THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV 2017-00483**

BETWEEN

LMCS LIMITED

Claimant

AND

NATIONAL ENERGY CORPORATION OF TRINIDAD AND TOBAGO LIMITED

Defendant

Before the Hon. Madam Justice C. Gobin

Date of Delivery: January 11, 2019

Appearances: -
Mr. G. Hallpike, instructing by Ms. K. Persad-Maraj, Attorney at law for the Claimant
Mr. K. Garcia instructing by Ms. V. Jaisingh, Attorney at law for the Defendant

REASONS

1. On 30th November 2018 after hearing submissions on a point on which I had invited the parties' assistance, I dismissed the Claimant's claim. The submissions in fact extended beyond the narrow issue of whether equitable principles, estoppel, waiver, and unjust enrichment could be imported into a claim arising out of a contract under FIDIC terms. The parties also addressed on the evidence on which the Claimant was relying to support the case of waiver and more generally on how the Court should treat with the failure to comply with required formalities. I now give my reasons for the dismissal of the claim.

<u>The Claim</u>

2. This is a claim by LMCS on an invoice dated 23rd July 2015, number 15-0701 for TWENTY-SIX MILLION SEVEN HUNDRED AND NINE THOUSAND AND SEVENTY-TWO DOLLARS AND TWO CENTS ($26,709,072.02) plus VAT comprised of NINETEEN MILLION FIVE HUNDRED AND THIRTY SEVEN THOUSAND SEVEN HUNDRED AND SEVENTY TWO DOLLARS AND TWO CENTS ($19,537,772.02) due and owing from the Defendant to the Claimant and the increase costing for materials in the sum of SEVEN MILLION ONE HUNDRED AND SEVENTY ONE THOUSAND THREE HUNDRED DOLLARS ($7,171,300.00) plus VAT. It has to be borne in mind that it is not a claim for restitution for unjust enrichment or of a quantum meruit.

3. The Claimant contractor LMCS entered into a contract dated 3rd April 2008, under FIDIC conditions with the Defendant, National Energy Corporation of Trinidad and Tobago Limited (NEC) for the Demolition and Reconstruction in the La Brea Dock Facilities (Berth 1). The Defendant appointed R.M. Engineering Ltd, (RMEL) the Engineer under the contract.

4. For my determination two clauses of the contract and their effects fell to be construed. I had further to decide whether on the facts as I found them to be, strict compliance was requisite or whether LMCS established its plea of waiver.

5. The first of the clauses is a condition of particular application which amended the general form of contract to provide as follows: -

> *3.1 – Engineers Duties and Authority*
>
> *"The Employer reserves the right to vary the Engineer's Authority at any time provided that any such variation shall be made in writing and shall not take effect until a copy thereof has been received by the Contractor."*
>
> *<u>"The Engineer shall obtain the specific approval of the Employer in writing before taking any of the following actions"</u>*
>
> *(a) Approving or sub-letting any part of the works under sub-clause 4.5; and*
> *(b) <u>Issuing a variation under Sub-Clause 13.1, except in the following circumstances:</u>*

(i) *An emergency situation, as reasonably determined by the Engineer; or*

(ii) *If such variation order would not increase the contract price or change the contract specifications.*

6. The second clause 20.1 deals with the Claimant's entitlement to payment as claimed.

20.1 Contractor's Claims

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply. ***[Emphasis added]***

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the extension (if any) of the

Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

7. The calendar of events leading up to the filing is important. This civil claim on the invoice was filed on 7th February 2017. The Claimant tendered for the contract almost ten (10) years prior to it being filed. The tender was accepted on 12th November 2007. The formal agreement was dated 3rd April 2008 but it is agreed that the works commenced in March 2008. In a letter to the Defendant's Chairman dated 20th December 2016 the Claimant indicated the contract milestones as follows: -

    - Start of works 2008 March
    - Date of substantial completion 2009 Dec 23
    - Date of issue of taking over certificate by NEC 2013 Feb 13
    - Date of payment of retention by NEC 2013 Feb 21

    The parties at all times agreed that the defects liability period ended on 23rd December 2010. On any view, what strikes immediately is the time lapses between each of those events as a whole and the date of this claim and this is material to the consideration of clause 20.1.

