

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. **CV2015-02852**

BETWEEN

**Cortez Subsea Ltd**

Claimant

AND

**Offshore Technology Solution Ltd**

Defendant

Before the **Honourable Madame Justice Mira Dean-Armorer**

Appearances:

Mr. Anand Singh instructed by Ms. Nisha Persad, attorneys-at-law for the Claimant

Ms. Sushma Gopseesingh instructed by Anthony Cherry & Co, attorneys-at-law for the Defendant

**JUDGMENT**

***Introduction***

1. The Claimant was a limited liability company involved in the business of offshore subsea inspections, while the Defendant was a limited liability company incorporated in Trinidad and Tobago.
2. By these proceedings the Claimant sought to recover monies, allegedly owed to it by the Defendant for the provision of engineering services.
3. No issues of law arose in these proceedings, which were therefore determined essentially on the evidence.

## ***The Pleadings***

4. These proceedings were instituted by a Claim Form accompanied by a statement of Case, both filed on the August 18, 2015. The Claimant alleged that it was a limited liability company engaged in the business of Subsea inspection and engineering works and that the Defendant was the Claimant's client.
5. The Claimant contended that during the period April, 2013 and July 2015, the Defendant contracted the Claimant to perform certain subsea inspection and engineering works relative to three projects: BHP, Petrotrin and Trinmar.
6. The Claimant further alleged that it incurred cost in preparing a remotely operated vehicle: a Saab Panther, which was provided by the Defendant to the Claimant for use on a sub-sea inspection project in Northern Europe.
7. The Claimant contended that the Defendant entered into a hire agreement with the Claimant for hire of equipment, being a reeling unit and pipe straightener unit.
8. The Claimant alleged that at the end of each phase of work, the Claimant sent invoices to the Defendant, but that at the date of filing of the Claim, there was an outstanding balance of \$1,334,481.79.
9. The Claimant referred to the letter dated July 24, 2015 from its attorney-at-law, demanding payment and provided particulars of the monies due and owing.

10. The Defendant filed its defence and counterclaim on February 26, 2016 and an amended defence and counterclaim on April 8, 2016.
11. The Defendant contended that the relationship between the parties involved 2 contracts separate and apart from each other.
12. The Defendant contended, in respect of the first agreement, that the Defendant had entered into an agreement with BHP Billiton and Petrotrin and that these agreements required the provision of engineering services, project personal and inspection software.
13. The Defendant alluded to negotiations between the parties and alleged that it was agreed that, as and when required, the Company would enter individual arrangements with the Claimant with respect to the supply of products.
14. The Defendant alleged that it was agreed that each product would be the subject matter of a separate independent agreement.<sup>1</sup>
15. The Defendant averred that payments for the supply of each product would be made when the Defendant received payment from the third party. The Defendant alleged that this arrangement is known as a back to back arrangement, and by employing this method, three jobs were completed: EOG, BHP Platform inspection, FTO.

---

<sup>1</sup> See the Amended Defence and Counterclaim in paragraph 5 (d)

16. At paragraph 5 (e) of the Amended Defence and Counterclaim, the Defendant stated that in April, 2014, it entered into an agreement with Trinmar to supply and to install 14 pipe lines.
17. The Defendant made reference to the pricing for the contract and stated that the pricing was based on engineering agreed prices, provided by the Claimant. The Defendant alleged that two weeks later, the Claimant submitted a price which was twice the originally agreed price of \$852,040.00.
18. The Defendant pleaded that one of its Directors, Antonio Donawa, issued a purchase order, contrary to the bye-laws of the Defendant Company, and that the Defendant Company was not bound by the purchase order.
19. At paragraph 5 (n), the Defendant contended that the terms of the agreement: as follows:

“(i) The Claimant will provide engineering drawings for the entire project.

(ii) the agreed price for the said service was \$852,040.00

(iii) the mode of payment...would be that as and when final payment is received from Petrotrin for each individual line, a prorated instalment on the engineering fee would become due and payable to the Claimant. The Claimant would be paid therefore in 14 instalments back to back.

