



[2026] JMCC Comm 27

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO.SU2025CD00053

BETWEEN THE TRUSTEES OF ALKALI JAMAICA LIMITED CLAIMANT
PENSION FUND (a trading name)

AND BPM FINANCIAL LIMITED DEFENDANT

Mr Emile Leiba and Miss Samantha Grant instructed by DunnCox for the claimant

Miss Katherine P.C. Francis instructed by Samuda and Johnson for the defendant

Heard: July 4, 2025, and September 25, 2026

Arbitration - Whether the claimant's case should be struck out or stayed pending arbitration - Whether the court has jurisdiction to hear the claim - Whether the dispute is arbitrable – Whether the claimant breached the arbitration agreement - Whether there was a repudiatory breach – Whether arbitration was waived by election -The Arbitration Act 2017

CORAM: JARRETT, J

Introduction

- [1] This application is concerned with whether a dispute should go to arbitration or should instead be determined judicially.
- [2] The Trustees of Alkali Jamaica Limited Pension Fund (“the claimant”) contend that BPM Financial Limited (“the defendant”), the Pension Fund Manager and Administrator for the Retirement Plan for the Employees of Alkali Limited and Associated Companies (“the Alkali Plan”), is in breach of several of its obligations under **The Pensions (Superannuation Funds and Retirement Schemes) Act** and **The Pensions (Superannuation Funds and Retirement Schemes) (Governance) Regulations 2006**. In a claim filed against the defendant on May 2, 2025, the claimant has sought several declarations and orders, premised on the alleged statutory breaches, breaches of trust and fiduciary duties committed by the defendant. In the present application, the defendant says the court either has no jurisdiction to hear the claim or should not exercise its jurisdiction to do so. It contends that the dispute between the parties relates to fees, and ought to go to arbitration in accordance with the arbitration clause contained in the agreement between them. It contends further, that the claimant had earlier invoked that very arbitration clause, but has now improperly resorted to litigation. The claimant on the other hand argues, that the dispute the subject of the claim, is an entirely different dispute, it is not about fees, and it is not arbitrable. Alternatively, it says that it terminated the arbitration agreement.

The factual background

- [3] Since around April 2010, the defendant has been the Pension Fund Manager and/or Administrator of the Alkali Plan. By an agreement known as the Pension Administration Agreement (“the PAA”), entered between the claimant and the defendant on January 1, 2019, the defendant continued to provide pension administration services for the Alkali Plan. The parties also entered into the Investment Management Agreement on January 1, 2019 (“the 2019 IMA”), which has been renewed annually. By this agreement, the defendant provided investment management, consultancy and advisory services for the management of the assets of the Alkali Plan.

- [4] The portfolio of investments being managed for the Alkali Plan were included in pooled funds, which were managed and overseen by the defendant.¹The agreed fees payable to the defendant for its services under the 2019 IMA was an annual fee of 1.0% on the value of the investment.²
- [5] In or around June 2023, Myers Fletcher & Gordon, lawyers acting on behalf of the claimant, raised issues with lawyers for the defendant, about performance fees reflected in the financial statements of BPM Financial Limited's Pooled Pension Equity Fund, which the defendant paid itself from the assets of the Alkali Plan. The claimant's lawyers requested documentation to support the charge to the funds of the Alkali Plan of these performance fees, including copies of agreements setting out the basis for those fees.
- [6] Among the documents provided to the claimant by the defendant were copies of three investment management agreements ("IMAs") entered between the defendant and its pooled funds' portfolios. All three IMAs are signed by the defendant in their dual capacity as investment manager and client. By letter of October 24, 2023, Jeanine Ewart ("Ms Ewart"), Chairman of the Alkali Plan, wrote to the defendant requesting a meeting to discuss the refund of all fees paid to the defendant, which were in excess of industry standards. She said that between 2011 and 2022, \$684,092,720.00 had been paid in fees to the defendant by the Alkali Plan, and that \$660,803,223.00 of that amount, was paid by the defendant from BPM's Pooled Pension Equity Investment. Ms Ewart wrote that the claimant took issue with the latter fees, as they were excessive. She also said that to facilitate the payment of such fees, against income over the same period of \$378,828,959.00, the claimant had been advised that the defendant, as its investment advisor, was in breach of its fiduciary obligations owed to the Alkali Plan.
- [7] Ms Ewart wrote a subsequent letter to the defendant, dated January 25, 2024, in which she advised that pursuant to the arbitration clause in the 2019 IMA, the claimant was referring the dispute, which had been earlier outlined in her letter dated October 24, 2023, to arbitration. Among the 10 points of dispute

¹ 2019 IMA, clause 2.

² Ibid clause 9.1

listed in that letter, were: a) the defendant agreed in the IMAs to pay an associated company, performance fees, without seeking the claimant's approval in breach of clause 3.2.7 of the 2019 IMA; b) the defendant's failure to disclose details of the IMAs when asked by the claimant to do so; c) the defendant incurring grossly exorbitant fees from the invested funds; d) the defendant, in breach of contract acted on its own advice to unjustly enrich itself or an associated company against the claimant's best interest; e) the defendant conducted the claimant's investment portfolio dishonestly, in breach of the 2019 IMA, and by a deliberate creation of a conflict of interest and duty, which caused the portfolio of the Alkali Plan to be significantly diminished; f) the defendant deliberately or negligently failed to resolve the conflict of duty and interest in favour of the claimant; and g) the defendant unjustly enriched itself.

- [8] Ms Ewart continued by saying that the claimant estimated that in excess of \$300,000,000.00 was due to it, as a result of the defendant's breach of contract, in addition to interest, aggravated and exemplary damages. In closing, she stated that pursuant to the Arbitration Act, the claimant nominates Mr Stephen Shelton K.C., as one of the three arbitrators contemplated by the arbitration clause in the 2019 IMA.
- [9] In its response, the defendant in a letter dated February 8, 2024, from its attorneys-at-law, Samuda & Johnson, said that the claimant's invocation of the arbitration clause was noted, and that should the matter proceed to arbitration, it nominated Mr Patrick Foster, K.C. as one of the three arbitrators.
- [10] In a demand letter to the defendant dated June 11, 2024, DunnCox, attorneys-at-law, writing on behalf of the claimant, demanded the sum of \$215,000,000.00 as compensation for losses suffered by the Alkali Plan, based on an analysis prepared by Eckler Jamaica Limited. Also sought were legal and professional fees of \$7,000,000.00. This letter indicated that if no response was received in seven days, the claimant would pursue all necessary legal steps to recover compensation. No mention was made in this letter of arbitration. Samuda & Johnson responded on behalf of the defendant, by letter dated June 28, 2024, advising that it was taking instructions and asked that no adverse steps be taken against the defendant without first advising them. In a

subsequent letter of July 22, 2024, Samuda & Johnson wrote to the claimant's attorney's-at-law, referred to Ms Ewart's January 25, 2024, letter and theirs in response of February 8, 2024, and observed that the June 11, 2024, letter from the claimant's attorneys-at-law, made no mention of arbitration. They expressed the view, that it seemed that the referral process needed to be completed.

- [11] On February 11, 2025, the claimant filed suit, with amended pleadings being filed on May 2, 2025.

