

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**[CIVIL JURISDICTION]**

**CIVIL ACTION NO. HBC 278 OF 2021**

**BETWEEN** : **WESTERN BUILDERS PTE LIMITED** a limited liability  
company having its registered office at Lot 1 Koula Road,  
Varadoli, Ba.

**PLAINTIFF**

**AND** : **PALA'S AUTO SERVICES PTE LIMITED** a limited liability  
Company having its registered office at Level -1, M.B. Pala  
Investments Building, Nakavu, Queens Road, Nadi.

**DEFENDANT**

Before : Master P. Prasad  
Hearing : By way of written submissions.

**RULING**

1. The Plaintiff, though its Statement of Claim (**SOC**) filed on 1 December 2021, alleges that pursuant to a building contract dated 28 September 2011, the Defendant engaged the Plaintiff company for the construction of a showroom and for some extensions and renovations (**Building Contract**). The Plaintiff was to be paid in phases after the works were certified by the architect.
2. On 2 August 2014, the Plaintiff rendered a final claim in the sum of \$166,298.21. On 3 December 2015, the architect certified payment in the reduced sum of \$88,888.00 (**Certified sum**) and on 4 December 2015, the architect sent the final payment certificate number 11 requiring the Defendant to pay the Certified sum.
3. Upon receipt of the said payment certificate, the Plaintiff disputed the deductions and submitted the same to the architect and the Defendant. On or around 22 February 2017, the Plaintiff sent a notice to the Defendant to pay the Certified sum within 14 days failing which it would commence proceedings. The Plaintiff then filed the SOC when the Defendant refused/neglected to pay the Certified sum.
4. The Plaintiff thus claims the following reliefs:

- a) Judgment for the Certified sum of \$88,888.00.
  - b) Judgment for \$106,686.45 for balance claim and 2.5% retention.
  - c) Interest at the commercial rate of 13.5% per annum from 4 December 2014 to the date of payment under the Law Reform (Miscellaneous Provisions) (death and Interest) Act.
5. The Defendant filed its Acknowledgement of Service on 07 December 2021 and thereafter filed a Summons for Stay of Proceedings pursuant to section 5 of the Arbitration Act 1965 on 2 June 2022 (**Application**). The Defendant filed an Affidavit in Support of the Application and an Affidavit in Response, both deposed by Jitesh Pala, a Director of the Defendant company.
  6. The Plaintiff opposed the Application and filed an Affidavit in Reply of Prashil Prabhash, the Chief Financial Officer of the Plaintiff company.
  7. Section 5 of the Arbitration Act 1965 confers the discretion to the Court to stay the proceedings of the matters submitted to arbitration. The said section states as follows:

*Power to stay proceedings where there is a submission*

5. *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]

8. On the issue of such discretion, Master Azhar (as His Lordship then was) in ***Uma Investment Pte Limited v Grace Road Restaurant Pte Limited*** HBC 242 of 2021L (18/07/24) stated as follows;

*The court is given discretion to stay the proceedings for this purpose. However, for the court to exercise its discretion, the applicant should, before delivering any pleadings or taking any other steps in the proceedings, apply to the court and discharge its burden under the above section. The onus on the applicant is to satisfy the court that, the matter is subject to arbitration 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.*

9. In dealing with a stay application, Honourable Justice Mr. K. Kumar stated the following in ***Digicel (Fiji) Ltd v Fiji Rugby Union*** [2014] FJHC 95; HBC30.2014 (21 February 2014)

*3.4 Onus is on the Defendant as Applicant to satisfy the requirements of s5 of Arbitration Act Cap 38 and to show that there is a dispute which is subject to the arbitration clause. **Gisborne Harbout Reed v. Spencer** [1961] 1 NZLR 204 at 213 (para 50).*

*3.5 Whether any party to an Agreement has agreed to submit to arbitration any particular dispute will depend on the facts of the particular case and the alleged dispute. **Apparel Holdings Ltd v. Jones** [1992] 3 NZLR 713 at 717.*

*3.6 The Court has discretion to try the dispute or stay the proceedings if the Applicant complies with the requirements of s5 of the Arbitration Act. **Heyman v. Darwin Ltd** [1942] 1 ALL ER 337.*

...