20. The Defendant alleged that payments were made.
21. The Claimant filed a Reply and Defence to Counterclaim on April 29, 2016.
22. The issues joined on the pleadings were:
  - (i) Whether there were separate agreements for each job
  - (ii) Whether the agreements were back to back
  - (iii) Whether the revised proposal, which requested a larger price was not valid as being contrary to the Bye-Laws of the Defendant.

### ***The Evidence***

23. The Court heard the evidence of two witnesses for the Claimant: Alasdair Cowie and Grant Cowie. Two witnesses also testified for the Defendant. They were Shandell Shaw and Rolf Hive.

### ***Evidence of Alasdair Cowie, first witness for the Claimant.***

24. Alasdair Cowie testified by his witness statement<sup>2</sup> that he was the managing director of the Claimant, which was a limited liability company engaged in the business of offshore inspection and engineering works.

---

<sup>2</sup> The Witness Statement of Alasdair Cowie was filed on December, 2016

25. Mr. Cowie alleged that the Claimant, the Defendant and a company by the name of Deeptech Oil Services entered into a co-operation/collaboration agreement entitled the Rovflex Agreement.
26. Mr. Cowie stated that all work would be done under separate arms-length contracts and explained that “separate arm’s length contracts” mean that every prospect or opportunity of contracted work would be considered as a stand-alone agreement between the parties.
27. Mr. Cowie testified that the Claimant supplied separate proposals for each requested project from the Defendant. The proposals included the Claimant’s standard terms and conditions and payment terms were 30 days from receipt of each invoice.
28. The Claimant sent to the Defendant a proposal CSL –COM-A21-0127 in respect of BHP Billiton, structural inspections, as outlined by the scope of work as supplied by the Defendant.<sup>3</sup>
29. The proposal was sent to the Defendant. Mr. Cowie alleged that the Claimant received no formal engagement from the Defendant and the Claimant adopted a different approach.
30. Mr. Alasdair Cowie outlined the approach at paragraph 5 of his witness statement: on receipt of purchase orders from the Defendant, invoices were sent to the Defendant

---

<sup>3</sup> The scope of works was exhibited to the witness statement of Alasdair Cowie and marked “B”

by the Claimant. The Claimant would refer to the proposal document to make it clear that the terms and conditions in the proposal document were adopted.

31. Mr. A. Cowie insisted that it was agreed that payment would be 30 days from the receipt of an invoice.

32. Mr. Cowie testified that between April 2013 and July 2015, the Defendant contracted the Claimant for Sub-sea inspections, provision of equipment and engineering work in respect of 5 projects:

- BHP Billiton
- Trinmar – fabrication and installation of 2”, 4” and 6” diameter Submarine pipeline and risers in the southwest Soldado field.
- BPTT
- EOG Resources
- Hire of Powered Reel Drive Unit

At paragraph 7 of his witness statement, Mr. Cowie told the Court that the services to be provided included the provision of equipment, personnel and engineering services.

33. Mr. Cowie stated that the Claimant provided a proposal to the Defendant, in response to which the Defendant issued a Purchase Order to the Claimant and the

Claimant would issue invoices for the works.<sup>4</sup> According to Mr. Cowie, the invoices would be issued upon completion of the relevant phase or milestone or on a monthly basis, as documented within the scope of works for the relevant purchase order.

34. At paragraph 7 of his witness statement, Mr. Cowie listed the purchase orders which were sent, along with the invoices which followed.

35. At paragraph 8 of his witness statement, Mr. A. Cowie told of the agreement between the parties as to the hire, by the Claimant, of the Defendant's Remotely operated Vehicle (ROV). Mr. Cowie alleged that the hire agreement was never ratified, that the Claimant incurred a lot of cost and it was agreed that the cost would be absorbed by the Defendant. Two invoices were issued. Mr. Cowie testified that the Claimant owed the Defendant \$183,550.18. This sum was set off against the amount owed by the Defendant to the Claimant.