The claim

- [12] In its claim, the following are the remedies the claimant seeks:

“i. A Declaration that the Defendant being the Investment Manager Administrator and Agent of Trustees of Alkali Jamaica Limited Pension Fund, a Retirement Plan for the Employees of Alkali Limited and Associated Companies (“the Alkali Plan”), breached its statutory duties pursuant to The Pensions (Superannuation Funds and Retirement Schemes) Act, The Pensions (Superannuation Funds and Retirement Schemes) (Governance) Regulations 2006, and The Pensions (Superannuation Funds and Retirement Schemes) (Investment) Regulations.

ii. A Declaration that the Defendant being the Pension Manager/Administrator, Investment Manager and Agent of Trustees of the Claimants, acted in breach of trust, in breach of its fiduciary duties owed to the Claimants, and unjustly enriched itself through unapproved investment management and performance fees charged to the Alkali Plan.

iii. A Declaration that the Investment Management Agreements made between the Defendant and BPM Pooled Equity Funds (the alter ego of the Defendant), including agreements made on 1st January 2018 and January 1, 2020 between BPM FINANCIAL LIMITED and BPM EQUITY PORTFOLIO (BP951); PJMD1; PEQ; FIXED INCOME FUND

(BP950); LSA FUND (BP952); NEST FUND (BP954); CHRISTMAS CLUB(BP 960), and Investment Management Agreement made on 1st January 2018 between BPM FINANCIAL LIMITED and BPM GLOBAL EQUITY PORTFOLIO (BP962); EQUITY PORTFOLIO (BP951);PEQ USD STOCKS; PERSONAL PENSION (BP964); US MAXIMIZER(BP961); PENSION US FUND (PUSD1)(ALL US\$ HOLDINGS),(collectively “BPM PEF Investment Management Agreements”) are void and an order that the BPM PEF Investment Management Agreements be set aside.

- iv. An Order for immediate repayment by the Defendant of the sum of One Hundred and Thirty-Seven Million, Six Hundred and Two Thousand and Seventy-One Dollars and Fifteen Cents (\$137,602,071.15), being the monies charged as Investment Management and Performance Fees and deducted from the Alkali Plan by the Defendant over the period 2011 to 2022, under the BPM PEF Investment Management Agreements between the Defendant and BPM Pooled Equity Funds.
- v. In the alternative to Order 4 above, an Order that a sum constituting a reasonable fee be determined by the Court and it be set off against the sums actually paid by the Claimants as Investment Management and Performance Fees arising from the BPM PEF Investment Management Agreements and deducted from the Alkali Plan by the Defendant over the period 2011 to 2022, with the difference being awarded as equitable compensation and or damages for breach of statutory duty, fiduciary duty, breach of trust and or unjust enrichment.
- vi. An Order that the Defendant is to provide an account of its management of the Alkali Plan, including the income, charges, and deductions, and the basis for such charges and deductions, as well as any agreement under which the (sic) any charges or deductions were made from the Alkali Plan for the period 2011 to 2022, within thirty (30) days of this Order.

- vii. Interest at the Commercial Rate, or alternatively, interest at such rate and such relevant period that this Honourable Court deems just pursuant to the provisions of the Law Reform (Miscellaneous Provisions) Act from 2022 to the date of Judgment and continuing on all sums found to be due and owing to the Claimants by the Defendant.
- viii. Costs and Attorney's Costs.
- ix. Such further and other relief as this Honourable Court deems just."

[13] The claimant avers in its amended particulars of claim that the defendant is an agent of trustee for purposes of **The Pensions (Superannuation Funds and Retirement Schemes) Act, The Pensions (Superannuation Funds and Retirement Schemes) (Governance) Regulations 2006** and **The Pensions (Superannuation Funds and Retirement Schemes) (Investment) Regulations**. It is alleged that despite several requests, the defendant, in breach of trust and of its statutory duties, has failed to provide audited financial statements for the Alkali Plan for the period 2011 to 2022. Upon receipt of these statements, it was discovered that there was significant decline in the value of the Alkali Plan. When copies of the IMAs were received, further breaches of trust, statutory and fiduciary duties were discovered. The defendant had entered into the IMAs without the consent of the claimant and without disclosing the conflict of interest. The defendant had also invested approximately 86% of the assets of the Alkali Plan in the BPM Pooled Equity Funds and paid itself investment management and performance fees, without the claimant's prior approval.

[14] The pleadings further allege that the defendant paid itself from the assets of the Alkali Plan, a total of One Hundred and Thirty-seven Million, Six Hundred and Two Thousand, Seventy-One Dollars and Fifteen Cents (\$137,602,071.15), in BPM Pooled Equity Funds fees over the period 2011 to 2022, which were not agreed by the claimant. The 2019 IMA makes no provision for performance fees. The defendant received administration fees of approximately Four Million Dollars (\$4,000,000.00) from the PAA, and approximately Twenty-Three Million

Dollars (\$23,000,000.00) from the 2019 IMA. These latter fees are not being challenged.

- [15] Further still, are pleaded allegations of breaches of duty as trustee, agents of trustee and investment manager under regulations 8(1), 8(4), 8(6), 8(7),8(8) , 9 and 9(d), of **The Pensions (Superannuation Funds and Retirement Schemes) (Governance) Regulations 2006**, regulations 3, 6, 7 (q), and 34(6) of **The Pensions (Superannuation Funds and Retirement Schemes) (Investment) Regulations**) and section 11 of **The Pensions (Superannuation Funds and Retirement Schemes) Act**.
- [16] The claimant also avers that the defendant has unjustly enriched itself and paid itself performance fees without approval. It is said that the defendant's actions have caused the significant depletion in the funds of the Alkali Plan and have caused loss and damage to its members.

The defendant's application

- [17] The defendant filed an acknowledgment of service on March 12, 2025, but no defence. Instead, it filed the current amended application on July 3, 2025, pursuant to section 9.6(1) of the CPR, which provides that a defendant who disputes the court's jurisdiction to try a claim or argues that the court ought not to exercise its jurisdiction to try a claim, may apply to the court for a declaration to that effect. The application also cited as one of its grounds, section 5 of the repealed Arbitration Act 1900, but in her oral submissions, Miss Francis, counsel for the defendant said the reference in the application to section 5 of the repealed Arbitration Act 1900 ("1900 Act"), was an error, and that the reference ought to have been to the Arbitration Act 2017("2017 Act"). It is important to state here, that section 5 of the 1900 Act, gave the court a discretion whether to stay proceedings pending arbitration, while section 11 of the 2017 Act makes it mandatory for the court to refer a matter to arbitration where a party so requests, once the relevant arbitration agreement is not null, void, inoperative or incapable of being performed.³

³ **Sabal Ph 1200 Limited v GN and Associates Limited [2020] JMCA Civ 43**

- [18]** The orders being sought by the defendant are: a) that the claim be struck out; b) alternatively, that the proceedings be stayed; c) an order directing the parties to proceed to arbitration and d) for costs to the defendant of the application. In support of the application, the defendant also relies on the fact that the claimant had invoked the arbitration clause in the 2019 IMA. It also says that: a) the claim falls within the scope of the arbitration clause; b) it has been filed in breach of that clause; c) arbitration will preserve judicial resources; and d) the parties will not be prejudiced by the orders sought, which are in keeping with the overriding objective and are in the interest of the efficient administration of justice.
- [19]** In her affidavit evidence in support of the application, Ms Peta - Rose Hall ("Ms Hall"), the defendant's Managing Director, recounts the factual background and says that the Akali Plan is in the process of being wound up. She says that by virtue of the 2019 IMA, the claimant was aware that the services provided by the defendant included investments in pooled funds which it oversees. For the performance of its various services, the defendant is entitled to charge fees lawfully incurred. According to her, since the claimant invoked the arbitration clause in the 2019 IMA, and that invocation was accepted by the defendant, the court has no jurisdiction to hear the claim.⁴ Ms Hall further says⁵ that the Alkali Plan is being wound up and winding up has been active since January 2022. According to her, the dispute to be resolved by arbitration is the same as the subject of the present claim. The pooled funds are comprised of a combination of funds. All the money in them does not belong to the claimant. As the defendant had a duty to oversee the funds, it signed the IMAs.
- [20]** In the affidavit of Ms Ewart, filed on behalf of the claimant in response⁶, Ms Ewart says that after the series of communication with the defendant, ending with her letter of January 25, 2024, the claimant retained new counsel, and based on advice received, revised its position. According to her, as of the demand letter of June 11, 2024, the claimant withdrew any indication of its participation in arbitration, because the IMAs (which are the subject of the dispute) , are not agreements between the claimant and the defendant. She

⁴ Affidavit of Peta-Rose Hall filed April 3, 2025

⁵ 2nd Affidavit of Peta-Rose Hall filed July 3, 2025

⁶ Affidavit of Jeanine Ewart filed May 2, 2025

says that the 2019 IMA, and the fees paid under that agreement, are not being challenged, the dispute between the parties does not arise under that agreement, and that agreement does not require interpretation. The IMAs are not agreements between the parties, and the defendant cannot rely on the arbitration clause in those agreements to stay this claim.

