THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2015-03619

IN THE MATTER OF A WRITTEN CONTRACT DATED 18th DECEMBER, 2014

BETWEEN

(1) ADAM'S PROJECT MANAGEMENT AND CONSTRUCTION LIMITED
AND
(2) UNIVERSAL STRUCTURES LIMITED
(3) LEON KOON KOON AND JOAN KOON KOON

BETWEEN

ADAM'S PROJECT MANAGEMENT AND CONSTRUCTION LIMITED

Claimant

AND

LEON KOON KOON

JOAN KOON KOON

UNIVERSAL STRUCTURES LIMITED

Defendants

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Garvin Simonette instructed by Ms Sophia Vailoo for the Claimant

Mr Farid Scoon instructed by Mr Walede Michael Coppin for the Defendant

Date: 8 November 2017

JUDGMENT

1. This claim arises out of the purchase by the Claimant of the shares of the first and second Defendants in the third Defendant. The third Defendant is a nominal defendant.

2. Central to the claim is a Share Purchase Agreement (SPA) dated 18 December, 2014. There is a difference of views in how this contract should be construed.

3. Arising out of that difference is how much money is payable for the sale.

4. The Claimants sought declaratory relief pursuant to the contract and orders arising from those declarations.

5. The Defendants' counterclaim is for breach of contract and related reliefs.

6. On 29 April, 2016 the Claimant asked for the determination of certain issues. Following from this the parties agreed on the determination of the following as preliminary issues:

   (i) Whether the Share Purchase Agreement dated 18 December, 2014 amongst the Claimant and Defendants alone constituted the final binding agreement amongst the parties for the acquisition by the Claimant of 100%

of the beneficial ownership and shareholding in the Third Defendant from the First and Second Defendants.

(ii) Whether clause 4 of the Share Purchase Agreement entitled "Consideration and Payment" alone governs the legally enforceable payment regime for the acquisition by the Claimant of 100% of the shareholding in the Third Defendant of which the First and Second Defendants were at all material times the beneficial owners.

(iii) Whether pursuant to clause 4(b) and (e) of the Share Purchase Agreement, the amount of $5,920,822.59 is deductible from the purchase price of $32,000,000.00 and payable directly to the creditors of the Third Defendant.

7. There were two issues advanced by the Defendants which were unagreed. I will return to these later.

8. In considering this application and the issues agreed, I have had cause to consider carefully the facts advanced and reliefs sought by both the Claimant and the Defendants.

9. Clause 3(b) of the Share Purchase Agreement provides that the purchasers shall purchase the shares of the first and second Defendants in the third Defendant free from all claims or encumbrances and with all attached or accrued rights as of the completion date.

10. This clause in itself made clear that the purchase was to be a complete one. The starting point in the analysis therefore must be that the parties intended their agreement to be a full or complete one dealing with all matters relevant to ensure that the purchase is final. The relevant clause 4 is central to this determination so it is reproduced as follows:

4 <u>Consideration and Payment</u>

(a) The consideration payable for the shares ('the Purchase Price") shall be the sum of ***TT$32,000,000.00.***

(b) The parties agree that the sum of ***TT$5,920,822.59*** *represents the Company's payables which are to be vouched by the directors and beneficial owners and will be deducted from the purchase price and paid to the Company's creditors pursuant to sub-clause (e) (iv) below and in accordance with a schedule of payment to be agreed by the parties on or before 30th January, 2015.*

(c) The parties further agree that the sum of ***TT$5,000,000.00*** *being part of the purchase price be withheld by the Purchaser until the directors and beneficial owners of the Company collect such sum in the Company's name* ***("the receivables")*** *whereupon the Company will receive the collected sum of $5,000,000.00 and at the same time pay over the sum of $5,000,000.00 to the directors and beneficial owners of the Company. For the avoidance of doubt, the purchase price shall be reduced by whatever part of the receivables remains un-collected after three (3) years from the date of this agreement; that is on 25th November, 2017. The directors and beneficial owners of the Company shall be entitled to all sums collected in excess of $5,000,000.00 within said 3 year period.*

(d) The Purchasers shall pay a deposit to the directors and beneficial owners of the Company in the total sum of ***TT$7,000,000.00 ("the deposit")*** *in the following manner:*

(i) $5,000,000.00 on 25th November, 2014; and

(ii) $2,000,000.00 on 23rd January, 2015.