36. At paragraph 10-11 of his witness statement, Mr. Cowie set out his understanding as to the time at which payment would be made. Mr. Cowie stated that the agreement was that the Claimant would be paid after each phase of work was completed or by regular monthly payments.

37. The agreement was different for the Panther recharges. According to Mr. Cowie it was agreed that the Claimant would send invoices to the Defendant, when costs were

---

<sup>4</sup> See paragraph 7 of the witness statement of Alastair Cowie.



incurred. As to the reel drive unit, Mr. Cowie alleged that invoices would be sent monthly in advance.

38. It was Mr. Cowie's evidence was that the arrangement ran smoothly at the start, but that from October, 2014 the Defendant began missing payments. Mr. Cowie told the Court that there was an attempt to resolve the issue of the outstanding invoices amicably and that the Defendant never queried any invoices.

39. Mr. Cowie alleged that, at the date of filing of the claim, the Defendant was indebted to the Claimant in the sum of \$1,334,481.79 USD.

40. This witness alleged that since August, 2015, the Claimant has continued to incur costs for the reel drive unit. Mr. Cowie alleged that the Defendant never indicated its intention to exercise the option to purchase the reel drive and that eventually the Claimant withdrew the option to purchase.

41. Mr. Cowie referred to a letter which was sent by the Defendant to, Her Majesty's Revenue and Customs. The letter was signed by Mr. Rolf Hive. It was undated and exhibited to the Witness Statement of Mr. Cowie as "F".

42. By this letter, Mr. Hive wrote on behalf of the Defendant:

*"HM Revenue and Customs*

*Dear Sir,*

*We hereby confirm the following amounts in table 1.1 herein are owed to Cortez-Sub-sea undisputed....”*

In their letter, the Defendant provided a table showing that the amounts due for the BHP/Panther, EOG, PHP Platform Inspection and BP/FIO were all paid in full. The table reflected an outstanding balance of \$937, 900.00 for the Trinmar project and 198,025.00 for the Reel Drive unit. Altogether, the Defendant admitted the sum of \$1,143,241.84 USD.

43. The letter to HM Revenue and Customs had been issued by the Defendant, at the request of the Claimant, in their letters of April 17, 2015. In that letter, Mr. Cowie wrote:

*“Dear Rolph,*

*In accordance with accountancy practice we are obliged to provide our accountants....and Her Majesty’s Revenue and Customs a debtor’s statement of Account....This is a legal obligation on the directors of the company in the course of any action taken by a creditor, in the case HMRC.*

*Attached to this letter is the current OTSL statement of account, reference, Cortez Subsea/OTSL Statement of Account 14/4/2015. This statement has been the basis of summarising on a monthly basis the invoices between the parties and the agreed....contingent discount provided against the Trinmar 2” and 4”*

*engineering undertaken by Cortez Subsea. The Statement is required to be verified by both parties, therefore please can you address this by confirming in signature the statement below....”*

***The Cross-examination of Mr. Cowie***

44. Mr. Alasdair Cowie was cross-examined. Mr. Cowie was cross-examined concerning the Trinmar proposal and was presented with the proposal annexed to the supplemental witness statement of Rolf Hive. Mr. Cowie admitted that it had been sent by the Claimant to OTSL. Mr. Cowie admitted that there had been 3 tenders in respect of the Trinmar project.
45. Mr. Cowie was cross-examined in respect of invoices which the Claimant sent in response to purchase orders. He admitted that the invoices dated the June 6, 2014 had been sent before the related purchase order, which was dated the August 18, 2014.<sup>5</sup>
46. Mr. Cowie was confronted with another purchase order dated the August 18, 2014<sup>6</sup> and the related invoice which was dated August 15, 2014<sup>7</sup> Mr. Cowie told the Court that there was a third invoice. He admitted that two invoices pre-dated their related purchase orders.

---

<sup>5</sup> See page 97 and page 137 of Agreed Bundle.