[21] Ms Ewart further states that after the demand letter of June 11, 2024, there was a series of correspondence between the claimant's attorneys-at-law and the defendant's attorneys-at-law, including letter dated June 28, 2024, from Samuda & Johnson.

[22] The defendant has delayed in stating its position in relation to the IMAs in writing, and its present application is another attempt to further that delay. The delay will mean that the claimant will be unable to further its claim, and disclosure cannot take place.

Analysis and discussion

[23] Whether the claim should be struck out or stayed, or the dispute referred to arbitration raise the following issues: a) what is the nature of the dispute; b) whether the arbitration agreement confers jurisdiction on an arbitrator to determine the dispute, c) whether the dispute is arbitrable, d) whether the remedies being sought can be granted at arbitration and e) whether the claimant had terminated the arbitration agreement.

[24] A good starting point is the 2017 Act, which is patterned off the UNCITRAL Model Law, said to be the: "single most important statutory instrument in the field of international commercial arbitration"⁷. The Jamaican legislature however, decided to expand the application of the UNCITRAL Model Law to domestic arbitration. In **DCL Castles & Cottages Development Limited v Skyscrapers Builders Limited [2024] JMCC Comm 04**, I described the 2017 Act as "transformative", and went on to say that:

"[15] The Act applies to both domestic and international arbitration and is modelled off the United Nations Commission on International Trade

⁷ Born, **International Arbitration: Law and Practice**, 4th Ed. p81

Law (UNCITRAL) Model Law. Section 5 (e) expressly provides that one of the Act's objectives is to give effect to the UNCITRAL Model Law. Section 3 in defining the UNCITRAL Model Law, states that it was adopted by the United Nations Commission on International Trade Law in 1985 and subsequently amended in 2006. A review of the Act undoubtedly shows that importance is placed on party autonomy and the arbitral process, while there are limits on judicial intervention save for those instances where it is needed to support arbitration agreements and arbitral awards. Section 3(5) (a) of the Act expressly states for example, that parties are free to agree on how a dispute should be resolved, subject to any safeguards that are necessary in the public interest. Section 4(1) provides that in the interpretation of the Act, regard is to be had to its international origin, the need to promote uniformity in its application and the observance of good faith. Section 8, meanwhile, states that in matters governed by the Act no court shall intervene except where so provided in the Act. Helpful assistance in the interpretation and application of the UNCITRAL Model Law from other UNCITRAL Model Law jurisdictions is in my view not only appropriate but is desirable to promote uniformity and consistency in its application."

What is the nature of the dispute?

- [25] The parties are divided on the nature of the dispute. The defendant contends that the dispute relates to the fees it charged the claimant, and is the very same dispute, which is the subject of the claim, and which was outlined in Ms Ewart's October 24, 2023, letter. The claimant on the other hand argues, that the dispute, which is the subject of the claim, is an entirely different dispute. Mr Leiba, counsel for the claimant says that the issue in the claim is about the failure of the defendant to properly perform its fiduciary duties and to comply with its statutory duties, "although colloquially phrased as a fee dispute". According to learned counsel, the 2019 IMA is not before the court, and the fees charged under that agreement are not in dispute. He argues that it was in respect of the breach of that contract, that Ms Ewart's January 25, 2024, letter

was written. The present claim is not one in breach of contract. What is presently in dispute, he argues, is the validity of the IMAs, because they were entered into by the defendant with itself and without the claimant's knowledge or approval. The claim, counsel argues, is one in breach of trust, and breach of statutory and fiduciary duties.

[26] In my view, the claimant's argument is too narrow and is artificial. It was the 2019 IMA which allowed the defendant access to the funds of the Alkali Plan as manager of its investment portfolio⁸, and created the fiduciary relationship between the claimant and the defendant. There could be no allegation of breach of trust, statutory or fiduciary duties, but for this agreement. That agreement expressly states that the defendant was to provide investment, advisory and managerial services: "in relation to a portfolio of investments that will be included in pooled funds" overseen by the defendant.⁹

[27] Ms Ewart's letter of October 24, 2023, requires close examination. In it, she requested a refund of fees paid to the defendant, which were: "in excess of industry standards". She said that the fees paid under the 2019 IMA were not being challenged, but those charged under the IMAs were. As stated earlier, she also said that the claimant was advised that the defendant is in breach of its fiduciary obligations as investment manager. She then went on to question the fee arrangement in the IMAs, described them as being: "highly irregular, and plainly against the best interests of the [Alkali] Plan". She raised doubts about how these IMAs were negotiated, given, what she called, fees that were: "arbitrarily charged". In addition to what she called discretionary fees with: "no performance criteria", Ms Ewart then went on to express the view that "...no independent investment manager would agree to this fee scale given the scope awarded to the fund manager to charge fees that are well above industry norms and that have no discernible correlation to performance". It seems to me, that the claimant had not had prior sight of the IMAs, as Ms Ewart said that: "...the Investor Management Agreement (only recently provided by BPM) has been

⁸ Clause 2 of the Investment Management Agreement dated January 1, 2019

⁹ Ibid

signed by BPM on behalf of itself and the specific funds...”. Miss Ewart made no reference in this letter , to any alleged breach of the 2019 IMA.

[28] There can, in my view, be no serious doubt, that the dispute which this letter sought to convey, concerned the legitimacy of the IMAs; the conduct of the defendant (which, on advice, had been characterised as being in breach of fiduciary duties); the propriety of the fees charged to the Alkali Plan under the IMAs; a request for a refund of fees which were said to be excessive; and the claimant’s apprehension that the defendant was not acting in the best interests of the Alkali Plan. Although clothed in legalese, with breaches of trust and statutory duties now ascribed to the defendant’s conduct, it seems to me, that the dispute in the present claim, and that described in Ms Ewart’s October 24, 2023, letter is indeed the same.

[29] By Ms Ewart’s subsequent January 25, 2024, letter, the claimant referred the dispute to arbitration. She begins this letter by expressly referring to her earlier October 24, 2023, letter, and says that, pursuant to clause 13 of the 2019 IMA, the claimant: “hereby refers the disputes initially detailed in a notification of dispute letter dated October 24, 2023 (which followed correspondence between the parties wherein the Client sought information relating to the said Agreement from the Investment Manager) and more specifically detailed herein”. Notwithstanding this preamble to the letter, Mr Leiba argues that the dispute referred to arbitration by this letter was one based in contract. He says this is evident from Ms Ewart’s reference in it, to the defendant acting in breach of contract. A careful examination of this letter however, does not support this submission.

[30] After referring the dispute to arbitration, Ms Ewart in the second paragraph of her letter, outlined 10 points of dispute. She wrote: -

“The dispute include(sic): -

- The Investment Manager’s agreement to pay an associated company a “performance fee” without reference to the client and without seeking the client’s approval in breach of clause 3.2.7 of the agreement.