8. NEC raised as a defence the issue of non-compliance with clauses 3.1 and 20 as a consequence of which the claim should have been struck out. LMCS did not seek to establish that it complied with the provisions. LMCS' case is that neither of these provisions applied. It contended that NEC was always aware of its claims for additional payments and it was at all times aware that LMCS was dealing with RMEL on further costing submissions. This was acknowledged in several minutes of progress meetings over the contract period. There were clear references in some

of the minutes to adjustments in dimensions and quantities of materials, variations, and new drawings were attached to some of them. In the circumstances, it argued NEC had waived the right to insist on strict compliance with the formalities.

9. In its letter dated 28th July 2015 to NEC, LMCS confirmed its failure to comply with both conditions. I shall set it out in full because I have found its contents to establish facts relevant to the timeline as well as other issues.

2015 July 28

National Energy Corporation of Trinidad and Tobago
Corner Rivulet and Factory Roads
Brechin Castle
COUVA

Attention: Mr. Haydn Jones

RE: <u>Additional Works:LABIDCO Berth 1 Demolition/Reconstruction Works: Contract No. LCS/02/0408</u>

Dear Sir,

Please find attached our invoice for additional works as well as for outstanding payments for items on the original scope of works for the Berth I Demolition/Reconstruction Works, LABIDCO, La Brea.

Execution of these works started in 2008 March and the National Energy Corporation issued a Taking over Certificate for these works on 2009 December 23, with the Defects Liability Period ending on 2010 December 2013.

During the execution of the Works the NEC requested several changes to the scope, both additions and deletions. <u>LMCS Limited duly followed the Client's instructions with the stated understanding that all costs associated with the changes would be subsequently approved in accordance with the NEC's procedures.</u>

The attached Minutes of Meetings documents many of the changes to scope requested by the NEC, and the Minutes also makes several references to the Client's Engineer

having the responsibility to tabulate the changes and to bring forward the documentation for approval by the NEC. <u>It is to be noted that these agreed changes have not been tabulated/approved by NEC up to the present time.</u>

<u>LMCS Limited has made several requests to the NEC and to the NEC's Engineer to obtain written approvals for the costs associated with the changes, in order for LMCS Limited to produce their invoices for payments of these agreed-upon changes. No such written approvals have been received by LMCS Limited.</u>

<u>LMCS Limited has been left with no other option but to tabulate the costs of all changes and to submit invoices for prompt payment of these costs that have long been outstanding.</u>

LMCS Limited has attached the following documentation to detail/support the invoice as follows:

1. *Cover Letter*
2. *Labidco Berth 1 Summary BOQ, Original and Additional Works*
3. *Labidco Berth 1 Detailed BOQ, Original and Additional Works*
4. *Details of Variation Works, Variations 1 to 25*
5. *Minutes of Status Meeting 2 to 39*
6. *Original and Addendum Drawings*
7. *Drawings Showing Revisions*
8. *Berth 1 Original Works Final Payment Details*

Please do not hesitate to contact the undersigned if further details and/or clarifications are required (Office: 658-0466 or Mobile: 299-9728).

Yours faithfully,

LMCS LIMITED

HASEEB ALI
Project Manager

10. First, the letter puts the claim in proper chronological context. It attaches the invoice and it indicates the claim or the value of it (and this is indisputable on the evidence) for the first time almost six (6) years after the completion of the project. The "stated understanding" as to

subsequent approval clearly departs from the particular condition 3.1. It accepts that the changes have not been "tabulated"/approved by the Defendant up to the date of writing and that it had received no written approvals for the changes. What it indicated too, and this is significant in my opinion, is that LMCS was indicating that it was only now forced to tabulate the costs of all changes and to submit invoices. This begs the question – did it not do so before? The statement of case (at para 16) confirmed that it was subsequent to the issuance of the invoice dated 23rd July 2015, that the Claimant reconciled its costs based on payments made – for materials purchased. This reconciliation increased the costs by a further SEVEN MILLION DOLLARS. These observations are relevant to the issue of whether LMCS had previously detailed and submitted a claim in accordance with clause 20.1. (see paragraph 27 hereunder)

11. What is clear from the letter and this claim is that LMCS, having failed to comply with the provision for approvals for variations, and with the notice provision, was now claiming a substantial sum of money almost 8 years after the project had come to an end. The question was then should LMCS be allowed to avoid the consequences for breaches of the terms which are so clearly expressed in the contract to recover on the invoice.