*3.26 Once the requirements in s5 of the Arbitration Act are met then the Court is to be "**satisfied that there is no sufficient reason why the matter should not be referred to arbitration 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...**". The use of the word "and" means that the Applicant has to satisfy both these limbs.*

10. The first issue to consider is: whether the Defendant applied to the Court for the stay before delivering any pleadings or taking any other steps in the proceedings?
11. The Plaintiff's dispute that the Defendant had applied to the Court for stay before taking any other step in this matter. In this regard the Plaintiff refers to letters dated 8 December 2021 and 21 January 2022 respectively, and e-mail correspondence of 14 March 2022 and 19 May 2022 wherein the counsel for the Defendant was seeking for extension of time to file its Statement of Defence (SOD).
12. The Plaintiff's counsel relied on Order 3 Rule 4(3) of the High Court Rules 1988 to support its grounds for objection.
13. The Defendant's counsel relied on ***FAI Insurance (Fiji) Ltd v Consort Shipping Line Ltd*** (1999) FJCA 10; Abu 0075u.98s and ***Sambhu Lal Constructions (Fiji) Ltd v Warren*** [2011] FJHC 63; Action 44.2008 (11 February 2011) to advance their submissions that seeking an extension of time is not a step in the proceedings, and as such this Court should grant a Stay.

14. The Defendant's counsel referred to Clause 33(1) of the Building Contract (annexed to the Defendant's Affidavit in Support and marked as "JP-2") which states:

*Provided always that in case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the Architect or any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in clause 30(5)(a) of these Conditions or the rights and liabilities of the parties under clauses 25 or 26 of these Conditions) then such disputes of difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties or failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an Arbitrator, a person to be appointed on the request of either party by the President or Vice President for the time being of the Fiji Association of Architects.*

[emphasis added]

15. Neither **FAI Insurance** [supra] nor **Sambhu Lal** [supra] dealt with the factual circumstances similar to the present proceeding. In this proceeding, it is obvious that the Defendant's Application was made before it delivered any pleadings. This Court needs to decide whether the act of the Defendant seeking consent from the Plaintiff to file its Statement of Defence is considered as taking a step in the proceeding.
16. Halsbury's Laws of England, 4th edition, volume 2 at paragraph 627 contains a relevant passage and reads as follows:

*The applicant must have taken no step in the proceedings after acknowledgment of service. A step in the proceedings is an act which both invokes the jurisdiction of the court and which demonstrates the applicant's election to allow the action to proceed. An applicant may take what would otherwise be a step if he makes it clear that that act is done without prejudice to his right to apply for a stay. Steps in the proceedings have been held to include: the filing of an affidavit in opposition to a summons for summary judgment, service of a defence, and an application to the court for leave to serve interrogatories, or for a stay pending the giving of security for costs, or for an extension of time for serving a defence, or for an order of discovery, or for an order for further and better particulars. The following have been held not to be steps: acts preliminary to the issue of proceedings, a request in correspondence for an extension of time for serving a defence, the filing of affidavits in*

*answer to an application by the plaintiff for the appointment of a receiver, transferring a summons into counsel's list, applying to strike out a defective statement of claim, resisting an application for an interlocutory injunction by putting in evidence and appearing in court, and applying for a stay on grounds other than that the dispute was subject to an arbitration payment.*

17. In a footnote to that passage there is a very general statement in the following terms:

*Any act which does not involve the court does not invoke its jurisdiction: ... as a general rule any application to the court, or filing of pleadings or documents, does invoke its jurisdiction and does amount to a step in the proceedings: ... under certain circumstances, however, such actions may not amount to steps.*

18. On the question of whether seeking further time to put up a defence is a step in the proceeding, North J in **Brighton Marine Palace and Pier Limited v Woodhouse** [1893] 2 Ch. 486 at page 488 held as follows:

*In my opinion, I ought to make the order I am asked to make. The application is made pursuant to sect. 4 of the Arbitration Act, 1889 which provides that, if any party to a submission "commences any legal proceedings in any Court against any other party to the submission...in respect of any matter agreed to be referred, any party to such legal proceeding may at any time after appearance, and before delivering any pleadings or taking any other step in the proceedings, apply to that Court to stay the proceedings." The Defendant has not delivered any statement of defence; therefore, there is no question so far as pleading is concerned: he has not delivered any pleading; but he must apply before taking any other step in the action. The question is whether he has taken any other step in the action. What is relied on as steps taken by the Defendant is, that his solicitors wrote on two occasions asking for further time to put in a defence, which applications were acceded to. In my opinion, asking for time by letter is not taking a step in the action; it is taking a step outside the action altogether. The application was under a rule which provides for enlargement of time without taking any step in the action, the very object of the rule being to enable the parties, without the expense of applying in the action, to enlarge time. If the other side did not agree to enlarge the time, the party wishing further time would have to take a step in the action. I am of the opinion that this is settled by decision, that obtaining time by agreement is not a step in the action.*

[emphasis added]

19. The Honourable Justice Mr. Clarke in **Furey & anor v Lurganville Construction Company Ltd & ors** [2012] IESC 38 (21 June 2012) upheld the position in **Brighton Marine Palace and Pier Limited** [supra] stating as follows