- Failure by the Investment Manager to disclose to details of the agreement made with its associated company when requested by the Claimant to do so.
- The Investment Manager's incurring grossly exorbitant "fees" from invested funds, which, for the last twelve years:-

(a) exceeded the income of the fund by an average of over J\$21.2 million and

(b) averaged more than 43.8% of the total returns of the fund (more than 49.1% for the last five years).

- In breach of contract and dereliction of its duty the Investment Manager, having held itself out to have "considerable skill, knowledge and experience" in the field of investment of money, acted on its own advice to unjustly enrich itself or an associated company against the client's best interest;
- The Investment Manager negligently misstated or fraudulently misrepresented to the client whether by wilful omission or deliberate misstatement that the "performance fee" was in the Client's best interests and/or standard practice in the industry;
- The Investment Manager conducted the client's investment portfolio dishonestly in breach of the Agreement and by the deliberate creation of a conflict of interest and duty that caused the value of the client's portfolio to be significantly diminished;

- The Investment Manager deliberately or negligently failed to resolve the conflict of duty and interest in the client's favour;
- The Investment Manager unjustly enriched itself;
- The Investment Manager aggravated the damage to the client by refusing to disclose information that would assist the client to hold the Investment Manager accountable and continuing the fraudulent misrepresentation and unjust enrichment , because of the level of profit being earned by the Investment Manager or its associated company trusting that this profit would likely exceed any amount of damages the Investment Manager might eventually be ordered to pay, despite knowing that its actions were unlawful;
- The Investment Manager failed to act in good faith and/or in the interest of the client.”

[31] Save for the dispute at the first bullet point, all the other bullet points, refer generally to allegations of either breach of fiduciary duties, conflicts of interest, fraudulent misrepresentation or unjust enrichment, all of which are, *stricto sensu*, non - contractual. In other words, all these alleged breaches fall outside the “four corners” of the 2019 IMA. But it is the legal relationship between the claimant and the defendant, created by that agreement, which gives rise to the allegations. Although the first bullet point refers to clause 3.2.7 of the 2019 IMA (which, with certain restrictions, provides for the defendant to delegate its obligations), substantively, the allegations in this bullet point are concerned with whether the defendant placed itself in a potential conflict of interest without first seeking the consent of the claimant, and whether the claimant knowingly agreed to the performance fees which the defendant paid itself under the IMAs. There is no question, that these allegations are part and parcel of the broader issue the claimant raises, relating to alleged breaches by the defendant of trust, fiduciary duties, unjust enrichment and conflict of interest.

[32] Although the fourth and sixth bullet points, may at first blush, give the impression that the allegations made are based in contract, a closer examination reveals otherwise. They concern allegations that the defendant, by virtue of the IMAs, placed itself in a position where its duty to the claimant conflicted with its own financial interests, failed to obtain the claimant's knowing consent for the IMAs, failed to make proper disclosures to the claimant, and unjustly enriched itself, resulting in the Alkali Funds being significantly diminished. Bullet points two, three, five and seven, through to ten, aggregately raise these very same issues, while adding, fraudulent misrepresentation and a failure to act in good faith. Bullet point nine, sets out the basis for aggravated damages.

[33] Mr Leiba stresses in his submissions, that the claim challenges the IMAs, and this did not form a part of the dispute prior to the commencement of these proceedings. I disagree with him. As I earlier observed, Ms Ewart's October 24, 2023, letter, raised issues about the soundness and legitimacy of the IMAs. In its claim, the claimant now seeks a declaration that these IMAs are void and that they be set aside.

[34] For all the foregoing reasons, I find, that substantively, the dispute outlined by Ms Ewart's letter of January 25, 2024, is not based in contract, and is the very same dispute raised in the earlier October 24, 2023, letter, which forms the basis of the present claim. What the claim does is to transform these allegations into pleadings and to aver that the alleged conduct of the defendant, amount to breaches of trust, statutory and fiduciary duties

Whether the arbitration agreement confers jurisdiction on an arbitrator to determine the dispute

[35] Miss Francis argues on behalf of the defendant, that the claimant had invoked the arbitration clause in respect of non-contractual claims, and that the issues raised by the challenged IMAs, fall within that clause. Mr Leiba disagrees. He argues that the premise of arbitration is to settle disputes that fall within the "four corners" of the contract between the parties. The interpretation of statutes, or legal duties, including fiduciary duties are not the proper subject of

arbitration. Furthermore, he argues, the relief sought in the claim are declaratory, and declarations cannot be granted in arbitration.

- [36] At the very outset, it is important to make the point that section 10 (1) of the 2017 Act provides, that an arbitration agreement may take the form of a clause in a contract or may be in the form of a separate agreement. The section is adopted from article 7 of the UNCITRAL Model. In ***UNCITRAL Model Law on International Commercial Arbitration: A commentary***, Ilias Bantekas et al, (2020), provide this analysis of article 7: -

“Although the arbitration clause is included in a contract, it is a separate and independent agreement, related to but independent from the contract in which it is contained. This basic concept of arbitration is usually referred to as “separability”. One particularly important consequence of the doctrine of separability is that even if the contract containing an arbitration agreement is found to be null and void, the arbitration clause can survive, assuming it is not itself null or void, it may validly trigger arbitral proceedings.”

- [37] Section 3 of the 2017 Act defines an arbitration agreement: -

““arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not”

This exact definition, which is the first sentence of article 7(1) of the UNCITRAL Model Law, in my view, removes any doubt that arbitration under the 2017 Act is not confined to disputes arising in contract. Commenting on article 7(1), *Ilias Bantekas et al* (supra), make the point at paragraph 2.4: -

“While article 7(1) of the Model Law is broad, it also makes clear that arbitration agreements cannot be entirely unlimited in scope. Specifically, an arbitration clause must concern ‘all or certain disputes that have arisen or which may arise between them in respect of a defined legal relationship’. Importantly, while there clearly must be a

contractual relationship between the parties, at least in the form of the arbitration agreement itself, the Model Law imposes no requirement that the dispute being submitted to arbitration must itself arise from a contractual relationship. Rather, so long as the relationship is 'legal', the requirements of article 7(1) in this respect are satisfied. Consequently, disputes regarding tort, or other non-contractual legal claims may also be submitted to arbitration under the Model Law."

[38] In the present case, the arbitration agreement is clause 13 of the 2019 IMA. It reads: -

"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including without limitation, its formation, validity, binding effect, interpretation, performance, breach of termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the Jamaican Arbitration Rules. The arbitral tribunal shall consist of [three arbitrators] [a sole arbitrator]. The place of arbitration shall be [specify place] The language to be used in the arbitral proceedings shall be English. The dispute, controversy or claim shall be decided in accordance with the law of Jamaica."

[39] The language used in this arbitration agreement is broad. It expressly includes noncontractual claims. This means that it covers not only disputes which directly arise from the parties' contractual relationship, but also those which do not. Therefore, disputes relating to, for example, the conduct of one party while performing its contractual obligations (including tort, claims for breach of fiduciary and statutory duties), fall squarely within its scope. I am accordingly satisfied, that in this matter, all the noncontractual claims of breach of fiduciary duties, breach of statutory duties, breach of trust, and unjust enrichment, are covered by the arbitration agreement. I find therefore that the arbitration agreement does confer jurisdiction on an arbitrator or arbitrators, if more than one, to determine the dispute.

[40] The intention behind broadly drafted arbitration agreements, is to ensure that all possible disputes related to the transaction in question, are resolved by arbitration¹⁰. Born, *International Arbitration Law and Practice 4th Ed.*, at page 106, says, that a broadly drafted arbitration agreement:

“...avoids the expense arising from parallel proceedings, where certain contractual disputes are arbitrated and other contractual, or noncontractual disputes are litigated. It also avoids the uncertainties resulting from potentially inconsistent decisions and jurisdictional disputes over the scope of the various proceedings.”

