costs as at April 30, 1997 Payment due upon receipt" - and the other unheaded but with the words - "Value of Goods and Freight"- at the top, both of which Counsel contends were signed "Approved" by an officer of the Defendant, as an admission of liability for the two amounts claimed in paragraph 8 of the Statement of Claim.

Again there is no evidence as to whose signature appears on the two documents and, even if they were established to be that of an officer of the Defendant, the use of the word "Approved" may not be sufficient to constitute an admission of liability for or agreement to pay those amounts.

It must be remembered that in the Tradax case the defendants admitted the invoices were correct, did not dispute the claim for despatch money and, at the trial, admitted they had no defence to the action either as to liability or quantum, and the Court of Appeal nevertheless held that a

"dispute" within the arbitration clause existed and the plaintiffs were required to appoint an arbitrator (page 345 a, c and f-g). This decision is, however, to be contrasted with a two other authoritative decisions of the English courts where the opposition to a stay was rooted in the contention of lack of any defence to the claim.

Counsel also relied on exhibit **DRS4**, a letter dated 8th September, 1997 from Walter Downes, the General Manager of the Defendant, to the Plaintiff's Area Manager, Don Smith. This is the only written communication emanating from the Defendant produced to the court. The letter seeks to confirm the Defendant's understanding of matters discussed between the parties at a meeting on 5th September, 1977, about one month after the action was commenced, relating to the procurement of building materials by the Plaintiff, housing payments and a completion schedule. Can it be said that this letter is an admission that specific sums are due and payable or an agreement to pay any quantified amount of a claim, so as to put any sum beyond dispute. **Associated Bulk Carriers v Koch Shipping [1978] 2 AER 254 (CA) at 255 d-f** and **Per Browne LJ at 264 c-g.**

It is my view, upon a careful reading of exhibit **DDRS4**, that in paragraph 1.0 the Defendant, although conceeding that the procurement of additional materials by the Plaintiff was "genuinely" for the Defendant's housing project, not withstanding they may not have been authorized by the engineer, expressly makes payment of that sum conditional upon the Plaintiff withdrawing its claim for $67,300 anticipated profit. There is therefore no clear unequivocal admission of liability in DRS4 to pay the sums claimed as profit and material costs at paragraphs 10 (i) and (ii) respectively of the Statement of Claim.

However, at paragraph 2.0 of DRS4 the Defendant is apparently seeking an accommodation whereby the payment of monies to the Plaintiff would be linked to the receipt of proceeds from the sale of housing units. The Defendant does not dispute the liability to pay, but wants to tie payments to sale of units. Obviously, these sums owing are the amounts certified payable by the Defendant's engineer upon practical completion and handing over to the Defendant of various housing units (see DRS2).

Exhibit **DRS5** comprises a cover sheet with inventory list annexed, apparently sent by the Plaintiff to the Defendant. On the cover sheet someone signed on behalf of the Plaintiff after the words "Delivered By" and one "K Phillip" signed on behalf of the Defendant after the words

"Accepted By". What purports to be the stamp of the Defendant company is affixed thereto with the date 29th September, 1997.

Learned Counsel for the Plaintiff advanced this document as proof of an admission of liability by the Defendant to pay the sum of EC $115,288.60 cost of materials, being a sum in excess of the actual amount claimed in paragraph 10 (ii) of the Statement of Claim. However, in my view, even if the signature on the cover sheet was established to be that of an officer of the Defendant (and there is no evidence of this) it cannot constitute an admission by the Defendant of liability to pay the total sum of EC $115,288.60 in the inventory list annexed or any part thereof, as no words necessarily conveying that meaning and intent appears on either the cover sheet or the inventory list. The wording use on the cover sheet is, at best, capable of two meanings, and in my view is a mere acceptance of delivery by the Plaintiff to the Defendant of the said inventory list. In any event, the cover sheet bears a date well after commencement of this Suit and the inventory list is undated.

Finally, reliance was placed by the Plaintiff on its letter of 18th September, 1997 (after commencement of the action) to the Defendant, Exhibit **JA1** to the supplementary affidavit of Walter Downes. Firstly, this is not a letter emanating from the Defendant or anyone on its behalf and, therefore, cannot constitute an admission of liability by the Defendant to pay any sums claimed. Secondly, on a correct reading of the letter, it refers, in the second paragraph on page 1, to "some of the other items which remain unresolved" and then goes on to list those item as: Payments, Remaining Twenty-One Houses, and Deficiencies. The letter goes further to refer to "a number of other issues which have been totally ignored" ("Outstanding Issues") these being the dog leg stairs, the extension of the contract, the Defendant transferring lands, and accruing daily interest. Notably, the writer Don Smith, the Plaintiff's Project Manager, states in the first paragraph at page 3 -

> *"With many of the above issues remaining unresolved and as we have not discussed these in our recent meetings, it is becoming apparent that either we should make one final attempt at negotiating or consider appointing an arbitrator."*

And in the penultimate paragraph he states -

> *"With this in mind I believe it is important to convene a meeting to deal with all these outstanding issues immediately so as we can determine our final positions and help bring this contract to a close."*

It is also noteworthy that the General Manager of the Plaintiff in paragraph 4 of his opposing affidavit deposes -

> *"I am advised and verily believe that the Plaintiff's cause of action against the defendant is the amount <u>if any</u> owed by the Defendant to the Plaintiff under the contract . . ."*

The use of the words "if any" by the deponent was termed a typographical error by Counsel for the Plaintiff.