<sup>6</sup> See page 99 of the Agreed Bundle

<sup>7</sup> See page 141 of the Agreed Bundle

47. Mr. Cowie was cross-examined as to the proposal annexed to the supplemental witness statement of Rolf Hive and admitted that Mr. Antonio Donawa requested that the proposal be sent to him alone.
48. Mr. Cowie was cross-examined as to the letter which had been sent by the Defendant to HM Revenue and Customs. Despite the indorsement in that letter, Mr. Cowie denied that the Defendant had paid BHP project in full.
49. Mr. Cowie was cross-examined as to the hire of Reel Drive Unit and identified the hire agreement by which it was governed.<sup>8</sup> He agreed that there was an option to purchase the unit at the end of 180 days hire.
50. Mr. Cowie agreed that the Defendant always indicated that they wished to purchase the reel drive unit and they did so by their purchase order, where there was an option specified in the purchase order of equipment ownership transfer.
51. Mr. Cowie agreed that the payment of \$133,500.00 had been paid in October, 2014 but was unable to recall payment in May and June 2015.
52. Mr. Cowie admitted that after 180 days he attempted to rescind the agreement to transfer ownership and agreed that payments were made by the Defendant towards purchase of the Reel Drive and that the final payment had been made in June 2015.

---

<sup>8</sup> Exhibited to the Witness Statement of Alasdair Cowie As "C"

53. Mr. Cowie identified the email dated the May 14, 2015, by which he recredited the Defendant the sum of \$240,000.00 for the purchase of the reel drive unit. Mr. Cowie agreed that the basis on which he re-credited the Defendant was that he had withdrawn the Defendant's option to the purchase the equipment.
54. Mr. Cowie agreed that sums had been paid towards the purchase of the Reel Drive Unit. He could not recall specifically how much had been paid, and insisted under cross-examination that all payments had not been made towards the purchase of the Reel Drive Unit. He suggested that the Defendants may have paid \$8000.00 US.

***The Evidence of Grant Cowie***

55. Mr. Grant Cowie, was the operations Manager of the Claimant. He supported the evidence of Mr. Alasdair Cowie. Mr. Grant Cowie was subjected to cross-examination.
56. Under cross-examination Mr. Grant Cowie told the Court that he was familiar with the Trinmar project and with purchase orders. Mr. Grant Cowie stated that he was involved in the Reel Drive project and that his involvement included overseeing deliverables for the project, for reviewing invoices and that he was in dialogue with Mr. Antonio Donawa, Director of the Defendant in order to obtain purchase orders for the project.
57. Mr. Grant Cowie also told the Court that he was involved in the Reel Drive project.

58. In respect of the Trinmar project, Mr. Grant Cowie agreed that he started working on the project. He was aware of the Defendant's successful tender to Trinmar and changes in the pipelines from diameters of 2", 4" and 6" to diameters of 2" and 4" and that the Claimant Company provided a unit price per pipeline.
59. Mr. Grant Cowie was cross-examined on the proposal, which was annexed to the Supplemental Witness Statement of Rolf Hive. This witness indicated that he had not been involved in preparing the proposal.
60. Mr. Grant Cowie was cross-examined on the invoice dated the June 6, 2014 which was exhibited and R.H.6 and agreed that it was related to a purchase order relating to pipelines of diameter of 2" and 4" at a unit price of \$461,476.00 US.
61. Mr. Grant Cowie admitted that the purchase order was generated by the Defendant after the date of the related invoice. Mr. Grant Cowie admitted the same in respect of two other pairs of invoices and purchase orders, in that the purchase orders had been generated after the invoices.<sup>9</sup>
62. Mr. Cowie was questioned as to his involvement with BHP project and as to the hire agreement for the Reel Drive Unit. This witness agreed that the Reel Drive Unit was hired for a period of 180 days beginning November, 2014 and ending May 5, 2015 at a rate of \$130,000.00 per day for 60 days.