4.4 *It will be necessary to consider some of the case law in a little detail. However, the problem is, perhaps, best approached by starting with a consideration of Halsbury's Laws of England 4th Edition Reissue Vol. 2 at para. 627, where the question of the meaning of a "step" is considered. From that paragraph it seems clear that what is described as an application to the court for an extension of time for serving a defence is taken to be a step in the proceedings. See Ford's Hotel Company Ltd v. Bartlett [1896] A.C.1. On the other hand a request in correspondence for an extension of time for serving a defence has been taken not to amount to taking a step in the proceedings. See Brighton Marine Palace and Pier Ltd v. Woodhouse [1893] 2 Ch.486.*

4.5 *It seems fairly clear, therefore, and was not disputed by the parties to this appeal, that at one end of the spectrum there is a case where the defendant brings an application before the court seeking an extension of time for the filing of a defence. Such an action, if it was accepted, clearly amounts to taking a step in the proceedings. At the other end of the spectrum there is a case where, by reason of the fact that the time for filing a defence has expired, the defendant requires a consent from the plaintiff to the late filing of a defence. A request to furnish that consent can arise in correspondence and outside the context of any application to the court. It seems equally clear, and not disputed, that such a request being made in correspondence does not amount to the taking of a step by the defendant in the proceedings.*

[emphasis added]

20. In view of the above, I find that the Defendant cannot be said to have taken a step in the proceeding by reason only of its solicitor's correspondence with the Plaintiff's solicitors seeking an extension of time within which to file the Statement of Defence.
21. This Court now needs to consider and be satisfied that: (i) there is no sufficient reason why the matter should not be referred to arbitration in accordance with the submission; and (ii) 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 arbitration.
22. The Defendant's counsel submitted that the dispute between the parties regarding the deduction and non-payment (as alleged by the Plaintiff), and the defective or incomplete works (as alleged by the Defendant) relate to the rights and liabilities of the parties under Clauses 25 and 26 of the Building Contract hence are disputes falling within the meaning of Clause 33(1).

23. The Plaintiff's counsel contends as follows: (i) the dispute is straightforward rather than technical and therefore does not warrant arbitration; and (ii) the dispute arises from work performed by the Plaintiff, for which the Defendant has withheld payment under the final certificate, citing alleged defects in the works.

24. In *Uma Investment* [supra], Master Azhar referred to Lord Hoffman in *Premium Nafta Products Limited and others v. Fili Shipping Company Limited (14th Claimant) and others* [2007] UKHL 40 on the construction of arbitration clauses, where it was held at paragraph 13 that:

*[T]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.*

25. The construction of the arbitration clause in the Building Contract must start with the above assumption as well. The arbitration clause in the Building Contract covers a number of disputes arising “*either during the progress or after the completion or abandonment of works, ...or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the Architect or any certificate to which the Contractor may claim to be entitled...*”.

26. Adopting the approach in *Premium Nafta Products Limited* [supra], the language of Clause 33 of the Building Contract contains nothing to exclude disputes about the non-payment of sums pursuant to payment certificates. I am therefore satisfied that the dispute between the parties herein falls within Clause 33 of the Building Contract.

27. Further, when the dispute first arose in 2015, the Defendant's former solicitors had written to the architect pursuant to the Building Contract, advising that a dispute existed between the parties and requesting that no certificates be issued until the matter was referred to arbitration and resolved. Subsequently, in response to the Plaintiff's demand notice dated 23 February 2017, the Defendant's former solicitors, by letter of 14 March 2017, informed the Plaintiff's counsel that the demand notice was invalid and reiterated the requirement for arbitration as mandated by Clause 33 of the Building Contract.

28. Following the Plaintiff's filing of its SOC on 1 December 2021, the Defendant's present solicitor, by letter dated 24 March 2022, informed the Plaintiff that the proper venue for resolving the dispute was arbitration. In the said correspondence, the Defendant's counsel allowed the Plaintiff time to withdraw its SOC.

29. The Plaintiff's counsel responded to this letter on 25 May 2022 refusing to withdraw its SOC. The Defendant then filed this current Application for Stay on 02 June 2022.

30. In light of the above, I find that the Defendant has satisfied this Court that, at the time when the proceedings were commenced, and continuing thereafter, it has remained ready and willing to do all things necessary to the proper conduct of the arbitration.

31. For the aforesaid reasons, I exercise discretion to grant a stay in the proceedings.

32. Accordingly, I make the following orders:

- a. The proceeding in this matter is stayed;
- b. The parties are to refer their dispute to arbitration in accordance with their agreement contained in Clause 33 of the Building Contract dated 28 September 2011; and
- c. The parties to bear their own costs.



**P. Prasad**  
**Master of the High Court**

**At Lautoka**  
**19 December 2025**

*Solicitors: Plaintiff – Messrs Samuel Ram Lawyers*  
*Defendant – Messrs AK Lawyers*