However, while this letter (**DRS5**) clearly establishes that, even from the Plaintiff's perspective, several issues remained unresolved between the parties and the letter is not an admission by the Defendant of liability to pay the amounts claimed in the Writ or any of them, the unresolved issues do not relate to any matters of practical completion in respect of which the engineer issued certificates, exhibit **DRS2,** totalling $9,319,858 and the reference by the writer to appointing an arbitrator does not relate to that sum or any portion thereof. Does the Defendant have any defence to that claim?

<u>Demonstrably No Defence</u>

Has the Plaintiff established that the Defendant demonstrably has no defence to the claims or any of them? This issue was considered in certain English Court of Appeal and House of Lords decisions.

In Nova (Jersey) Knit Ltd v Kammgarn Spinnerei Gmbh [1977] 2 AER 463 the respondents having issued bills of exchange to the appellants in part payment for machines purchased from the appellant, paid some of the bills at maturity but refused to pay the remainder. The appellants sued on the dishonoured bills and the respondents wished to assert by way of defence, set-off and counterclaim to the appellants claim on the bills, a claim for unliquidated damages. The respondent applied for a stay of the English action whilst arbitration proceedings were being pursued in Germany.

The House of Lords held that the arbitration clause did not apply to the claims under a bill of exchange, but even if it did apply, there was no dispute between the parties as regards the claim since a claim for unliquidated damages could not be raised by way of defence, set-off or counterclaim to an action on a bill of exchange and therefore could not be used to create a 'dispute' on the bill of exchange. Accordingly, no admissible defence to the appellant's claim had been put forward by the respondent (at page 464 d-e and Per Lord Wilberforce at 470 b-e and Per

Lord Russel at 479 j).

In the instant matter, while we are not concerned with a bill of sale which is in law "taken as equivalent to deferred installments of cash." (Per Lord Wilberforce at 470 c), we are concerned with amounts certified by the Defendant's engineer as payable upon practical completion of housing units and the acceptance by the Defendant in writing of each housing unit, Exhibit **DRS2.**

Ellis Mechanical Services Ltd v. Wates Construction Ltd [1978] 1 Lloyds' Law Reports 33, concerned a building contract and a claim in respect of work done by sub-contractors employed by the main contractor, prior to termination of the main contract. The sub-contractor was entitled to be paid for, in effect, all work they had done and all materials they had purchased, acquired or made available at the date of termination of the main contract. Under the contract interim certificates had been given by the architects and engineers. Most of the sums certified had been paid to the sub-contractor but an amount of some £52,437 was retained as against them as retention money according to the retention clause in the contract, pending completion but payable in respect of work already done. The sub-contractor claimed the retention monies plus additional amounts subsequently worked out by them as what they were due. They applied for Order 14, judgment for the amount of the retention stating their willingness to go to arbitration regarding the remainder. Judgment was given for the retention sum, the main contractor appealed against that order. The Court of Appeal held that on the facts as disclosed even subsequent to the master's order for judgment, at least the amount of the retention was indisputably due and the remainder ought to be referred to arbitration.

Lord Denning MR at page 35 opined:-

> *"It seems to me that if a matter comes before the Court in which, although a sum is not exactly quantified and although it is not admitted nevertheless the Court is able, on an application of this kind, to give summary judgment, for such sum as appears to be indisputably due, and to refer the balance to arbitration. The defendants cannot insist on the whole going to arbitration by simply saying there is a difference or a dispute about it. If the Court sees that there is a sum which is indisputably due, then the Court can give judgment for that sum and let the rest go to arbitration. . ."*

Having referred to final valuations of the works prepared by independent valuers, which valuations had been agreed to by the employer as ultimate paymasters, and although the valuations may not be binding upon the main contractor, Lord Denning continued in this way -

"That is all very well; but, as all of us with experience of building and construction cases are aware, there is inevitably something due. In most cases it can be said with certainty that £X is due. In such a case the Court gives judgment for the £X and gives leave to defend as to the balance. Otherwise it would mean that the builders and contractors could be kept out of a great portion of their money indefinitely by the employers simply saying, "I want to investigate the accounts." The employer could force the builder into bankruptcy by saying that he wants to sort out accounts. So the Court does not allow a builder or contractor to be kept out of the whole of his money on such an excuse It gives judgment for such sums as it is reasonably seen is due."