[41] Born (supra),¹¹ observes, that the effect of a valid arbitration agreement is that it places an obligation on the parties to participate in arbitration in good faith pursuant to the arbitration agreement, while also placing an obligation not to pursue litigation in court. He writes that:

“In agreeing to arbitrate, the parties do not merely negatively waive their access to judicial remedies, but also affirmatively agree to participate in the resolution of their disputes through the arbitral process. This positive obligation to participate cooperatively in a mutually established, adjudicative dispute resolution process is central to the arbitration agreement”.¹²

I believe that this obligation is given statutory force in the definition of an arbitration agreement, in section 3 of the 2017 Act, which was referred to earlier.

Whether the dispute is arbitrable

[42] Arbitrability is concerned with whether the dispute between parties is capable of settlement by arbitration. The question is not about what the parties agreed, but rather, it is whether the law governing the proceedings, have placed restrictions on the types of matters that can be the subject of arbitration.¹³ This

¹⁰ UNCITRAL Model Law on International Commercial Arbitration: A commentary, page 127

¹¹ Born, *International Arbitration Law and Practice 4th Ed.*, P 171

¹² Ibid p 172

¹³ Ibid p 891

is an instance under the UNCITRAL Model Law regime, where there are limitations on party autonomy in arbitration. The UNCITRAL Model Law does not however, set out what disputes are not arbitrable. This is left to national laws to determine. In Jamaica, under section 55(2)(b)(i) of the 2017 Act, the court can set aside an arbitral award where the dispute is not capable of settlement by arbitration under Jamaican law. Notably, section 55(2)(b)(ii), provides that an arbitral award can be set aside if it conflicts with public policy in Jamaica. Mr Leiba argues that the dispute between the parties cannot be resolved by arbitration. He has, however, not given any reasons or cited any legal authority to support this argument. I could find no decided case from our jurisdiction on the point.

[43] The following extract from *Born* (supra)¹⁴, is helpful: -

“The types of disputes that are nonarbitrable differ from nation to nation. In general, disputes or claims are deemed “nonarbitrable” because of their public importance or a perceived need for judicial protection. Among other things, various nations refuse to permit arbitration of at least some disputes concerning criminal law, labour grievances, intellectual property, real estate, bankruptcy and domestic relations.

The nonarbitrability doctrine was frequently invoked during the 20th century. National courts concluded that a variety of claims were nonarbitrable, applying expansive, sometimes ill-defined conceptions of public policy. More recently, courts in most developed jurisdictions have materially narrowed the nonarbitrable doctrine, typically applying it only where statutory provisions expressly require doing so.”

Born, then goes on to summarise those types of claims which are generally treated as nonarbitrable. They are: - a) competition and antitrust claims, b) claims arising from securities regulations; c) bankruptcy cases, d) cases involving labour and employment contracts and e) consumer disputes.

¹⁴ Ibid p223

- [44] I have carefully reviewed **The Pensions (Superannuation Funds and Retirement Schemes) (Governance) Regulations 2006**, **The Pensions (Superannuation Funds and Retirement Schemes) Act**, and **The Pensions (Superannuation Funds and Retirement Schemes) (Investment) Regulations**. The specific provisions in these statutes which the claimant alleges the defendant has breached (earlier referred to in this judgment), deal, in summary with the duties of trustees, agents of trustees and investment managers to ; a) avoid and properly manage conflicts of interest; b) adequately disclose a conflict or potential conflict of interest and remuneration arrangements; c) not use the position of trustee to further their own interest; d) obtain written consent for a conflict or potential conflict after full disclosure is made; e) deal fairly with clients with conflicting interests; f) exercise the required skill, diligence and judgment; g) provide regular, timely and complete information and reports; and h) not misrepresent and conceal material facts.
- [45] I see nothing in any of these statutes, which demonstrates that Parliament intended to place any restrictions on arbitration being used to resolve disputes relating to alleged breaches of these duties. I see nothing granting the court exclusive jurisdiction, or which prescribes a mandatory statutory procedure inconsistent with arbitration, for the determination of the dispute in question.¹⁵ There is also nothing in these statutes which leads me to the view, that a dispute in relation to the pleaded breaches is incapable of resolution by arbitration. The present dispute raises no public policy issues. Neither is it of public importance nor, in my view, does it raise matters that require judicial protection. In the result, I find that the dispute is indeed arbitrable.
- [46] Although the facts are entirely different from the current facts, the Singapore Court of Appeal's decision in **CNA v CNB [2024] SGCA (1)(2)**, is worth mentioning for the limited purpose of demonstrating that a dispute involving an alleged breach of fiduciary duties may be capable of arbitral determination. The dispute related to rights arising from the licensing and exploitation of an online computer game. The appellant held certain licensing rights on its own behalf as

¹⁵ Sections 15 -17 of The Pensions (Superannuation Funds and Retirement Schemes) Regulations 2006, provide a complaint framework, but this is not relevant to the matters in this case.

well as jointly with the respondents. The respondents argued that the appellant owed them fiduciary duties as their agent, failed to consult them before extending the licence to a third party, and acted contrary to their joint interests without consulting them. Pursuant to an arbitration agreement, the dispute went to arbitration. The tribunal found, among other things, that it had the jurisdiction to determine the dispute, that the appellant owed the respondent fiduciary duties, and had breached those duties as well as the duty to consult in entering into an agreement to extend the licence. It accordingly found that the agreement extending the licence was voidable and did not bind the respondents. The appellant sought to set aside the award; but the Singapore International Commercial Court dismissed the application. Its decision was upheld by the Singapore Court of Appeal.

- [47] Singapore, like Jamaica, is an UNCITRAL Model Law jurisdiction. While the case did not involve alleged breaches of statutory duties, and the court did not examine any statute to determine whether there was any restriction on arbitration, the decision shows that in an UNCITRAL Model Law jurisdiction, an arbitral tribunal may determine equitable claims. It also shows that fiduciary obligations can be arbitrable, that an arbitral tribunal may determine whether a fiduciary duty exists, whether that duty has been breached, and may grant relief affecting the validity and enforceability of the transaction brought about by the breach.

Whether the remedies being sought can be granted at arbitration

- [48] The remedies being sought in the claim are in the main, declaratory. Neither the UNCITRAL Model Law nor the 2017 Act prescribe the types of remedies which may or may not be granted at arbitration. Mr Leiba in his oral submissions, argues that declarations cannot be granted at arbitration. No reasons were given, or authority cited for this proposition. I do not however, accept this as an accurate statement of the law, particularly in relation to UNCITRAL Model Law jurisdictions.

