

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2018-4840**

BETWEEN

JUNIOR SAMMY CONTRACTORS LIMITED

Claimant

AND

ESTATE MANAGEMENT AND BUSINESS DEVELOPMENT LIMITED Defendant

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

Appearances:

Mr. Ramesh Lawrence Maharaj S.C. leading Mr. Jagdeo Singh, Mr. Kiel Taklalsingh, instructed by Ms. Karina Singh and Ms. Shanice Harewood, attorneys-at-law for the Claimant

Mr. Jonathan Acton Davis Q.C leading, Mr. Colin Kangaloo, instructed by Mrs. Danielle Inglewood, attorneys-at-law for the Defendant

REASONS

1. The Claimant, Junior Sammy Ltd instituted these proceedings on December 20, 2018 seeking to recover \$82,804,219.19 for sums due and owing under a building contract, which had been executed in February, 2015.
2. Following the filing of the Defendant's Defence on March 18, 2019, the Claimant filed an application under Part 15.2 **CPR** for Summary Judgment. Almost simultaneously, the Defendant filed an application seeking specific disclosure of listed documents.¹
3. After considering written submissions and hearing supplemental oral submissions, I dismissed the application for specific disclosure and granted the Claimant's application for summary judgment.

¹ The Defendant's application for specific disclosure was filed on March 26, 2019

4. My reasons for so doing are set out below:

Facts

5. The Claimant, Junior Sammy Ltd, is a limited liability company which is engaged in the provision of construction services, while the Defendant is a wholly owned state enterprise concerned with the development of State lands.
6. On January 7, 2015, the Defendant invited tenders for the development of lands in Caroni. The project was known as the Caroni Savannah Residential Development.
7. The Claimant, Junior Sammy Contractors Ltd. was successful in its tender for the project and on February 4, 2015, parties executed a written contract, incorporating the standard form FIDIC Contract. The Contract document was amended by the parties and supplemented by a cover letter dated February 25, 2015.
8. The appointed engineer under the contract was VIKAB Engineering Consultants Ltd. The Engineer certified 13 Interim Payment Certificates (IPC's) six of which were paid.
9. Seven IPC's remained outstanding. They were set out at paragraph 25-30 the Amended Statement of Case filed on December 21, 2018. They were also listed in Tabular form at paragraph 32 of the Amended Statement of Case. It was in respect of these sums, certified in the seven IPCs, that the Claimant instituted these proceedings.
10. The Claimant also sought to recover Retention Monies to which they claimed they were entitled pursuant to Clause 14.9 of the contract documents.
11. The Claimant alleged that the Engineer issued the taking over certificate on August 17, 2015, and thereupon, the Claimant became entitled to one half of the retention fee. See paragraph 31 of the Amended Statement of Case.
12. The Claimant alleged that following the issuing of the taking over certificate on August 17, 2015, the remaining retention monies became due at the end of the Defects Notice period on August 16, 2016. See paragraph 36 of the Amended Statement of Case.
13. The Claimant alleged that by a letter dated October 9, 2015 to First Citizens Bank, the Defendant admitted in the sum of \$77,658,948.91.
14. The Defendant raised three defences:

- a. That the Claimant had assigned all their receivables under the contract to a third party, namely ANSA Merchant Bank and it is only the third party who holds the right to institute proceedings.
- b. That the IPCs do not finally determine the Claimant's entitlement to payment. If IPCs are not correct they can be re-opened.
- c. The Defendant has not been able to conclude its analysis of the IPCs since it is awaiting specific disclosure of documents.

Reference was made to these defences at page 3 of the written submissions of the Defendant.²

The Application for Specific Disclosure

15. The Defendant's application for specific disclosure was filed on March 26, 2019. This application was made pursuant to Part 28.5 of the **CPR** 1998 (as amended). The Defendant applied for disclosure of this information:
 - a. Full details of the Claimant's payment applications, including substantiation and measures of work undertaken
 - b. Full details of certifications made by Vikab Engineering Consultants Ltd on the Caroni Savannah Project, including substantiation and measures of works undertaken.
 - c. All measures of work undertaken if not included in applications or certifications.
16. The application for specific disclosure was supported by the affidavit of attorney-at-law, Danielle R. Nieves as well as by Written Submissions which were filed on behalf of the Defendants on June 6, 2019.