---

<sup>9</sup> See RH8 and RH7

63. He agreed that the cost of the unit agreed price was \$240,000.00. Being aware of the relevant purchase order dated October 22, 2014, Mr. Grant Cowie agreed that this included the price of the equipment ownership transfer.
64. Mr. Grant Cowie, was presented with the Reel Drive Agreement and agreed that it did not provide for the suspension of the purchase agreement.
65. Mr. Grant Cowie was questioned as to emails passing between himself and Mr. Donawa.<sup>10</sup>
66. He agreed that 3 items had been generated for the month of May 2015, but that up to the May 14, 2015, no invoice had been generated for that month. Nonetheless, Mr. Grant Cowie confirmed that the option to purchase was withdrawn in middle May, 2015 followed shortly by a credit note for \$240,000.00 crediting the Defendant for payments towards the purchase of the Reel Drive Unit.
67. Mr. Grant Cowie admitted that an invoice was generated on the May 14, 2015 and rescinded on May 15, 2015.
68. Mr. Grant Cowie was questioned as to his allegation that the Defendant failed to notify the Claimant in writing as to their option to purchase the Reel Drive Unit. Mr. Grant Cowie agreed that clause 4.5.21 of the Reel Drive Unit agreement did not require notification in writing.

---

<sup>10</sup> Emails exhibited at "D" of the Witness Statement of Mr. Grant Cowie.

### ***Evidence for the Defendant***

69. Mr. Shandell Shaw testified, in his capacity as the Planning Engineer of the Defendant. Mr. Shaw outlined the process by which the Defendant submitted their tenders to Petrotrin, before being successful in procuring the award for the installation of pipelines and risers at the Southwest Soldado field.
70. Mr. Shaw referred to a meeting with representatives of the Claimant at the Marriott Courtyard Hotel on March 21, 2013. Mr. Shaw stated that he prepared a costing spreadsheet. A second spreadsheet was prepared for the second tender.
71. Mr. Shaw deposed that subsequent to the tender submission, Trinmar replaced all 6 inch diameter pipelines with 4" diameter pipelines. Finally Trinmar made an award to the defendant and for the supply and installation 14 submarine pipelines. Ten pipelines were to have a diameter of 4 inches and four pipelines were to have a diameter of 2 inches.
72. Mr. Shaw referred to new proposal which was issued by the Claimant. This proposal, which was exhibited as 4 (a) to the supplemental Witness Statement of Rolf Hive and called for a price of \$1,845,900.00 USD, whereas the original agreed price was of \$852,040.00.
73. Mr. Shaw stated that he met with Mr. Hive who was surprised and upset at the new pricing. Mr. Shaw stated that he later learnt that purchase orders had already been



issued by the Claimant and that \$654,700.00 had already been paid. Mr. Shaw did not annex any proof that payment had been made.

***Cross-examination of Mr. Shaw***

74. Under cross-examination, Mr. Shaw told the Court that he was responsible for preparing tenders and putting together cost associated with the project. He stated that Antonio Donawa was director in 2013 and was still with the Company, at the date of the trial.

***Evidence of Rolf Hive***

75. Mr. Hive, by his witness statement identified seven contracts between the defendant and the Claimant. They were:

- a. a contract for the assignment of the Panther ROV
- b. E.O.G
- c. BHP Platform Inspection
- d. FTO (BP)
- e. Trinmar (pipelines)
- f. Lease purchase agreement
- g. 7 Engineering platform R.P 13 Trinmar.

Mr. Hive stated that all contracts were paid in full except the Trinmar pipelines agreement and the lease purchase agreement.

76. Mr. Hive told the Court that in April 2014 the Defendant entered into a contract with Petrotrin for supply installation of 14 pipelines. He stated that in order to tender for the contract, he met with representatives of the Defendant over several days at Marriott hotel.
77. Mr. Hive deposed that the Claimant agreed to the sum of \$852,040.00 USD for the Claimant's work on the project.
78. Mr. Hive confirmed that the Defendant had to submit three tenders in order to secure the contract Mr. Hive testified that the Claimant confirmed its commitment to the tender by way of a letter dated March 18, 2014 and the Defendant submitted its letter to Trinmar, validating prices on April 3, 2014.
79. By letter dated April 29, 2014, Trinmar accepted the Defendant's bid for the project. Two weeks later, the Defendant received a revised proposal was exhibited as RH 4 (a) to the Witness Statement of Rolf Hive.<sup>11</sup>
80. Mr. Hive stated that he had not seen the revised proposal until several payments had been made and the project was on its way.