- [49] In **Electra Air Conditioning BV v Seeley International Pty Ltd., ACN 054 687 035 (2008) FCAFC 169**, a decision of the Federal Court of Australia¹⁶, the court had to consider whether a provision in an arbitration agreement which allowed the parties to seek injunctive or declaratory relief in the event of a material breach of contract, meant, that these remedies were only available from the court and not from an arbitrator. In that case the respondent brought proceedings against the appellant, seeking declarations in relation to the appellant's obligations under a contract between them. Alternatively, the respondent sought declarations that the appellant had engaged in conduct which was misleading or deceptive or likely to mislead or deceive, in breach of the Trade Practices Act. The respondent also sought summary judgment against the appellant, while the appellant sought a stay of the proceedings, pending arbitration, under the relevant arbitration legislation. At first instance, the court refused the appellant's application for a stay, and held that it was only a court, that could grant declarations.
- [50] On appeal, the Federal Court of Australia, accepted the appellant's submission that in interpreting an arbitration clause, the starting point is the presumption that the parties would have intended that all disputes arising out of the contractual relationship would be decided by the same tribunal. The court however found that on the facts, the presumption was rebutted as on a true construction of the arbitration clause, the parties had intended that either party was free to apply to the court for a declaration or an injunction. However, citing article 17 of the UNCITRAL Model Law (from which sections 20(1) and 25(2) of the 2017 Act is patterned), which provides that unless the parties agree otherwise, at the request of a party, the arbitral tribunal may grant such interim measures as it considers necessary, the court at paragraph 44, expressed the view that an arbitrator has the power, to grant declarations and injunctions.
- [51] The Supreme Court of Victoria Court of Appeal, in **AED Oil Ltd v Puffin FPSO Ltd [2010] VSCA 37**, had before it, a clause in an arbitration agreement similar to that in the arbitration agreement in **Electra**. Although it appears to have been common ground between the parties, that arbitral tribunals can make

¹⁶ Australia is an UNCITRAL Model Law jurisdiction

declaratory awards, one of the issues the court had to grapple with was whether an *interim* declaration awarded by an arbitral tribunal, was enforceable by the court. In paragraph 20, the court said this:

“There is Australian authority which supports the proposition that declaratory awards made by arbitrators are enforceable. In **Electra Air Conditioning BV v Seeley International Pty Ltd**, the Full Court of the Federal Court said:

‘It may be assumed that an arbitrator can make an award which contains injunctive or declaratory relief provided that the arbitration agreement signed by the parties gives the arbitrator that power ...

We think the Model Law gives an arbitrator appointed under that law power to make an order in the nature of an injunction and, if necessary, a declaration.’”

[52] At page 675, *Born* (supra), writes in respect of arbitrators’ remedial authority, within the context of international arbitration, but, given the expansion in Jamaica of the UNCITRAL Model Law to domestic arbitration, his comments are, in my view applicable to arbitration in our jurisdiction. He says this:

“The remedial powers of an international arbitral tribunal are defined in the first instance by the arbitration agreement. This is an element of the parties’ general autonomy with respect to the arbitrator’s jurisdiction and arbitral procedures. In principle, parties should be free to confer authority on the arbitrators to grant any form of civil remedy calculated to resolve their dispute.

Under most arbitration regimes, arbitrators have broad discretion in fashioning relief. Indeed, it is frequently said that “arbitrators have broad discretion in fashioning remedies and may grant equitable relief that a Court could not”. These views reflect judicial deference to the arbitrators’ commercial expertise, which is considered peculiarly well-suited to fashioning workable remedies as well as the discretion which

is granted to first instance courts in remedial matters in many legal systems. These views also accord with commercial parties' presumptive intentions, being to grant to the arbitrators the power to fully resolve their dispute in a practical manner."

[53] He goes on to state at page 677 that: -

"International arbitration conventions and national arbitration statutes are generally silent on the tribunal's authority to order injunctive or declaratory relief. Nonetheless, national courts have repeatedly upheld awards that order injunctive or declaratory relief if the parties' agreement or institutional rules that it incorporates provide such authority"

[54] England is not a Model Law jurisdiction. Its Arbitration Act 1996, by section 48(3), however, expressly confers on arbitral tribunals, the power to grant declarations. Although, the 2017 Act does not have a provision like section 48(3) of the English Act, there is nothing in it which prohibits arbitrators granting declaratory relief. Jamaica is an UNCITRAL Model Law jurisdiction, and there is, in my view, persuasive UNCITRAL Model law authority to support the view that arbitrators under the Model Law, have the power to grant declaratory relief.

[55] I accept the presumption that parties, by agreeing to arbitrate, intend the arbitral tribunal to have the authority to fully determine their disputes, unless that authority is expressly limited by agreement. I have found that the arbitration agreement confers jurisdiction over this dispute and that the dispute is arbitrable. This means that the arbitrator (s) appointed by the parties, have the authority to determine the parties' rights, in relation, among other things, to: a) whether fiduciary and statutory duties exist by virtue of the defendant's role as investment manager, agent of trustees and pension manager/administrator, b) whether those duties were breached , c) whether the defendant unjustly enriched itself through the IMAs, d) whether the IMAs are void and should be set aside¹⁷, e) whether money paid to the defendant as fees ought to be repaid

¹⁷ It is recalled that in **CAN v CNB**, the Singapore Court of Appeal did not set aside an arbitral award which included a determination that an agreement was voidable and therefore did not bind the respondent.

to the claimant, and f) whether the defendant ought to provide an account of its management of the Alkali Plan over the years.

[56] Declarations are declaratory of rights¹⁸. Put differently, they are a formal statement of parties' rights. Therefore, since the arbitration agreement in this case, confers on the arbitrators appointed by the parties, the jurisdiction to determine the rights in issue, and since the 2017 Act does not provide any legislative bar to the exercise of that jurisdiction, I see no reason why the arbitrator or arbitrators appointed by the parties would not have the power to grant the declaratory relief being sought in this claim. I accordingly find that the remedies, including the declarations being sought in the claim, can be granted at arbitration.

Whether the claimant had terminated the arbitration agreement

[57] The claimant argues that if the court finds that the pre litigation dispute is the same dispute as the litigation dispute, the filing of the claim, was an irrevocable waiver of its right to arbitration or, its election not to pursue arbitration. Accordingly, the argument goes, there is no existing arbitration agreement between the parties in respect of the matters the subject of the dispute. In the alternative, the claimant submits, relying on the decision in **Sabal Ph 1200 Limited v GM and Associates Limited [2020] JMCA Civ 43**, that in continuing to communicate with the defendant, pursuant to the demand letter of June 11, 2024 (by which it withdraw its invocation to arbitrate), the defendant accepted the claimant's withdrawal or election not to pursue arbitration.

[58] Having found that the prelitigation and the litigation disputes are the same, I must now turn to the question whether the claim filed by the claimant amounted to a waiver by election of arbitration.

[59] The principle of election operates where a party is entitled to inconsistent rights, whether arising from contract or by operation of law, and knowingly acts in a manner which indicates that he has chosen one right over the other. (See for example judgment of Lord Leggatt in **Delta Petroleum (Caribbean) Ltd v**

¹⁸ **Gouriet v Union of Post Office Workers & Others** [1977] 3 AER 70 per Lord Diplock

British Virgin Islands Electricity Corporation [2020] UKPC 23). As I understand the claimant's argument, by filing the instant claim and electing to waive arbitration, it terminated the arbitration agreement.

[60] Section 36 of the 2017 Act provides that arbitration begins when a notice of referral is received by the other party. As there is no evidence of the date the claimant's letter of January 25, 2024 (referring the dispute to arbitration), was received by the defendant, somewhere between that date, and Samuda & Johnson's response of February 8, 2024, arbitration began. Having agreed to arbitrate, acknowledged that a dispute had arisen, invoked the arbitration clause, identified its nominated arbitrator and commenced arbitration, it seems to me, that to then file the present lawsuit, was inconsistent conduct on the claimant's part. However, in the context of arbitration, there is a consequence that flows, from acting inconsistent with the contractual obligation to take disputes to arbitration. The present arbitration agreement does not give the claimant the contractual right to pursue litigation to settle the dispute, after having commenced arbitration. I therefore hardly see how the claimant could have truly made a genuine election, arising from contract, to litigate rather than to arbitrate. Moreover, the circumstances of the case do not lend themselves to the claimant being entitled to any such right by operation of law. Counsel did not argue otherwise. On what basis then, is the claimant arguing that by filing a lawsuit, instead of continuing with arbitration, the mutually agreed arbitration agreement came to an end? I can see none, and none was suggested by the claimant.