Issues

17. Two major issues arose for my consideration:
 - Whether the Claimant was entitled to summary judgment;

² See the Defendant's written submissions in opposition to the Claimant's application for summary judgment filed on July 19, 2019

- Whether the Defendant is entitled to disclosure of the specific categories of documents.

The Application for Summary Judgment

18. The circumstances under which the Court may grant an application for summary judgment are set out at Part 15.2 **CPR**. This rule provides:

“The court may give summary judgment on the whole or part of a claim or on a particular issue if it considers that-

(a) On an application by the claimant the defendant has no realistic prospect of success on his defence to the claim, part of the claim or issue or;

(b) On an application by the defendant, the claimant has no realistic prospect of success.

19. The test to be applied in determining whether to award summary judgment may be found in the judgment of Kangaloo J.A., in **Western United Credit Union Cooperative Society v. Corrine Ammon** Civil Appeal 103 of 2006. Justice of Appeal Kangaloo stated:

“the test to be applied in dealing with applications for summary judgment is contained in Part 15 of the CPR which provides that the court may give summary judgment if it is of the view that either the claim or defence has no realistic prospect of success...The principles to be applied in dealing with application for summary judgment have been recently set out by Beason J. in Torprise Fashions Ltd., Nik Nak (1) Ltd, Anjum Ahmed. In his judgment the following passage from the case of Federal Republic of Nigeria v. Santolina Investment Corp [2007] EWHC 437 (CH) is reproduced:

“i) The court must consider whether the defendant has a “realistic” as opposed to a “fanciful” prospect of success: Swain v Hillman [2001] 2 All ER 91;

ii) A “realistic” defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a “mini-trial”: Swain v Hillman

iv) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [\[2001\] EWCA Civ 550](#);

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [\[2007\] FSR 63](#);

vii) Although there is no longer an absolute bar on obtaining summary judgment when fraud is alleged, the fact that a claim is based on fraud is a relevant factor. The risk of a finding of dishonesty may itself provide a compelling reason for allowing a case to proceed to trial, even where the case looks strong on the papers: Wrexham Association Football Club Ltd v Crucialmove Ltd [\[2006\] EWCA Civ 237](#) at [57].”³

20. Guided by the foregoing, I proceeded to consider each of the Claimant’s defences, and to examine whether any of them had a realistic prospect of success.
21. The Defendant contended that the Claimant, Junior Sammy Contractors, had assigned its cause of action against EMBD to Ansa Merchant Bank. It was accepted by both

³ Western United Credit Union Cooperative Society v. Corrine Ammon Civil Appeal 103 of 2006

parties that if indeed there was assignment, the Claimant would have no authority to initiate proceedings as this would fall to the assignee, Ansa Merchant Bank Ltd.

22. It was also common ground that the embargo against the Claimant would only be operative in the case of an absolute assignment. Both parties cited section 23(7) of the **Supreme Court of Judicature Act Ch 4:01** as to the effect of an absolute assignment. Section 23(7) provides:

“(7) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim the debt or thing in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to the debt or thing in action from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor; but if the debtor, trustee, or other person liable in respect of the debt or thing in action has had notice that the assignment is disputed by the assignor or anyone claiming under him, or of any other opposing or conflicting claims to the debt or thing in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the same.”

23. I proceeded to consider the relevant documents in order to ascertain whether there was an absolute assignment. In so doing, I was guided by **Boxhill UK Ltd. v. Razzaq** [2012] EWCA Civ 1376, where Atkins LJ said at paragraph 45:

“whether a particular instrument creates an absolute assignment or an assignment ‘by way of charge only’ is question of construction of the relevant instrument taken as a whole”

24. The relevant instrument taken as a whole was the Assignment of Receivables. The Assignment of Receivables was annexed to a Factoring Agreement as Schedule B. The Factoring Agreement was made on February 16, 2016 between the Claimant, Junior Sammy as ‘the Seller’ and Ansa Merchant Bank Ltd. as the ‘the Purchaser’. In the wake

of the Factoring Agreement, the Claimant issued a letter dated February 16, 2016 to Ansa Merchant Bank Ltd., informing the Defendant of the assignment.