---

<sup>11</sup> The Supplemental Witness Statement of Rolf Hive was filed on November 26, 2018

81. Mr. Hive referred to the internal system of the Defendant. Upon receiving a quotation, the Defendant would issue a purchase order. At that stage, the Defendant considered itself contractually bound. Mr. Hive stated that there was no purchase order for the sum of USD \$1,845,900.00.
82. Mr. Hive complained that the revised price was only communicated to the Director, Antonio Donawa. He referred to the company bye-laws and stated that the only contracts which could be signed by one director were those valued at less than USD 1 million dollars and for a duration of less than one year. Because the contract in question was in excess of one million dollars, the approval of the Board of Directors was necessary for the issue of the purchase orders.
83. Mr. Hive testified as to the agreement concerning the hire of the Reel Drive Unit. Mr Hive stated that the Defendant always intended to exercise its option to purchase the Reel Drive Unit.
84. At paragraph 24 of his witness statement, Mr Hive set out the payments which had been made between October, 2014 and June 2015. Mr. Hive stated that the final payment of \$84,550.00 was made in June, 2015. The Claimant accepted all payments.
85. Mr. Hive by his Witness Statement told the Court that the Claimant refused to release a report on the ground that the Defendant had not completed its payments in respect of the BPH project.

**Cross-examination**

86. Under cross-examination, Mr. Hive agreed that both Mr. Donawa and Mr. Bertrand made significant input the projects, and that they lived in Trinidad. He did not explain why they were not called to testify.

87. Mr. Hive was directed to the Reel Drive agreement (exhibited as RH4) and in particular to Clause 4.5. 21, which records this agreement:

*“This proposal offers the transfers of ownership of the specified equipment after 180 days hire period, transfer will be documented and processed by means of an asset transfer agreement to be agreed by both parties hire to give 45 days notice to supplier if either option to buy is to be revised.”*

88. Mr. Hive did not accept that he never tried to get the asset transfer document, but agreed that his attempts were not in writing Mr. Hive accepted under cross-examination that he never tried to agree the asset transfer document.

89. Mr. Hive was questioned as to payments for the hire of the Reel Drive Unit. He admitted under cross-examination that the hire period ended on the May 7, 2015 but that he had not returned the reel Drive until the June 10, 2015 and had not paid the full price until June 11, 2015.

90. Mr. Hive was questioned as to the invoices issued by the Claimant in September 2014 and stated, under cross-examination, that he saw all 3 invoices and that payments

were made by wire transfer in September, 2014. Mr. Hive admitted that each wire transfer had been signed by himself and Ian Bertrand as directors and that Antonio Donawa had not signed the wire transfers. Mr. Hive admitted that he continued to make part payments on invoices up to September, 2014. Mr. Hive admitted that each wire transfer had been signed by himself and Ian Bertrand as directors and that Antonio Donawa had not signed the wire transfers. Mr. Hive admitted that he continued to make part payments on invoices up to September, 2014.

91. Mr. Hive was questioned as to his undated letter, which was addressed to HM Revenue and Customs in respect of his indebtedness to the Claimant.
92. Mr. Hive was also presented with the letter dated April 17, 2015 by which the Claimant asked the Defendant to confirm its indebtedness. Mr. Hive said that he could not recall which letter came first. He agreed that his letter would have been sent before May, 2015.
93. Mr. Hive admitted that he had no discussion in respect of the 2014 tender with Mr. Cowie. Responding to the suggestion that he submitted the final tender on his own, Mr. Hive stated that Mr. Donawa drew it up. Mr. Hive admitted that he used 2013 prices in preparing the 2014 tender.