The parties agree that the 2nd instalment of the deposit of $2,000,000.00 was originally due on 23/12/14 and therefore the said sum of $2,000,000.00 will attract interest at the rate of 8% per annum from 23rd December, 2014 to 23rd January, 2015 which totals $13,589.04.

*(e) But for the sum of $5,000,000.00 referred to at clause 4(c) above the balance of the purchase price shall be payable to the directors and beneficial owners of the Company in 4 equal monthly instalments of **$5,000,000.00** to be paid as follows:*

(i) *First instalment of $5,000,000.00 payable on **27th February, 2015;***

(ii) *Second instalment of $5,000,000.00 payable on **31st March, 2015;***

(iii) *Third instalment of $5,000,00.00 payable on **30th April, 2015;***

(iv) *Fourth instalment of $5,000,000.00 payable on **29th May, 2015** (subject to clause 4(c) above).*

Provided always that from the above payments the agreed list of payables amounting to $5,920,822.59 referred to at 4(b) above are paid directly to the Company's creditors by the Purchaser provided that the creditors fully release and discharge the Company by executing a release and discharge in the Agreed Form.

(f) Upon the payment of the first instalment of the deposit set out at (d) above, the directors and beneficial owners of the Company shall cause a directors and shareholders meeting to be convened in order to pass a resolution transferring or issuing and allotting 100% of the shareholding in the Company to the Purchaser but which shares shall be held in escrow by the Attorney at Law for the directors and beneficial owners, A.F. Douglas & Co., for delivery to the Purchaser upon completion of the purchase herein.

(g) For the further avoidance of doubt, the parties agree that any payables and/or debts or liabilities identified before completion in excess of the sum of $5,920,822.59 shall be deducted from the purchase price and settled out of the instalment payments and paid directly by the Purchaser therefrom.

11. The critical issue is whether the court should look at the Share Purchase Agreement as a complete document representing the entire terms of the contract for sale as contended by the Claimant or whether the court ought to look at, as an extrinsic aid, a letter dated 5 November, 2014 by the first Defendant. In effect the issue is whether

the agreement should be construed in accordance with the terms of the first Defendant's letter.

Legal Principles

12. A number of legal principles have been cited by the parties.

13. It is the duty of the court to construe an agreement according to the ordinary grammatical meaning of the words used in the document without reference to anything which has previously passed between the parties to it: per **Cozens–Hardy MR in Lovell and Christmas Ltd. –v- Wall [1911-1913] All ER Rep. Ext.1630.**

14. There are exceptions to when the Court can look beyond the agreement. These include:

(1) Where the words have a technical or special meaning;
(2) Where examining the purpose and background to the document will resolve an important ambiguity;
(3) Where examining the purpose and background (the factual matrix) will avoid an absurdity when construing the literal meaning of the document.

15. The Court is generally not entitled to consider prior acts or correspondence or look at words deleted before the conclusion of the contract to ascertain the meaning of the contract finally agreed upon: **Halsbury's Laws of England, Vol. 32, (2012) at para.375.**

16. In **Attorney General of Belize and Others –v- Belize Telecom Ltd. (2009) All ER 1127 (PC) Lord Hoffman stated:**

> 16. "Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the

process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see Investors *Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

17. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.

18. In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.

19. The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973]

1 WLR 601, 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:

"[T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

20. More recently, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn said:

"If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting."