And at page 36 Lord Denning concluded in this vein -

"But, looking at it in broad outline, as I think one ought to do, and Courts ought to do in cases of this kind, it seems to me as plain as can be that at least the sum of £52,437 is owing to the sub-contractors . . . As a matter of common-sense procedure in a case of this kind it seems to me that there should be judgment for that sum . . . and the rest of the matters in dispute should go to arbitration."

Lawton, LJ addressing the predicament of a sub-contractor as regards payment of indisputable sums, opined at page 36 -

"If the main contractor can turn around, as the main contractor has done in this case, and say, "Well, I don't accept your amount; therefore there is a dispute," that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties; he is deprived of his commercial life-blood. It seems to me that the administration of justice in our Courts should do all it can to restore that life-blood as quickly as possible.

The Courts are aware of what happens in these building disputes; cases go either to arbitration or before an official referee; they drag on and on and on; the cash flow is held up . . . that sort of result is to be avoided if possible. In my judgment it can be avoided if the Courts make a robust approach, as the Master did in this case, to the jurisdiction under Order 14.

When the cocoon of legal argument which has been wrapped round this case with great skill by [counsel for main contractor] is unravelled, what is left is this: it is a straight forward case, save for the amount, of a claim by a builder for work done and materials supplied."

And finally on this aspect, Lord Bridge at page 37 having disagreed with the use of the epithet "robust", formulated the principle to be applied in cases of building contracts in this way:-

". . . is it established beyond reasonable doubt by the evidence before the Court that at least £X is presently due from the defendant to the plaintiff? If it is, then judgment should be given for the plaintiff for that sum, whatever x may be, and in a case where, as here, there is an arbitration clause the remainder in dispute should go to arbitration. The reason why arbitration should not be extended to cover the area of the £X is indeed because there is no

issue or difference, referable to arbitration in respect of that amount."

Both the **Nova (Jersey) Knit** and **Ellis Mechanical** decisions were considered by Kerr J in the Tradax case at page 349 e-f, as cases involving indisputable quantified liquidated sums.

If must be emphasized that in the *Ellis v Wates Construction* case, the amount in respect of which judgment was given was retention money retained pursuant to the contract from certified sums which had already been paid except for the 10 percent retention. Further, the Court of Appeal had the benefit of a statement of possible defenses to that claim and so they were able to examine their strength in the face of an indisputable amount and to conclude that there was no possible issue or difference in respect of that amount, it having been established as due beyond reasonable doubt.

In the instant matter, although section 7 of the Arbitration Act expressly forbids the service of pleadings, such as the defence, before applying for a stay under the said section, the aggregate liquidated sums claimed at paragraph 7 of the Statement of Claim are all sums certified payable by the engineer in respect of the practical completion of certain housing units which were handed over to and accepted in writing by the Defendant in each and every instance, (see Exhibit DRS2) pursuant to Clause 4.5 of the Agreement. There can be no defence to those sums and none has been advanced by the Defendant either in correspondence or by affidavit. Indeed, the Defendant in its letter dated 8th September, 1977 (DRS4) clearly demonstrates that it is only arrangements for payment which are being discussed. The amounts claimed at paragraph 8 are for contractual interest and service charges and are equally indisputable as mere arithmetical calculations.

From the documentary evidence, I cannot say with any degree of certainty that any of the amounts claimed at paragraph 10, which are all said to have resulted from delays in instructions by the Defendant, are indisputable or the Defendant has no defence thereto and, accordingly, those sums totally $596,782 ought to proceed to settlement by arbitration or conciliation.

The claims at paragraphs 7, 8, and 9 total $10,132,564 of which the Defendant has paid so far $5,147,915. The balance amounting to

$4,985,149 is in my view and based on the learning in the **Nova (Jersey Knit** and **Ellis Mechanical** cases, indisputably due and payable and the Defendant has no defence thereto. The justice of the case therefore demands that the Plaintiff should be entitled to judgment for that sum for work done and materials supplied. The Defendant ought not to be allowed to keep the Plaintiff out of its money, and thereby deprived it of its commercial life-blood, by the Defendant simply saying there is a dispute that must be referred to arbitration. However, from that balance must be deducted 2.5 percent retention sum as per Appendix III paragraph 3 of the Agreement

Clause 11

Learned Counsel for the Plaintiff made two other legal submissions in opposing the Defendant's application for stay. She submitted that, on a proper construction of Clause 11 of the Agreement, a dispute is only deemed to have arisen when a party gives "notice of dispute" to the other party pursuant to Clauses 11.1 and 11.2 read together and, no such notice having been issued or served by the Defendant, no dispute exists which is capable of being referred to arbitration. She argued, therefore, that the authorities of **Tradax and Ellerine Brothers**, relied on by Counsel for the Defendant, do not apply to the arbitration clause under consideration in this matter. Counsel buttressed her submission on this point by observing that the word "arbitration" is not used in Clause 11.1 at all and that clause is therefore not, on its own, an arbitration clause.