## ***Discussion***

94. In these proceedings, the Claimant, a provider of engineering services, seeks to recover the sum of \$1,334,481.79, for services provided to the Defendant. Although learned Counsel for the Claimant indicated, in his opening address, that these proceedings pertained to two contracts, the pleaded claim alleges that the Defendant was indebted in respect of 4 contracts. These are set out at paragraph 9 of the Statement of Case and are:

- Panther recharges
- BHP
- Trinmar
- Hire charges for reeling unit and pipeline straightener.

95. The Defendant, for its part made a counterclaim against the Claimant, seeking an order transferring the Reel Drive Unit from the Claimant to the Defendant.

96. Accordingly, two broad issues arise: whether the Defendant is indebted to the Claimant and whether the Defendant is entitled to exercise its option to purchase the Reel drive Unit.

97. There was no dispute that the parties had entered a tripartite arrangement with a company designated Deep Tech Oil Service. The Tripartite Agreement was termed the Rovflex Collaboration Agreement. There was however no evidence that the Rovflex

Agreement was ever implemented. Instead, there was evidence of an unwritten course of dealings between the Claimant and the Defendant. By the course of dealing the Claimant would issue a proposal, in response to which the Defendant would issue a purchase order. The Claimant would then issue an invoice for payment.

98. The Defendant contracted the services of the Claimant in respect of seven contracts. These were listed in the witness statement of Rolf Hive, witness for the Defendant.

These seven contracts were:

- a. A contract for the assignment of Panther ROV
- b. EOG
- c. BHP Platform Inspection
- d. FTO (BP)
- e. Trinmar – supply and installation of pipelines
- f. Lease Purchase Agreement
- g. 7 Engineering RP 13 Trinmar

I accept the evidence of the Defendant that these contracts were separate and independent of each other. I also accept, on the basis of the indication of learned counsel for the Claimant in his opening address at the trial on November 27, 2018 that only two contracts are relevant to these proceedings: Trinmar and the Lease Purchase Agreement of the Reel Drive Unit.

99. In respect of the Trinmar Contract, there was no dispute that the Defendant submitted a tender to Petrotrin for the supply and installation of 14 Subsea pipelines at the West Soldado field. For the purpose of preparing the tender, the Defendant engaged the Claimant for the provision of engineering services. Representative of both parties met at the Marriot Courtyard Hotel on March 21, 2013<sup>12</sup>
100. It is also not in dispute that the defendant submitted three separate tenders to Petrotrin, before being able to procure an award.
101. Two weeks after having received the award, the Claimant issued a revised proposal, which indicated prices which were substantially higher than those agreed by the parties in their initial Marriot meeting. The original agreed price was \$852,040.00. The price reflected in the revised proposal was \$1,845,900.00. <sup>13</sup>
102. Notwithstanding the increased prices, the Defendant sent out purchase orders to the Claimant and honoured invoices by way of wire transfer. They did so without protest.
103. The Defendant, in these proceedings, has contended that their director Antonio Donawa had acted on his own in making these payments and that he acted contrary to the company's bye-laws, which stipulated that purchase orders for values, greater

---

<sup>12</sup> See paragraph 7 the witness statement of Rolf Hive filed on May 5, 2017

<sup>13</sup> See the Supplemental Witness Statement of Rolf Hive filed on November 26, 2018.



than \$1 Million USD and for a duration of less than a year, were to be approved by the Board of Directors.<sup>14</sup>

104. Accordingly, there was a veiled and implied suggestion that there was some kind of collusion between Mr. Donawa and the Claimants.

105. In the course of the cross-examination of Mr. Rolf Hive, the Defendant's witness, it emerged that Mr. Donawa was still a Director of the Defendant and was in Trinidad and available. No reason was offered as to why he had not been joined as a defendant for breach of his fiduciary duties or why he had not at least been called as a witness to explain his secretive alliance with the Claimant. The Defendant's failure to call witnesses who could ostensibly have assisted their defence, entitles the court to draw robust inferences against the Defendant.

