IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 57 of 2011

BETWEEN : **BULILEKA HIRE SERVICES LIMITED**

Plaintiff

A N D : **THE HOUSING AUTHORITY**

1st Defendant

: **MIKAELE TUPUA**

2nd Defendant

COUNSEL : **Mr. A. Pal for the Plaintiff.**
Mr. V. Maharaj for the Defendants.

Date of Hearing : **17th November, 2015**

Date of Ruling : **19th January, 2016**

RULING

[1] The plaintiff instituted this action by way of writ of summons on 02nd March 2011 claiming $ 4,145,800.00 as damages for breach of contract and for illegally possessing its plant and machinery. This case is arising out of a construction contract entered into between the parties and the New Zealand Conditions of Contract for Building and Civil Engineering construction NZS 3910 was the applicable standard form of contract.

[2] The defendants filed their statement of defence on 14th April 2011 wherein they claimed $ 2,049,012.45 from the plaintiff. The reply to the counterclaim and the defence was filed on 11th August 2011. On 17th January 2012 the defendants filed an inter-parte notice

of motion seeking leave to file amended statement claim and counterclaim. Pre-trial conference minutes were filed on 14th January 2014.

[3] The matter was fixed for trial on 02nd November 2015. On 06th July 2015 the parties informed Court that they have agreed to nominate an engineer to go through the reports filed of record and to give his opinion. The plaintiff however, moved for time to file its consolidated report. Thereafter the matter was mentioned on several occasions but the parties could not agree on an engineer to obtain an independent opinion on the reports filed.

[4] On 22nd November 2015, on applications made by the parties the Court granted time for the plaintiff to file its amended statement of claim and the defendants to file their amended statement of defence. On the same day a preliminary objection was taken to the maintainability of the action on the ground that the plaintiff is not entitled to have and maintain this action without referring the dispute for arbitration and the Court ruled that the objection would be considered on the day of the hearing. On 30th October 2015, since the parties had not tendered their respective amended pleadings the Court vacated the trial and fixed the matter for preliminary hearing on 17th November 2015.

[5] The hearing was in respect of the following issues;

1. Whether the plaintiff is entitled proceed with the matter without first referring the dispute between the parties for arbitration.
2. Whether the Court should stay the proceedings and direct the parties to refer the matter for arbitration.

[6] Sub-clause 13.4.1 of the New Zealand Conditions of Contract for Building and Civil Engineering construction NZS 3910 provides as follows;

If either:

(a) The Principle or the Contractor is dissatisfied with the Engineer's decision under 13.2.4; or

(b) No decision is given by the Engineer within the time prescribed by 13.2.4;

then either the Principal or the Contractor **may** by notice require that the matter in dispute be referred to arbitration. [Emphasis added].

[7] Under this clause, referring a dispute for arbitration is not a compulsory requirement. It only provides that a party to a dispute may require the other party that the matter be referred for arbitration. The word "**may**" only expresses a possibility. The word "**may**" in the above clause only confers a right on a party to refer a dispute for arbitration if he is not satisfied with the decision of the engineer made under sub-clause 13.2.4 or if the engineer fails to make a decision within the time period prescribed by the said sub-clause and it does not make it an absolute necessity to refer the dispute for arbitration before instituting proceedings in a Court of law.

[8] Sub-clause 13.2.4 of the New Zealand Conditions of Contract for Building and Civil Engineering construction NZS 3910 reads as follows;

> Unless the dispute or any question arising in connection with it has been referred under 13.2.3 and is awaiting a recommendation from the agreed expert, the engineer may, at any time, in respect of any dispute or difference under 13.2.1 give a decision (in this Section called a "formal decision") which states expressly that it is given under this sub-clause 13.2.4. The engineer shall give a formal decision on the matter within 20 Working Days of the receiving notice in writing from the Principal or the Contractor requiring him or her to give a formal decision and expressly referring to sub-clause 13.2.4. Upon making a formal decision the engineer shall forthwith send copies of it to both the Principal and the Contractor. The Engineer's formal decision shall, subject to 13.3 and 13.4 or any Adjudication proceedings, be final and binding.

[9] It is clear from the above terms of the agreement that a dispute can be referred for arbitration only if the principal or the contractor is dissatisfied with the decision of the engineer made under sub-clause 13.2.4 of the New Zealand Conditions of Contract for Building and Civil Engineering construction NZS 3910 if the engineer fails to make a decision within the time period prescribed by the said sub-clause.

[10] It is therefore a prerequisite to refer any dispute either to an expert of consent of the contractor and the principal or otherwise for the engineer to make a decision and then and only then the parties are entitled to refer any dispute for arbitration.