Clause 11 is, to some extent, poorly drafted and Clause 11.2 provides, *inter alia* -

> "For the purpose of Clause 11.3 to 11.5 inclusive, a dispute is deemed to arise when one party serves on the other a notice in writing (Notice of Dispute) stating the nature of the dispute."

On this issue, Learned Counsel for the Defendant submitted that, on a proper construction, service of a 'Notice of Dispute' is not a necessary precondition to a dispute or difference arising under Clause 11.1.

Clearly Clause 11.1 is the general provision for the settlement of any dispute or difference whatsoever, including a dispute as to any act or omission of the engineer, "in accordance with the following provisions". Those provisions are 11.2 to 11.7. Clause 11.2 provides for one party to serve on the other a Notice of Dispute, the effect of which is that a dispute is then deemed to have arisen for the purpose of Clause 11.3 to 11.5 inclusive.

Clause 11.3 provides for the settlement of disputes of which Notice of Dispute was served under Clause 11.2 by conciliation, upon a further notice issued within 28 days, utilizing the procedure in the Institution of Civil Engineers' Conciliation Procedure (1988); and Clause 11.4 provides for reference of that dispute to arbitration, after receipt of the conciliator's recommendation, by serving a "Notice to Refer", failing which the conciliator's recommendation shall be deemed to have been accepted in settlement of the dispute. And Clause 11.5 makes provision, where Notice of Dispute was given under Clause 11.2 but not referred to conciliation under 11.3, to, by notice, refer the dispute for determination by arbitration, and if no Notice to Refer is served within 28 days of service of the Notice of Dispute the latter notice is deemed to have been withdrawn. At that stage there would therefore be no dispute within the meaning of Clause 11.

Clause 11.6 prescribes the procedure to be adopted where the parties have failed to appoint an arbitrator after service of a Notice to Concur in the appointment of an arbitrator, in which case the dispute is referred to a person appointed on the application of either party by the President or Vice President of the Institution of Civil Engineers. And Clause 11.7 provides for the arbitration to be conducted in accordance with the Civil Engineers' Arbitration Procedure [1983] the Short Procedure in Part F thereof. This clause expressly empowers the arbitrator "to open up review and revise any decision, instruction, direction, certificate or valuation of the Engineer."

It is clear, therefore, that the certificates issued by the Engineer appointed by the Defendant under the Agreement may be opened up and reviewed by an arbitrator appointed under Clause 11 in circumstances where a Notice of Dispute has been served by a party to the Agreement, either directly by a Notice to Refer or indirectly after receipt of the recommendation of the conciliator by also serving a Notice to Refer within the specified period. However, the Defendant has not issued or served a Notice of Dispute challenging any of the engineer's certificates of practical completion and the sums are payable 60 days after issuance of each certificate (Appendix III paragraph 2).

Counsel for the Defendant also submitted, and I concur, that where the parties have expressly agreed or provided a method or procedure for resolving their disputes, even though that method or procedure does not amount to arbitration, the Court has an inherent jurisdiction to stay the action and allow the dispute to be resolved in the manner agreed by the

parties. **Channel Group v Balfour Beatty Ltd** [1993] 2 WLR 262, Per Lord Mustill at 263, 275 and 276.

Clause 11, construed as a whole, clearly provides for disputes to be resolved by alternative methods other than litigation, that is, conciliation or arbitration, but the invoking of either method starts with service of a Notice of Dispute.

Merger in Judgment

Finally, on this application, Learned Counsel for the Plaintiff submitted that the Court has no jurisdiction or discretion to stay the proceedings pending arbitration, because legally there is no longer any dispute in relation to the causes of action in this Suit, which can be referred to arbitration, they having merged in the judgment in default of defence entered 17th September, 1997 and have, accordingly, legally ceased to exist. Therefore, the only recourse open to the Defendant is to have the judgment set aside. In support of this proposition Counsel cited **The Indian Endurance** (1993) 1 AER 998 (HL). Per Lord Goff at 1003 g-j where, after distinguishing between the principles of res judicata and merger in judgment, he states -

> *"The basis of the principle [merger in judgment] is that the cause of action, having become merged in the judgment, ceases to exist, as is expressed in the Latin maxim transit in rem judicatam".*

In **Halsted v. Attorney General et al** Civil Appeal No. 10 of 1993 (Antigua and Barbuda) at page 15, Sir Vincent Floissac CJ, delivering the judgment of the Court, stated the principle thus -

> *"According to that principle, where a right of action or a cause of action was determined to exist and judgment was given on it by a local court, the right and cause of action become merged in or transmuted into the judgment and ceases to exist".*

That decision went on further appeal in Privy Council Appeal No. 53 of 1996, restricted to the question of the construction of certain words in a consent order (**see page 3 2nd para. Per Lord Clyde**) and the decision of the Court of Appeal was held to be correct (page 5).