106. However, the answers given by Mr. Hive, under cross-examination belie the suggestion that Mr. Donawa alone interfaced with the Claimant for the purpose of making payments for services on the Trinmar contract. Mr. Hive, in answer to systematic questions in cross-examination, told the Court that payments to the Claimant were by wire transfers signed by himself and Ian Bertrand as Directors. Accordingly, I reject the suggestion that no one aside from Mr. Donawa, was aware of the revised Trinmar proposal. I hold that the Defendants were fully aware of the

---

<sup>14</sup> See paragraph 14 of the witness statement of Rolf Hive.

revised proposal, and made part payments on it. They thus accepted the revised prices, and in my view justifiable so, since, according to Mr. Hive in cross-examination, the third and successful tender though submitted in 2014 was based on 2013 prices.

107. In my view however, the foregoing analysis was rendered unnecessary in the light of a clear admission by the Defendant as to their indebtedness to the Claimant.

108. By its letter dated the April 17, 2015, the Claimant, through Mr. Alasdair Cowie, wrote to the Defendant requesting a verification of statement of account for the purpose of fulfilling its obligation to their accountants and HMRC, Her Majesty's Revenue and Customs.<sup>15</sup>

109. By its undated letter to the HMRC, the Defendant confirmed their indebtedness in the sum of \$1,143,241.84 USD. Mr. Hive was cross-examined on these documents. There was no suggestion that they were fraudulent or compromised in any way. This admission led had the court to the conclusion that the Defendant is indebted to the Claimant, as admitted.

110. The admitted sum is less than the sum claimed by \$191,239.95. I proceeded to examine the evidence in order to determine whether the Claimant had succeeded in proving the Defendant's indebtedness in the non-admitted sum.

---

<sup>15</sup> See page 265 of the Agreed Bundle

111. Examining the evidence for the Claimant, one finds a mass of contradictions, with invoices having been issued before the receipt of purchase orders. This occurred in respect of the invoice/ purchase order duos that were placed before the Court.
112. It was therefore my view that over and above the admission by the Defendant, the Claimant was not able to prove its case, and that there should not be judgment beyond the admitted sum.
113. I proceed to consider the Defendant's counterclaim, which is based on the Reel Drive Hire agreement, which was exhibited in these proceedings as RH4<sup>16</sup>. Both parties rely on clause 4.5.21 of this agreement which provides:

*"This proposal offers the transfer of ownership of the specified equipment after 180 days hire period, transfer will be documented and processed by means of an asset transfer agreement to be agreed by both parties. Hirer to give 45 days' notice to supplier if either option to buy is to be exercised "*

114. Under cross-examination, both Mr. Alasdair Cowie and Mr. Grant Cowie had been confronted with emails and they agreed that the Defendant was always interested in purchasing the Reel Drive Unit.

---

<sup>16</sup> See the Witness Statement of Rolf Hive May 5, 2017

115. Mr. Hive was also cross-examined and admitted that they had taken no steps to enter into the asset transfer agreement and had not provided notice of their intention to purchase.
116. It falls to this Court to decide whether the undisputed desire of the Defendant to purchase the Reel Drive Unit satisfies the requirement at Clause 4.5.21 that the Defendant, as hirer provide 45 days' notice to the supplier if the option to buy is to be exercised.
117. In considering the meaning of clause 4.5.21, I relied on the principle that the agreement falls to be interpreted objectively and that the question is not what one or other of the parties meant or understood, but rather what a reasonable person in the position of the parties would have understood the words to mean.<sup>17</sup>
118. Whereas there was no stipulation for written notice, it is my view that the term "notice" requires a formal indication of intention. This is most easily achieved in writing. In fact, while there was no doubt that the Defendant had a desire to retain possession of the reel drive unit, this was never formalised in writing or otherwise. It is therefore my view that the Defendant failed to comply with Clause 4.5.21 of the Reel Drive Agreement and the Counter Claim must be dismissed.

---

<sup>17</sup> See paragraph 13-043, Chitty on Contracts Volume 1 (2015 edition.)

119. Accordingly, there will be judgment for the Claimant in the sum of \$1,143,241.84 USD,  
with costs as prescribed.

Date of Delivery: December 3, 2019

Justice Dean-Armorer