21. It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

22. There are dangers in treating these alternative formulations of the question as if they had a life of their own. Take, for example, the question of whether the implied term is "necessary to give

business efficacy" to the contract. That formulation serves to underline two important points. The first, conveyed by the use of the word "business", is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties. That was the basis upon which Equitable *Life Assurance Society v Hyman* [2002] 1 AC 408 was decided. The second, conveyed by the use of the word "necessary", is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.

….

26. In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 282-283 Lord Simon of Glaisdale, giving the advice of the majority of the Board, said that it was "not … necessary to review exhaustively the authorities on the implication of a term in a contract" but that the following conditions ("which may overlap") must be satisfied:

"(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying' (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract".

27. The Board considers that this list is best regarded, not as series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so. The Board has already discussed the significance of "necessary to give business efficacy" and "goes without saying". As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good

> reasons for saying that a reasonable man would not have understood that to be what the instrument meant."

17. I come now therefore to resolving the questions put for determination in light of the agreement and the facts put before me in evidence. There are some undisputed facts.

18. First, the Share Purchase Agreement (SPA) provides that it supersedes the Heads of Agreement dated 18 November, 2014. Second, a written agreement was arrived at. Third, the agreement was signed by the parties. Fourth, the parties had the benefit of legal representation and advice. Fifth, the SPA did not incorporate by reference, annexure or in any way any previous correspondence. Sixth, this was clearly a business contract important to the Claimant and the first and second Defendants as it impacted on the third Defendant. It is, therefore, expected that care and due diligence would have been exercised.

19. The law is also clear that where parties have reduced an agreement into writing, the court will be reluctant to look to other documents unless it is necessary to give business efficacy to the contract.

20. The present SPA appears to be a complete one dealing with all relevant matters necessary to give effect to the agreement. In light of the undisputed facts above, I find that it constituted the full agreement among the parties in respect of the transfer of the interest of the first and second Defendants in the third Defendant to the Claimant.

21. The second question follows from the first relating to Clause 4. This clause provided the payment regime for the $32 million transaction. It provided as follows:

(1) The consideration was $32 million.

(2) The company's payables were agreed to be $5,920,822.59. This is to be "deducted" from the purchase price and paid to the creditors directly.

(3) $5 million of the purchase price is to be withheld by the Purchasers until the directors and beneficial company collect receivables amounting to $5 million and the Purchasers will then pay over sum of $5 million to the directors and beneficial owners. If part of the receivables are uncollected at 25 November, 2017, the purchase price will be reduced by the uncollected sum. The directors and beneficial owners are entitled to any sums over $5 million collected.

(4) A deposit was payable to the directors and beneficial owners of $7 million in tranches of $5 million and $2 million. Since the latter sum was payable by 12th December, 2014 interest was payable up to 23rd January, 2015.

(5) Except for the sum of $5 million referred to in Clause 4(c) the payments were:

(i) First instalment of $5 million payable 27th February, 2015;

(ii) Second instalment of $5 million payable on 31st March, 2015;

(iii) Third instalment of $5 million payable on 30th April, 2015;

(iv) Fourth instalment of $5 million payable on 25th May, 2015

subject to clause 4(c). (Emphasis supplied)

(6) From the above payment the payables of $5,920,822.59 is payable directly to the Creditors.

(7) On payment of the deposit the directors and beneficial owners are to transfer their shares to be held in escrow.

22. While the agreement may have been expressed more simply the effect of the language is clear enough. There is no ambiguity. (5) (iv) was expressed to be "subject to clause 4(c)". This $5 million payment was to be "withheld" pending the collection by the directors and owners of the receivables up to $5 million. Thus, it was a recognition that there were receivables due to the company and that was to be collected before this payment was to be made by the purchaser. Any sum collected above this was to be for the benefit of the directors and beneficial owners. The payment of the $32 million as consideration was subject to the mechanisms set out in 4(b) and 4(c) and the fourth instalment was subject to 4(c). This means that this payment was dependant on 4(c). In other words, the directors and beneficial owners had until 25 November 2017 to collect the receivables. However, if they were collected before 29 May 2015 the $5 million instalment would be due.