25. A consideration of the relevant instrument taken as a whole, required, in my view a consideration of the Assignment of Receivables, the Factoring Agreement and the letter of February 16, 2016.
26. The Assignment of Receivables, annexed as Schedule B to the Factoring Agreement, was a very short document. It is set out below:

“ASSIGNMENT OF RECEIVABLES

THIS ASSIGNMENT is made on this 16th day of February, 2016, by and between JUNIOR SAMMY CONTRACTORS LIMITED, a company incorporated in Trinidad and Tobago...and ANSA MERCHANT BANK LTD...

WHEREAS the parties hereto have entered into a certain factoring agreement dated day of February, whereby the Seller has agreed to assign and sell to the Purchaser and the Purchaser has agreed to purchase the EMBD Receivables (as defined in the Factoring Agreement) described in the Schedule hereto:

NOW THIS ASSIGNMENT WITNESSES that in pursuance and in consideration of and subject to the terms and conditions of the Factoring Agreement, the Seller as beneficial owner hereby assigns absolutely and sells to the Purchaser and the Purchaser hereby agrees to purchase... all the Seller's right title and interest in and the full benefit of EMBD Receivables...”

27. The Assignment was expressly subject to the terms and conditions of the Factoring Agreement. At Clause 4.1.5 of the Factoring Agreement, the Seller is expressly made responsible for instituting proceedings.
28. By Clause 4.1.4., the Seller is fixed with the responsibility promptly to notify the Purchaser of any request for extension of time to pay or request for credit or adjustment, or any dispute or claim relating to any of the EMBD receivables.
29. Under the heading “Responsibilities of the Seller”, paragraph 4.1.5 fixes Junior Sammy as Seller with this responsibility:

“ Promptly at its own expense to take all such actions as required under the EMBD Contract to settle, compromise, adjust or otherwise enforce or dispose of by litigation...any such dispute, contrary...as referred to in clause 4.1.4”

30. It was my view that the clear terms of the Assignment of Receivables dictate that this instrument should be read subject to the Factoring Agreement. The Factoring Agreement preserves to the Seller, the right to institute proceedings.
31. It was, in my view, clear that the Assignment, though stated to be absolute, was not absolute, but was conditional on the Factoring Agreement and in particular the right and obligation of the seller to institute proceedings where required.
32. The Defendant put forward an alternative argument, contending that in the event that the Assignment was found not to be absolute, the Court should find that there was an equitable assignment.
33. Even if this argument were to be accepted, the Claimant, as seller, would not be deprived of right to institute proceedings. The Assignee (Ansa Merchant Bank Ltd, in this case) would be authorised to commence proceedings only if the seller or assignee is joined.⁴
34. This was in my view, clear from the learning in ***Chitty on Contracts*** paragraphs 19.002, 19.004, 19.005, cited and relied upon by the Defendant in its written submission of July 19, 2019.
35. At paragraph 19.005, the learned authors of ***Chitty on Contracts*** identified the difference between the statutory and equitable assignments:
- “There is one very important procedural consequence, which attaches to the distinction between statutory and equitable assignments. A statutory assignee can sue the debtor without joining the assignor...whereas an equitable assignee cannot often do this...”*
36. The prohibition is stated to be against the assignee (ANSA) from commencing proceedings without joining the assignor (Junior Sammy).
- There is no learning to suggest that, in the context of an equitable assignment, an assignor may not institute proceedings.
37. Accordingly, it was my view that the assignment defence was wholly unmeritorious and has no realistic prospect of success. The Factoring Agreement, to which the Assignment was expressly conditional, fixed the Claimant with the responsibility for

⁴ See paragraph 40 of the written submissions for the Defendant filed on July 19, 2019

instituting proceedings. In my view, it was not arguable that the Claimant was prevented from instituting these proceedings by the same Assignment, whose governing Factoring Agreement required the Claimant to institute proceedings.