[11] Therefore, the failure of the plaintiff to refer the dispute between the parties for arbitration does not have the effect of vitiating the proceedings before this Court.

[12] The other matter for determination is whether the Court should stay the proceedings and direct the parties to refer the matter for arbitration.

[13] Section 5 of the Arbitration Act (Cap 38) provides as follows;

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

[14] It is thus clear that the party who seeks a stay of proceedings under the provisions of section 5 of the Arbitration Act (cap 38) must make an application in that regard before delivering any pleading or taking any other steps in the proceedings.

[15] I have in this judgment laid down the sequence of events that have occurred from the time of the institution of the action until the application for stay was made.

[16] There cannot be any dispute between the parties that the application for stay under section 5 of the Arbitration Act (Cap 38) was made only after the matter was fixed for trial after completing the pre-trial procedure.

[17] At the hearing the following previous decisions on this question of law was brought to the attention of this Court.

[18] In **W Bruce LD v. J. Strong [1951] 2 K.B. 447** it was held:

> It is not material that the time fixed for demanding arbitration has run out, for to hold otherwise would mean that one party to the agreement could defeat the rights of the other party to have a dispute settled by this procedure merely by waiting until the time had elapsed and then bringing an action.

> If the parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then since that Act of Parliament was passed a prima facie duty is cast upon the courts to act upon such an agreement.

[19] In **W Bruce LD v. J Strong** (*supra*) there had been an agreement between the parties that neither buyer nor seller nor any person claiming under anyone of them should bring any action against the other of them in respect of any dispute until it had been settled by arbitration.

[20] **FAI Insurance (Fiji) Ltd v Consort Shipping Line Ltd [1999] FJCA 10; Abu0075u.98s (11 February 1999)** is a case where the respondent who is a ship owner insured his ships with the applicant. Two of the respondent's ships were sunk in the sea. A dispute arose regarding the applicant's liability to compensate the respondent for the loss of the two vessels. The insurance policy, referred to as the respondent's "standard marine hulk policy", which provided that all differences between the parties are to be referred to the decision of an arbitrator.

[21] The Court, in that case observed that the respondent's solicitors, apparently unaware of that provision, caused a writ to be issued out of the High Court claiming damages for the sinking of the ships. The applicant then gave notice of intention to defend the action. Notwithstanding that the provision for mandatory referral to arbitration was a term of the applicant's standard policy it did not move to have the action stayed until the requirement had been met.

[22] It is thus clear that in that case too there had been a clause in the contract of insurance that as a prerequisite to filing an action in a Court of law the dispute must be referred for arbitration which was mandatory.

[23] Therefore, the circumstances under which the Court of Appeal arrived at that decision are different from those of the case before this Court. Hence the principles laid down in the two decisions cited above are of no relevance to this case.

[24] In **Pitchers, Ltd. v. Plaza (Queensbury), Ltd. [1940] 1 All E.R. 151** it was held, that the defendants were precluded from relying on the arbitration clause as they had taken a step in the action when they opposed the summons for leave to sign final judgment before the Master.

[25] An application for stay must be made after formal acknowledgement of the proceedings but before taking any substantial step in the action to respond to the substantive dispute (*e.g.* by entering a defence). – [**Handbook of Arbitration Practice by Ronald Bernstein, John Tackaberry, Arthur L. Marriot and Derrek Wood, Third Edition, 1998**].

[26] For the reasons set out above I hold that there are no grounds for the Court to stay the proceedings and direct the parties to refer the dispute for arbitration.

[27] In conclusion I may say that in deciding whether or not to grant stay of proceedings the Court must also bear in mind the purpose of referring a commercial dispute for arbitration. Arbitration is a speedy and less expensive mode of settlement of disputes. The parties to a contract where there is a requirement to refer the dispute for arbitration before instituting proceedings in a Court of law must without any delay comply with such requirement. If the parties wait for years like in this case without making an attempt to refer the dispute for arbitration and after taking all the pre-trial steps in the matter move Court to refer the dispute for arbitration it would defeat the very purpose of referring a dispute for arbitration.

[28] In view of the reasons aforementioned I make the following orders.

ORDERS.

1. The application of the defendant to stay the proceedings and direct the parties to refer the dispute for arbitration is refused.

2. The objection taken by the defendant to the maintainability of this action without first referring the dispute for arbitration is overruled.

3. The defendant shall pay the plaintiff $ 1000 as costs (summarily assessed).

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Lyone Seneviratne

JUDGE