A default judgment is not a decision or judgment on the merits and therefore, the principle of res judicata would not apply to the same extent as a judgment on the merits. However, it is a judgment of the Court which must be obeyed unless and until it is set aside. **Issac v. Robertson** (1984) 3 AER 140 P.C. If not set aside then it is a final determination, as

between the parties, of the issues or causes of action in the statement of claim.

Conclusions on Stay

Having carefully review this matter and based on the authorities referred to above, I hold that the Defendant demonstrably has no defence to the liquidated amounts claimed at paragraphs 7, 8 and 9 of the Statement of Claim which are indisputably due and payable and there is no dispute or difference to be referred to arbitration in respect of those sums. However, from those sums must be deducted 2.5 percent retention sum. I hold therefore that the amount not in dispute is -

(a)	total of claims at paragraphs 7, 8 and 9 statement of claim	$10,132,564.00
(b)	Less 2.5 percent retention	253,314.10
	Sub-total	$9,879,249.90
	Less total payments to date	- 5,147,415.00
	Total due	$4,731,834.90

However, no dispute as to the remainder of the claim totalling $596,782.00 has arisen as yet for the purposes of or so as to put into effect Clauses 11.3 to 11.5 because neither party has served a Notice of Dispute as required by Clause 11.2. No such notice can be served "unless the party wishing to do so has first taken any step or invoked any procedure available elsewhere in the Contract in connection with the subject matter of such dispute and the other party or the Engineer as the case may be has (a) taken such step as required, or (b) been allowed a reasonable time to take such action". From the evidence before me none of the amounts claimed at paragraph 10 of the Statement of Claim were certified payable by the engineer. Assuming a reasonable time in the context of this type of contract has elapsed, these sums can therefore be referred to arbitration or conciliation pursuant to Clause II of the Agreement.

The said sums not having been paid by the Defendant, and there being no express or implied agreement to pay those sums and the Court being unable form the available evidence to clearly conclude the Defendant demonstrably has no defence thereto, a dispute exists to those claims at paragraph 10 of the Statement of Claim. It follows that the Plaintiff cannot in respect of these claims unilaterally by-pass the agreed upon method in the Contract for settlement of disputes and differences by resorting

directly to litigation, and the Court will, in exercise of its inherent power, stay proceedings or certain claims brought before it in breach of an agreement to decide disputes by an alternative method. **Channel Tunnel Group v. Balfour Beatty Ltd.** (1993) 2WLR 262 Held.

Further, Clause 11.2 does not provide a time limit for service of Notice of Dispute so that a failure to do so would bar a party from issuing such a notice unless an extension of time was granted on the ground of undue hardship pursuant to section 23(5) of the Arbitration Act. No such time limit is implied by virtue of section 4 and the First Schedule Arbitration Act. See **F E Hookway and Co Ltd v H W Hooper and Co [1950] 2 AER 842,** Per Sommervell L J at 842 d-f.

Accordingly, I am not satisfied that any sufficient reason exists why the Plaintiff's claims, at paragraph 10 of the Statement of Claim should not be referred to conciliation and/or arbitration. Therefore, these proceedings ought to be stayed as to those sums only totally $596,782 pending the service of a Notice of Dispute and the reference of such disputes or differences to and determination by conciliation and/or arbitration.

The staying of the proceedings are, however, dependent upon the success of the Defendant's application to set aside the judgment in default of defence. If that application fails then the claims or causes of action would be merged in the judgment and there would be no issue for determination or settlement by arbitration.

Summons to Set Aside Default Judgment

As mentioned above, this action was commenced as summary proceedings pursuant to Article 727 of the Code of Civil Procedure, but the judgment in default of defence purported to be entered under Order 13 r.1 and Order 19 r.1 of the RSC 1970. Different periods are specified for the filing of a defence under the Code of Civil Procedure and under the Rules of the Supreme Court.

Article 727 of the Code of Civil Procedure lists certain types of actions or causes of actions which may be treated as summary. These include actions for the recovery of a debt or liquidated demand, with or without interest, founded on, inter alia, "any agreement, express or implied for the payment or reimbursement of money, including detailed accounts for work done and materials provided."

I am satisfied that the Plaintiff's claim in this action, being liquidated sums in respect of work done and materials supplied pursuant to a building contract, and which contract also provides in clause 7.6 for the submission by the contractor of final accounts to the engineer, qualifies under that limb of Article 727 and may properly be the subject of summary proceedings pursuant to that Article.

Regarding the procedure to be followed in such summary proceedings, Article 728 provides for "the rules governing ordinary procedure" to apply "subject to the special provisions" in Book Second Chapter First.

Article 731 makes special provision, subject to any application for extension of time, for the defence in summary proceedings of this type to be filed within 2 days after appearance . This must be construed as 2 clear days. There is no special provision relating to the entering-up of judgments in default of appearance or pleadings and so, pursuant to Article 728, the rules governing ordinary procedure, to wit the Rules of the Supreme Court 1970 Orders 13 and 19, would apply.