[61] By filing suit, it seems to me that the claimant committed a repudiatory breach of the arbitration agreement. It is if that repudiation were accepted by the defendant, that the arbitration agreement would come to an end. That was how the court of appeal framed the respondent's conduct in **Sabal**.

[62] In **Sabal**, a contractor invoked arbitration after an adjudicator's decision. However, before taking steps towards arbitration, the contractor filed a claim in court, against the employer. The underlying construction contract provided for disputes to be resolved firstly, by adjudication and secondly, by arbitration. The adjudicator had ruled in favour of the employer. In the claim, the contractor

sought the determination of the same issues which had led to it being aggrieved by the adjudicator's decision. In response to the claim, the employer filed a defence and counterclaim. When the matter came before Batts J at first instance, the contractor withdrew the claim (after obtaining clarification on the adjudicator's award) and sought instead to pursue arbitration. For its part, the employer applied for judgment on the counterclaim. Batts J ordered, among other things, that the claim be withdrawn, and he stayed the counterclaim pending arbitration. In doing so, he found that the contractor had not made a genuine election to proceed to litigation, due to a misunderstanding of the adjudicator's decision. The court of appeal however disagreed.

- [63] Writing for the court, Morrison P said that the contractor was not confused as to which course to pursue, and by proceeding to litigation, its conduct: "...evinced a clear intention to repudiate the arbitration agreement". The court went on to say that although an application to stay the claim under section 11 of the 2017 Act was open to the employer, instead it unequivocally accepted the contractor's repudiation by filing a defence and counterclaim. According to the court¹⁹:

"The contractor must therefore be taken to have abandoned the remedy of arbitration in favour of court proceedings. In making an order staying the court proceedings pending arbitration, therefore, the judge exercised a jurisdiction which it was no longer open to him to exercise on the facts of the case."

- [64] In coming to its decision, that filing a lawsuit amounted to a repudiation of the contract in **Sabal**, the court said:

"[66] The following extract from Russell on Arbitration [23rd ed, para.2-111-2-112] also makes it clear that depending on the circumstances of the case, a party to an arbitration agreement may be taken to have repudiated it by commencing court proceedings:

¹⁹ Para 70

“Express or implied repudiation. A party may repudiate the arbitration agreement and if the other party accepts that repudiation the arbitration agreement will come to an end. The repudiation may be express or may be inferred from the conduct of a party who acts in a way that is inconsistent with the continued operation of the arbitration clause and evinces an intention not to be bound by it. However, a failure to comply with the general duty to do all things necessary for the proper and expeditious conduct of the arbitral proceedings is not a repudiation of the arbitration agreement. The repudiation may be by anticipatory breach of the arbitration agreement. Acceptance of the repudiation may be demonstrated by the commencement of proceedings in court.

Repudiation by commencing proceedings. A party may repudiate the arbitration agreement by commencement of proceedings in court in breach of its terms, but such breach will only be repudiatory if done in circumstances that show the party in question no longer intends to be bound by the agreement to arbitrate. Such an intention can only be inferred from conduct which is clear and unequivocal. If there was some reason for the breach, such as confusion as to the correct course, the court will not infer that the party bringing proceedings intended to renounce the obligation to arbitrate.”

[67] The authorities therefore confirm that, where a party to an arbitration agreement commences court proceedings in breach of the agreement, the other party may apply for a stay of proceedings pursuant to section 11(1) of the 2017 Act; and once the preconditions to the grant of a stay set out in section 11(1) are satisfied, the judge will be obliged to grant the stay...”

[65] In the present case, there is nothing on the facts which leads me to conclude that the claimant by filing the claim did not demonstrate an intention no longer to be bound by the arbitration agreement. No reason has been given by the claimant for the breach of the arbitration agreement. There is no evidence of

confusion, on the claimant's part, between court proceedings and arbitration. The issue whether the claimant had waived arbitration by election, on the filing of the claim, was raised as an **alternative** to the claimant's primary argument that the dispute, the subject of the litigation is not arbitrable and is not the same dispute as the pre litigation dispute. These were not offered by the claimant as the reasons for the breach.

[66] In the result, I find that there was no termination of the arbitration agreement by the claimant's decision to file the present claim. I find however that by commencing the present claim, the claimant unequivocally repudiated the arbitration agreement. But unlike the employer in **Sabal**, the defendant did not accept that repudiation. Instead, it filed the current application seeking to stay the claim, pending arbitration, or to strike it out.

[67] Interestingly, it is its submission, made in the alternative to that on waiver by election, that the claimant relies on to argue, that it repudiated the arbitration agreement. In doing so, it cites **Sabal**. The argument is that by virtue of the demand letter of June 11, 2024, the claimant repudiated the agreement to arbitrate, and that repudiation was accepted by the defendant subsequently engaging in communication with the claimant, on the letter's contents.

[68] Based on the legal principles stated in the extract from Russell on Arbitration, which the Court of Appeal in **Sabal** relied on, the first question to ask, in relation to this alternative submission, is whether it can be inferred from the demand letter, that the claimant no longer intended to be bound by the arbitration agreement. The demand letter, as earlier outlined, sets out the background facts, the amount of compensation being demanded, and ended with the following statement:

“If no response, or no positive response is received within seven days of the date of this letter, we will take all necessary legal steps to recover compensation.”

[69] In my view this demand letter does not clearly and unequivocally communicate that the claimant no longer intends to be bound by the arbitration agreement. Arbitration had already begun, consequent on the claimant's letter of January

25, 2024. The claimant's request for compensation was not inconsistent with continuing arbitration. Arbitration is a legal dispute resolution process, and so, when it is stated in this letter, that a failure to respond within seven days, would lead to the claimant "[taking] all necessary legal steps to recover compensation", the steps referred to, could well include, steps towards the continuation of arbitration. In its submissions, the claimant argues that this letter was an indication of its "withdrawal of its invocation to arbitrate." I cannot agree with this characterization of the letter.

[70] I find, therefore, that the demand letter was not a repudiation of the arbitration agreement. In any event, the defendant's response to this letter can hardly be said to be an acceptance of the claimant's repudiation. Samuda & Johnson's June 28, 2024, letter, merely said instructions were being sought, and it ended with language typical of counsel seeking time to obtain instructions in order to provide a substantive response. Samuda & Johnson's later July 22, 2024, letter makes the point even stronger. In this letter, counsel expressed the view that the referral needed to be completed. There is no evidence that any other communication between the parties with a view to the resolution of the dispute, amounted to the defendant accepting any repudiatory conduct on the part of the claimant.

Should the dispute be referred to arbitration or the claim be struck out?

[71] In its notice of application, the defendant seeks to have the claim struck out or stayed. It also seeks an order that the court direct the parties to proceed to arbitration. For the granting of a stay, the defendant relies in its notice of application on section 5 of the 1900 Act. As stated earlier, Miss Francis in her oral submissions, acknowledged that the 1900 Act was repealed and said that the reference to that legislation was an error. Mr Leiba argued that the old legislation was used in the application and said, that on that basis alone, the court should refuse the application. In my view however, it is plain that by its application, the defendant is seeking a stay of these court proceedings in favour of arbitration. It is equally plain, and accepted by both sides, that the 1900 Act has been repealed since 2017 and replaced by the 2017 Act. I accept counsel's assertion, made to the court, that the reference in the application to section 5

of the repealed legislation as the source of the court's power to grant a stay, was an error. The relief being sought is unmistakeable. The claimant has not said it was misled and thereby prejudiced by the error.