Whether the IPCs finally determine Junior Sammy's Entitlement to Payment

38. I proceeded therefore to consider the second defence, that is to say, that the Claimant is required to prove its claim, regardless of the certificate of the Engineer.
39. In these proceedings, the Claimant contended that the Defendant, as employer is bound by the Certificate of the Engineer.
40. The Claimant contends further that the failure of the Defendant to challenge the IPCs, according to Clause 2.5 of the Contract, operate as a bar to the Employer/Defendant presenting such challenges as a defence to this Claim.
41. In support of its contention, the Claimant relies on the Privy Council decision in ***NH International v. NIPDEC*** [2015] UKPC 37.
42. The Defendant for its part does not take issue with ***NH supra*** , but contends that notwithstanding ***NH***, they could rely on the defence of abatement. I agreed with the argument of the Claimant, that there was no plea of abatement in the Defence.
43. The Defendant contends that the Claimant has failed to substantiate its claim by providing the documents reasonably requested. It was their contention that they had previously hired a contractor H. Lewis Works, and that claims which had been made by the Claimant were in respect of works done by H. Lewis.
44. At paragraph 22, of its Defence, the Defendant alleged that the Engineer over-certified or incorrectly certified the outstanding IPCs and put the Claimant to strict proof of its claim.
45. The Claimant relied heavily on ***NH supra*** and the Defendant has not sought to avoid the effect of ***NH***.⁵ I therefore considered ***NH*** carefully.

⁵ See paragraph 61 of the written submissions for the Defendant.

46. **NH** arose out of awards made by an arbitrator, Dr. Robert Gaitskell in respect of the construction of the new Scarborough hospital in Tobago. The Agreement, before the Board, was expressed to be subject to the FIDIC General Conditions of Contract.
47. In the second part of his judgment, Lord Neuberger, considered the effect of Clause 2.5 of the Contract based on the FIDIC Standard Form. At paragraph 38, Lord Neuberger had this to say:
- “In agreement with the attractively argued submissions of Mr. Alvin Fitzpatrick SC, it is hard to see how the words of Clause 2.5 could be clearer. Its purpose is to ensure that claims which an employer wishes to raise whether or not they are intended to be relied on as set-offs or cross-claims should not be allowed unless they have been the subject of notice which must have been given ‘as soon as practicable’. If the Employer could rely on claims which were first notified well after that, it is hard to see what the point of the first two parts of Clause 2.5 was meant to be”*
48. In these proceedings, the Employer first notified its claims and complaints, three years after the engineer has certified the IPCs and after proceedings had been filed by the Contractor to recover the sums. In my view, it is entirely unarguable that the Employer made its claim for set-off ‘as soon as reasonably practicable’.
49. In fact, in its Defence, the Employer has fallen short of making a claim for set-off. At paragraph 22.8 of the Defence, the Defendant avers that it had real reason to believe that the works were over-certified. “Real reason to believe” falls short of a plea of a material fact, unless the belief of the Defendant is proved to be relevant.
50. The Defendant complains that the Claimant failed to annex the relevant documents. An examination at the Amended Statement of Case, reveals that the Claimant annexed both the engineer’s certificate and the relevant invoices.
51. By Clause 14.7 of the Contract, the Respondent is bound by the Certificate of the Engineer. It seems therefore that the only relevant document was the certificate of the engineer. When it is issued, the Employer is bound by Clause 14.7 to pay.
52. The Claimant also relies on a letter dated October 9, 2015 addresses to February, whereby the draft acknowledges the Debt of \$77,658, 948.71. It was my view that this letter was a clear admission.