Article 734 provides for judgments to be "given" in the vacation, executory eight days after it is pronounced.

The Defendant's appearance to these summary proceedings was entered on 19th August, 1997 during the vacation. Normally 2 clear days would expire on 21st August, 1997. However, since there is no provision for the entering-up of default judgments under the summary procedure in the Code of Civil Procedure, we must look to the Rules of the Supreme Court for the proper procedure to be followed, which includes the rules relating to the filing of pleadings during the Long Vacation. (See Order 3 r.3 and Order 18 r.5)

A default judgment is not, in my view, a judgment "given" within the meaning of that expression in Article 734 which presupposes the pronouncement of judgment by a judge and not the entering-up of a default judgment "administratively", as it were, by an officer of the court. Support for this distinction is to be had from Article 733 which expressly makes it not necessary for a judge to "give" his judgment or the reasons therefor in writing.

I must therefore look to the Rules of the Supreme Court in determining whether the default judgment is regular or irregular.

Failure to State Grounds in Summons

Learned Counsel for the Defendant has taken what may be termed a preliminary objection or point in relation to this application. She submitted that the Defendant's failure to state the grounds of the irregularity in the summons, as mandated by RSC Order 2 r.2(2), is fatal and for that reason only the Summons to Set Aside Judgment ought to be dismissed.

Mr. Deterville countered that such an omission is not fatal provided the grounds are stated in the supporting affidavit, which was done at paragraphs 7 and 9 of the affidavit of Joseph Alexander filed 8th October, 1997. In support of this proposition Learned Counsel relied on **Carmel Exporters v. Sea Land Inc.** (1981) 1 WLR 1068. In that case *Goff J* (as he then was) opined at page 1074 -

> *"But it is equally clear that they [the Defendant] failed to comply both with the requirement that the summons so issued and served should state the grounds of their application and with the requirement that a copy of the affidavit in support should be served with the summons. The latter point is conceded. As to the former, the only ground stated in the summons is that the honourable court does not have jurisdiction in this matter. That is plainly not enough".*

And at page 1075 -

> *"But looking at the matter simply as a point of construction of the rules, the effect of the plaintiff's submission is that, if any mistake is made as to the form of the defendant's application for example, . . . or the grounds are not stated in the summons (even though the plaintiff may already know what they are). . . then once the 14 day period has expired without the matter being put right or at least an application being made under Order 3 r.5 the court is powerless to assist the defendant. The possible injustice can be highlighted by taking extreme examples . . . or where the plaintiff's solicitors notice the procedural error, but lie low and say nothing until the 14 day period expires. That the court should be powerless to intervene to ensure that justice is done in such cases as these is surely unthinkable. In my judgment, the short answer to the whole problem lies in the wide powers now conferred on the court under Order 2 r.1".*

And further at page 1076 -

> *"On this approach (referring to the statement of Lord Denning MR in Harkness v. Bellis Asbestos and Engineering Ltd. [1967] 2QB 729) since the plaintiffs have suffered no prejudice by reason of the defendant's error, I would of course not hesitate, in the exercise of my discretion, to give leave to the defendants to amend their summons to state the grounds of their application, and to proceed with their application despite the late service of their affidavit in support".*

In the instant matter, the grounds, though not stated in the Defendant's Summons, were set out at paragraphs 7 and 9 of the supporting affidavit

of Joseph Alexander. The Plaintiff was therefore not taken by surprise and has suffered no prejudice by the procedural error and, indeed, none has been asserted. The grounds as stated are:-

(1) the time limited for filing the defence had not elapsed in that-

(a) this period comprised part of the long vacation when the filing of pleadings were closed;

(b) the defendant had applied to have the action stayed under the Arbitration Act; and

(2) the judgment was irregular and an abuse of the process of the court.

The Defendant's counsel applied viva voce to amend to have the grounds (set out at paragraphs 7 and 9 of the said affidavit) stated in the summons and, on the authority of the *Carmel Exporters* case, I have no hesitation in acceding to the said application, which is granted.

Status of Judgment - Regular or Irregular

The judgment in default of defence was obtained on 17th September, 1997. Order 48 r.5 (c) provides for the court's Long Vacation beginning 1st August and ending on 15th September, inclusive. Therefore 16th September is the first day of the new court term. By Order 18 r.5 pleadings may not be served during the Long Vacation without the leave of the court or consent of the other parties to the action. Since Articles 728 to 735 of the Code of Civil Procedure makes no special provisions for the entering-up of default judgments in summary proceedings, the procedure available to a plaintiff is, by virtue of Article 728, to be found in the Rules of the Supreme Court 1970.