[72] Section 5 of the 1900 Act allowed a party to an arbitration agreement, to apply to the court to stay proceedings pending arbitration, where the other party to the agreement had commenced legal proceedings. The application had to be made after entering an appearance but before filing a defence or taking any other steps in the proceedings. As observed earlier, the court under that provision had a discretion whether to grant the stay.

[73] Section 11 (1) of the 2017 Act is different. An application for a stay under this provision does not give the court a discretion, instead the provision is in mandatory terms. The section provides that: -

“A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”

[74] The material difference between these two provisions was acknowledged by the Court of Appeal in **Sabal**. The court observed the mandatory nature of section 11(1) of the 2017 Act at paragraphs 54 : -

“[54] ...The position under the 2017 Act is therefore that, on an application for a stay made by a party to an arbitration agreement in respect of which action has been commenced “not later than when submitting his first statement on the substance of the dispute”, the court “**shall**...refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”

In paragraph 55 the court continued: -

“[55] The paradigm case of an application for a stay of court proceedings in favour of arbitration, whether under section 11 or any of its statutory precursors, is one in which a party to an arbitration agreement files action against another party without reference to the agreement. It is in such a case that the other party, usually the defendant, will make an application to stay the action pending arbitration, the governing principle being that, as far as possible the parties’ choice of an alternative method of settling disputes between them should be respected.”

- [75] The claimant in its submissions argues, that there is no arbitration agreement between itself and the defendant under the IMAs and therefore section 11 of the 2017 Act is inapplicable. It seems to me, that this argument is only relevant if the pre litigation dispute and the litigation dispute are not the same. I have found that they are the same dispute, and that the arbitration was begun by the claimant under the arbitration clause in the 2019 IMA.
- [76] The claimant’s further challenge to the defendant’s application is the IMAs. The argument is that since the IMAs, which are the subject of the claim, are illegal and void by operation of law, they fall within the disqualifying factors in section 11(1) of the 2017 Act, and therefore the court ought not to refer the parties to arbitration. I do not accept this argument. Firstly, whether the IMAs are illegal, null and void is to be determined on the resolution of the dispute. Secondly, the disqualifying factors in section 11(1) of the 2017 Act refer to the arbitration agreement, not the underlying contract. In other words, it is **if the arbitration agreement** is found by the court to be null and void, inoperative or incapable of performance, that the court may decline to refer the parties to arbitration. I do not find that the arbitration agreement between the claimant and the defendant in this case, suffers such a fate.
- [77] Section 11 (1) is adopted from article 8(1) of the UNCITRAL Model Law. *Ilias Bantekas et al* (supra), commenting on the article, said in respect of this article that:

“...in [the court’s] review of the application for referral, it may assess whether the **arbitration agreement** on which the respondent is relying is null and void, inoperable or incapable of being performed as well as whether it exists in the first place. [Emphasis added]

Furthermore, given the separability principle referred to earlier, even if the underlying contract is found to be illegal, that does not affect the legality of an arbitration agreement which is itself legal.

[78] In its written submissions, the claimant also cites Batts J’s decision in **Neville L. Daley & Co v H & H Ventures Limited [2022] JMCC Comm 7**, and makes the following argument: -

“Indeed, a valid arbitration agreement by way of an arbitration clause must be a contract between the parties: see **Neville L. Daley & Co v H & H Ventures Limited [2022] JMCC Comm 7**, wherein Batts J refused to strike out, stay or refer the parties to arbitration in the face of an existing arbitration agreement, on the basis that neither party made a section 11 request to the Court. We commend this dictum and submit that this Honourable Court with less favourable facts before it, ought to similarly refuse the Defendant’s Application ...”.

[79] I do not find this authority helpful. The dispute between the parties in that case surrounded alleged non-payment of money under a construction contract which contained an arbitration clause. The claimant filed a claim in court with respect to the alleged non-payment, and the defendant applied to strike it out. The defendant also sought a declaration that the court had no jurisdiction to try the claim. In support of the application reliance was placed on section 5 of the 2017 Arbitration Act which sets out as one of the Acts objectives, the facilitation of the use of arbitration agreements. Neither party made an application under section 11. At the start of the proceedings, the court suggested to the parties that the claim be stayed pending arbitration. The defendant rejected that suggestion on the basis that under the arbitration agreement, the court had no jurisdiction to make such an order. The defendant argued that it did not want a stay of proceedings pending arbitration, and that arbitration was no longer

available to the parties given the timeline for a referral under the arbitration agreement. Both parties had decided ultimately to terminate the agreement. The defendant's case was that the arbitration agreement made arbitration mandatory, the claimant did not pursue arbitration, it was now out of time to do so, and having not made a section 11 application, the claim ought to be struck out.

- [80] In rejecting that argument, the court found that there was nothing in the arbitration agreement which precluded a resort to litigation, after the contract had been terminated. The fact that arbitration was not pursued did not mean that litigation could not. It is not accurate to say that Batts J refused to refer the parties to arbitration, on the basis that there was no application for a referral. As I understand the judgment, the court refused to strike out the claim, which was the application being sought, because it reasoned that there was no justification for doing so, independent of an application under section 11.
- [81] In the case before me, there is an application by the defendant for the claim to be struck out or stayed pending arbitration. I have accepted counsel's assertion that the reference in the notice of application to section 5 of the 1900 Act was an error and that the application is based on the 2017 Act. The defendant has not taken any steps in the claim prior to making the present application. I find the arbitration agreement to be valid, and I have found that the dispute is arbitrable.
- [82] The remedies generally available to a party applying under article 8(1) of UNCITRAL Model Law, is discussed by *Ilias Bantekas et al* (supra):²⁰

“Traditionally, four types of remedies are available to parties seeking referral of a dispute to arbitration from the court seised. First, they may request a stay or dismissal of the judicial proceedings. Second, they may request another court to issue an anti-suit injunction. Third, they may seek indemnity to recover costs or other harm caused by litigation. Finally, they may request that the judgment issued by the court in

contravention of the parties' arbitration clause not be recognised or enforced."

[83] *Born (supra)* expresses similar views. He writes that:²¹

"A party's commencement of litigation claims that are subject to an arbitration agreement, is therefore a breach of that agreement and, in particular its negative obligations. The breach, like other violations of contractual obligations, entitles the nonbreaching party to relief, including specific enforcement through a stay or dismissal of the litigation, and exposes the breaching party to contractual liability or injunctive and other remedies."

[84] He goes on to write that jurisdictions that adhere to the UNCITRAL Model Law typically never enforce arbitration agreements by **directing** that parties proceed to arbitration, instead, ²²:

"...the consistent approach is to dismiss or stay (i.e. suspend) litigation brought in breach of an agreement to arbitrate."

[85] Born also writes that in the past, courts tended to refuse to grant stays of litigation, but that in modern times:

"... the principal contemporary remedies for breach of an arbitration agreement's negative obligation not to litigate arbitrable disputes are either dismissal of the improperly commenced litigation or a mandatory stay of that litigation."

[86] Jamaica is an UNCITRAL Model Law jurisdiction. I remind myself of the statutory directive in section 4 of the 2017 Act, that in its interpretation, regard is to be had to its origins and the need to promote uniformity in its application. Having regard to my foregoing findings, and the circumstances of this case , which lead to the statutory imperative of section 11 of the 2017 Act, to refer the parties to arbitration, I will order that these proceedings be stayed, pending

²¹ Born, *Ibid*, page 178

²² *Ibid* page 176

arbitration. I will make such an order instead of striking out the claim, in the event, for example, that there are any issues which arise in the arbitration process which may remain for judicial determination after the completion of arbitration.

[87] In the result, I make the following orders.

- i. The proceedings herein are stayed pending arbitration.
- ii. Costs to the defendant to be agreed or taxed.
- iii. Leave to appeal granted to the claimant.

A Jarrett

Puisne Judge