53. By their submissions, the Defendant raised the issue of abatement which allows the Employer to defend itself against payment, asserting that the work is defective.
54. The Claimant argued that there was no plea of abatement and that in any event the Defendant failed to avail itself of dispute resolution mechanisms under the contract. Indeed, the Defence as filed, omits any plea of abatement. At the time when the Court heard arguments in respect of Summary Judgment, we were long past the first Case Management Conference. The Defendant would be prevented by the **CPR** Part 20 from amending its Defence, unless they are able to bring themselves within Parts 20.1(3) and 20.1(3A) of **CPR**.
55. I was therefore, persuaded by the arguments of the Claimant that by the certificates of the engineer, the claimant became entitled to the payment as certified and that the defendant has failed to avail itself of dispute resolution mechanisms under the contract, and in the circumstances the Defendant has no realistic prospect of succeeding in the second defence.
56. The third defence referred to at paragraph 14 supra was that the Defendant is awaiting specific disclosure was in reality not a defence, but a plea for time to ascertain whether there was a defence and if so to develop one.
57. One wondered what would be the value of any material which might “turn up” with specific disclosure. By the date of the application for specific disclosure, the first case management conference had long passed and the Defendant would encounter Part 20 problems, should they wish to amend. Nevertheless, the third defence merged with the application for specific disclosure, which I proceeded to consider.
58. By their application for specific disclosure the Defendant applied for disclosure of:
 - i. Full details of the Claimant’s payment application, including substantiation and measure of work undertaken;
 - ii. Full details of certifications made by VIKAB Engineering Consultants...including substantiation and measures of work undertaken and;
 - iii. All measures of work undertaken if not included in application or certification.
59. Applications for specific disclosure are governed by Part 28.5 **CPR** which provides:

“28.5 (1) An order for specific disclosure is an order that a party must do one or more of the following things:

(a) disclose documents or classes of documents specified in the order; or

(b) carry out a search for documents to the extent stated in the order; and

(c) disclose any document located as a result of that search.

(2) An order for specific disclosure may be made on or without an application.

(3) An application for specific disclosure may be made without notice at a case management conference.

(4) An application for specific disclosure may identify documents—

(a) by describing the class to which they belong; or

(b) in any other manner.

(5) An order for specific disclosure may only require disclosure of documents which are directly relevant to one or more matters in issue in the proceedings.”

60. **CPR** defines “directly relevant” at Part 28.1(4):

“(4) For the purposes of this Part a document is “directly relevant” if-

(a) the party with control of the document intends to rely on it;

(b) it tends to adversely affect that party’s case; or

(c) it tends to support another party’s case, but the rule of law known as “the rule in Peruvian Guano” does not apply.

61. It was my view that the concept of direct relevance was predicated on the party having control of the document. Thus, at Part 28.1(4)(a), a document is directly relevant if the party with control of the document intends to rely on it. Part 28.1(4)(b) refers to “that party” meaning “the party with control of the document”. Part 28.1(4)(c) by reference to another party, means a party other than the one with control of the document.

62. It seemed to me therefore, that on a plain reading of Part 28, the party seeking disclosure, must first prove that the documents are in control of the respondent to the application for disclosure.

63. In these proceedings, the Defendant has not established that any part of the three wide classes of documents are within the control of the Claimant. On the contrary, it seems reasonable to infer that all those documents had been sent by the Claimant to either the Defendant or the Engineer, who is the Defendant's agent.
64. These documents ought to have been in the custody and possession of the Defendant. It also seemed to me that the third defence and the current application fall within the parameters of ***Bank of Bermuda v Pentium Ltd Civil Appeal No.14 of 2003***, where Saunders CJ had this to say:
- "In response to an application for summary judgment, a defendant is not entitled without more merely to say that in the course of time something might turn up that would render the Claimant's case untenable...To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim..."*
65. I found these words to be apposite to this case since the wide berth of documents sought, suggest that the Defendant is on a fishing expedition, hoping for something to turn up.
66. It was therefore my view that the application for specific disclosure was without merit and I dismissed it and order in terms of application dated March 25, 2019 for summary judgment.

Date of Delivery: March 11, 2020

Justice Mira Dean-Armorer