Article 337 of the Code of Civil Procedure which expressly provided that in reckoning delays in matters of pleading the period of the prescribed vacations shall not be counted, was repealed by Order 3 r. 3 of RSC 1970 which provides that in reckoning any period prescribed by RSC, *inter alia*, for serving or filing any pleading, the period of the Long Vacation shall not be counted.

It follows therefore that whether the applicable period for filing of the defence was 2 days after entry of appearance pursuant to Article 731 of the Code of Civil Procedure or 14 days thereafter as prescribed by Order

18 r.2(1), when the default judgment was entered-up on 17th September, 1997 two (2) clear days after the end of the Long Vacation had not elapsed.

The judgment is therefore irregular having been obtained in breach of the Rules of the Supreme Court.

It is now well settled that an irregularly obtained judgment is not void or a nullity, but is valid unless and until set aside by the court in proceedings brought for that purpose.
Issacs v. Robertson (1984) 3 AER 140 P.C. per Lord Diplock at 143 F.
M v. Home Office (1992) 4 AER 97 C.A. per Lord Donaldson M.R. at 133 e-f.

Waiver of Irregularity - Fresh Step

RSC Order 2 r. 2 (1) provides that the court will not allow an application to set aside for irregularity any judgment, if the applicant has taken some fresh step in the proceedings after becoming aware of the irregularity.

Learned Counsel for the Plaintiff submitted that the Defendant had constructive notice of the default judgment when it was registered in the office of Deeds and Mortgages on 18th September, 1997 as such registration was notice to the whole world. In support of this proposition she relied on the writings of Winston Cenac Q.C. in **Coutume De Paris** at page 36 where the author states -

> *". . . registration is proof or presumption of knowledge acquired of the existence of the right. In fact, every registered act is held to be known by all the world: that which is not registered when it ought to be registered is held not to exist so far as third persons are concerned . . ."*

These statements were made in the context of matters pertaining to land law and registration of title to real property in St. Lucia. I do not consider that the author meant or intended those statements to be of general application to all areas or matters where some matter or document has been registered. Certainly his opinion cannot be construed as applying to the Rules of the Supreme Court 1970 or Order 2 r.2 (1) in particular.

On the basis of this presumption of knowledge or constructive knowledge, Learned Counsel for the Plaintiff submitted that when the Defendant filed on 22nd September, 1997 its Summons for Stay of action and the supplementary affidavit on 10th October, 1997 these constituted fresh steps in the proceedings after the Defendant had become aware of the irregularity of the judgment. In support of this submission she cited,

Halsbury Laws of England 4th Ed. Vol. 37 para. 37 where it is stated -

> *"The basic principle is that the party is not allowed to treat the proceedings as validly constituted and at the same time object that they are invalid because of an alleged irregularity".*

In my opinion, Order 2 r.2 (1) requires a party to be aware of the irregularity, in the sense that he must have actual knowledge of the proceeding or judgment which was irregularly taken, although he may not have actually been aware of the irregularity itself, when he took the fresh step in the action. An analogous situation is in the application of the draconian provisions of Order 34 r. 11. The party who has the benefit of an action being deemed abandoned may be held to have waived his rights where, being aware of the matters giving rise to the abandonment of the action, he takes some step in the action which is inconsistent with him insisting on his rights, thereby waiving such right. Further, knowledge by one's solicitor may be deemed to be knowledge of the party. See **Rignall Developments Ltd. v. Halil** (1987) 3 WLR 394 per Millett J at 403.

There is no evidence as to when the Defendant actually became aware of the default judgment as it was not served on it or its solicitor. What we do know is that on 8th October, 1997 the Defendant applied to set aside the judgment, having previously applied for a stay of the proceedings under the Arbitration Act. The application for stay of the proceedings cannot therefore amount to a waiver of the irregularity in obtaining the default judgment.

In order to establish a waiver you must show that the party has taken some step which is only necessary or only useful if the objection has been actually waived or has never been entertained. **Rein v. Stein** (1892) 66LJ 469 per Cave J at page 471.

I do not accept that the filing of the Defendant's supplementary affidavit on 10th October, 1997 in support of the prior pending summons for stay of the proceedings constitutes a fresh step in the action or waiver of the irregularity relating to the entering of the judgment. **Supreme Court Practice 1993 para. 2/2/3**. A fresh step must be one sufficient to constitute a waiver of the irregularity.

The Defendant has not filed any pleadings or taken any step in the action inconsistent with challenging the propriety and validity of the proceedings. Indeed Section 7 of the Arbitration Act precludes an applicant for a stay

from serving any pleadings or taking any further steps in the action.