23. Nothing has gone wrong with the language and a reasonable person can understand what the language means. What it results in is provided that clause 4 (c) is complied with, $27 million is payable to the first and second defendants and $5,920,822.59 is payable to the creditors of the company. In effect, the consideration is really $32,920,822.59. But even this does not undermine the language of the contract.

24. The language means that the sum of $5,920,822.59 is deductible from the purchase price and payable to creditors directly. Clause 4(g) provides for settlement of payables, debts or liabilities exceeding the sum of $5,920,822.59 and a mechanism for such payments.

25. There also does not appear to be any mistake as expressed in the language of the agreement save for the consideration sum which as noted is really $32,920,822.59. But the agreement contemplates some adjustment of this figure contingent on the operation of 4(c), 4(e)(iv) and 4(g), which all in effect refer to the same thing.

26. If, as the first and second defendants contend, they consider they ought to have had a different arrangement entitling them to an additional sum; that is a matter for the negotiation process. The bargain, as reflected in the agreement, is discernible and clear. The difference in interpretation relates to whether the receivables figure is to be deducted from the sum of $10,155,408.24 as set out in the agreed accounting of the parties. The answer is provided for in the agreement. There is therefore no need to go beyond the SPA to interrogate that matter.

27. It is unnecessary to question how the figure of $5,920,822.59 was arrived at, or where the $32 million is to come from, or to address the questions raised at paragraphs 29 and 40 of the submissions of the first and second Defendants. In light of the authorities cited, there is no need shown to go beyond the SPA.

28. The two additional issues raised by the first and second defendants are as follows:

> (i) Whether the term "consideration in an agreement for the acquisition of shares has a particular and technical meaning and what is that meaning, and

should that meaning be used as an aid to the interpretation of the Share Purchase Agreement?

(ii) Whether the express terms of the Share Purchase Agreement are capable of a commercially sensible construction and whether they make accounting sense and are capable of double entry reconciliation, and if not, how is the real meaning of the contract to be arrived at?

29. Having regard to these conclusions arrived at, in my respectful view, these two additional issues do not arise for consideration. There is no need to look for a technical meaning of the term consideration outside of what it means in ordinary contract law. It remains essentially the price being paid for the transfer. And the mechanism for payment is as set out in the agreement.

30. On the second issue the **Belize Telecom** case has expressly explained that:

> "The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means."

> "If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls."

> "The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable." (Lord Pearson in the Trollope case as quoted in the Belize case)

> "There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"
>
> "It must be satisfied that it is what the contract actually means."

31. All of these quotes are apt in the sense that the agreement tells us what each side was to do and get. There is no need to look beyond the agreement.

32. It must be remembered that the 5 November letter was written by one Defendant. There is no suggestion of an acknowledgement of its terms by the Claimant. Also, a lot happened after that leading to the 18 December 2014 SPA.

33. This conclusion resolves the claim of the Claimants. There is acceptance that $17 million has been paid by the Claimants. The findings above establish what is left to be paid. The matter is being decided on the interpretation of the contract. That interpretation means that the counterclaim of the first and second Defendants is also resolved.

34. The counterclaim is for $10,155,408.24 in damages for breach of contract. But this relief is hinged on the court accepting the interpretation of the SPA advanced by the first and second Defendants which the Court has not. It also requires the court to conclude that there is more to be decided in this case than the interpretation of the agreement. The nub of this dispute is the difference in the interpretation of the contract. There is nothing else before the court on the pleadings that requires a separate determination.

35. The CPR provides for judgment to be given where the dispute is resolved on a preliminary issue. This is the consequence of my findings here.

36. Accordingly, there is judgment for the Claimant against the Defendants in accordance with paragraphs 2 to 6 of the Fixed Date Claim Form filed 30 October, 2015.

37. I will hear the parties on costs.

Ronnie Boodoosingh

Judge