Effect of Irregularity - Judicial Discretion

The general rule of practice is stated in **Halsbury Laws of England** 4th Ed. Vol. 37 para. 38 -

> *"The general rule of practice is that where proceedings are irregular, the party affected by the irregularity is entitled to have the proceedings set aside ex debito justitiae, and he is ordinarily entitled to costs of the application; the court may set the proceedings aside in its inherent jurisdiction and it is not necessary to appeal against the order".*

This principle is always subject to the power of the court, expressly provided by Order 13 r. 8, to vary a judgment in an appropriate case so as to correct an irregularity. If the irregularity is due to an error arising from an accidental slip or omission, it may be corrected, ***Armitage v. Parsons*** (1908) 2KB 410 C.A. The principle is also subject to the power of the court to allow amendments to correct irregularities under Order 2 r. 1 (2) and to the requirement that the application to set aside for irregularity be made within a reasonable time and before taking a fresh step after becoming aware of the irregularity. **Supreme Court Practice 1993 para. 13/9/6** and **Singh v. Atombrook Ltd.** (1989) 1WLR 810 at 819.

The modern authorities have done away with the distinction between a non-compliance with the rules which were said to render the proceedings a nullity, and those which merely rendered them irregular. Now every omission or mistake in practice or procedure is to be regarded as an irregularity, which the court can and should rectify as long as it can do so without injustice. **Halsbury Laws of England** 4th Ed. Vol. 35 para. 36.

And so a judgment entered-up before time for defending which was hitherto held to be a nullity and must be set aside, is now, under the modern approach, treated as an irregularity. **Anlaby v. Praetorius** (1888) 2 QBD 764. **Supreme Court Practice 1995 para. 2/1/1 pages 10-11.**

The manner in which a court exercises its discretion under Order 2 r. 1 (2) in cases of irregularity, will depend upon whether the opposite party has suffered prejudice as a direct consequence of the irregularity, but the court has the widest possible power to do justice, and prejudice or no prejudice is not always the all important factor. The court's discretion must be exercised judicially. **Metroinvest Anstalt v. Commercial Union** (1985) 2 AER 318. Per Cumming - Bruce LJ at 324 g-h, 325 j, 326 a-b.

Boocock v. Hilton International Co. (1993) 4 AER 19 and 20; Per Neil LJ at 29 j-k and per Mann LJ at 30 b-c.

Learned Counsel for the Plaintiff relied, as a factor for the court to consider in exercising its discretion whether to set aside the irregularly obtained default judgment, on the contention that the Defendant has no defence to the Plaintiff's claims at paragraphs 7, 8, 9, 10 (i), (ii) and (iv) of the Statement of Claim, in that it has expressly admitted those claims as determined by the engineer's certificates issued pursuant to Clause 7 of the Agreement or demonstrably has no defence thereto. As such, the justice of the case dictates that the judgment ought not to be set aside in its entirely, but varied so as to delete the amount in respect of additional costs at paragraph 10 (iii) of the Statement of Claim, which is the only sum not certified or admitted, Counsel summarized.

I have already addressed this issue in relation to the application for stay of proceedings and concluded that the Defendant has no defence to the amounts claimed at paragraphs 7, 8 and 9, only of the Statement of Claim, which after deductions of the retention sum and payments to date amounts to $4,731,834.90.

In my view, the entering of the judgment before the time for filing of the defence in respect of a claim in a writ specially indorsed with statement of claim filed during the Long Vacation, and after the Defendant had applied for a stay of the proceedings under the Arbitration Act was irregular and not justified. However, the general practice is to set aside irregularly obtained judgments, unless the justice of the case dictates otherwise.

Clearly, the Defendant has suffered some prejudice by the entry of the judgment for the full amount of $5,581,931 as a charge or caution against all of its immovable properties. However, the Plaintiff is entitled to judgment for the indisputable sum totalling $4,731,834.90

Conclusion on Setting Aside

I therefore exercise my discretion not to set aside but to vary the judgment in default of defence obtained irregularly on 17th September 1997 by entering judgment for the Plaintiff in the principal sum of $4,731,834.90. The justice of the case, in my view, so requires.

Orders

It is ordered that -

(1) the judgment in default of defence entered on 17th September, 1997 against the Defendant is varied to the extent that judgment is entered for the Plaintiff for the sum of $4,731,834.90 with interest thereon at 2 percent per annum to date of payment and costs to be taxed;

(2) the Registrar of Lands do forthwith rectify all cautions entered by the Plaintiff on the registered titles for the immovable properties of the Defendant to reflect the variation of the said judgment;

(3) all further proceedings in this action regarding the sums claimed at paragraph 10 of the Statement of Claim are stayed pending settlement of those disputes and/or differences between the Plaintiff and Defendant by conciliation and/or arbitration pursuant to Clause 11 of the Agreement dated 6th September, 1995;

(4) the Defendant do pay the Plaintiff's costs of the application to stay the proceedings, to be taxed unless agreed;

(5) no Order as to costs of the application to set aside the judgment in default of defence;

(6) reliefs Nos. 4 and 6 in the Defendant's Summons to Set Aside Judgment in Default of Defence filed 8th October, 1997 is refused.

GERARD ST. C. FARARA, Q.C.
HIGH COURT JUDGE (ACTING)