12. On the short point as to whether in the face of clear non-compliance with the FIDIC terms – the Court could import principles of waiver or estoppel to allow the Claimant of some relief in equity, the answer is to be found in **Hudson's Building and Engineering Contracts 11th Edition Volume 1 at pages 902 to 903: -**

> **SECTION 2. VARIATION CLAIMS AND EXPRESS PROVISIONS**
>
> **(1) GENERALLY**
>
> **Paragraph 7.041**
>
> As has been seen, the general rule is that a contractor who has been requested to do work which is in fact a variation will be able to recover payment for it if the owner has himself expressly or impliedly requested the work knowing it to be such. The contractor, therefore, is unlikely to be in a difficulty in advancing a variation claim unless either:

(a) The owner does not know of and so has not authorised the variation, or

(b) The contract has been so worded as to deny legal effect to any request or authorisation by or on behalf of the owner of his A/E which is relied on by the contractor

Since a public or private corporation, or indeed the government itself, can act only by its duly authorised representatives, it is submitted that the word "owner" in the second of the above propositions should be interpreted, on analysis, as applying only to agents of the owner rather than the owner himself.

Paragraph 7.042

Additionally the courts have not been slow to apply principles of waiver or estoppel, or implied promise or unjust enrichment, so as to prevent an owner in appropriate circumstances from setting up a defence of non-compliance with contractual requirements of form for varied work.

Broadly speaking, therefore, it will only be in cases where the owner in the sense defined about does not know of and has not authorised a variation, or where the person who has authorised it is some official or representative of the owner whose authority has been expressly denied by the contract, that it will then become necessary, at least so far as the question of liability to pay an additional price is concerned, for the contractor to bring himself within the terms of a contractual variation clause. So far as *valuation* under the terms of that clause is concerned, however, if that is desired, both contractor and owner will usually have to show compliance with any formal requirements of the contract, except in cases of waiver or estoppel.

13. When this general learning was applied the Claimant's case was bound to fail. The particular condition 3.1 was to be accorded the highest priority. The Engineer's authority for approving variations was specifically denied by the contract, save as provided for.

14. In the course of submissions, the Claimant's Counsel was asked to identify the conduct of NEC which gave rise to the estoppel or waiver. He indicated that he was relying upon the minutes of progress meetings which reflected that at all times representatives of LABIDCO and NEC

were in attendance. This he claimed was sufficient to ascribe knowledge of the discussions about variations and approvals and the entitlement to increased project costs. More importantly, the minutes, he claimed, appeared to refer to instructions for and variations in certain aspects of the works by the Engineer. In those circumstances, Counsel submitted that the Engineer was agent of the Defendant for the purpose of approving the variations and that the record in the minutes met the requirement for approval in writing. I rejected this submission. Clause 3 (1) provided expressly for the engineer to obtain the prior approval of NEC in writing for variations. The Defendant is a Corporation. Its approval could only be given in writing through a decision of the Board of Directors. The suggestion that RMEL qua agent of the Employer could give himself as engineer the requisite approval in writing by references in the minute in my view was untenable if not absurd.

15. It is settled that the issue of waiver is a question of fact. On my analysis, the facts in particular those relied upon by Counsel to establish the conduct amounting to waiver, did not do so.

16. LMCS and NEC parties are who, prior to this particular contract and even subsequent to its completion, had other contractual dealings with each other. They are business entities. It is accepted that the only time during their relations that an external engineer RMEL was appointed under one of their contracts. In all of their other dealings Defendant's internal engineers and employees were authorised to act as its agent. Further, it was also the only time particular condition 3 (1) which required the Defendant's prior approval in writing to variations was stipulated. The Claimant must at all times have recognised that this was a provision which the NEC, considered necessary for its protection against unauthorised expense and one which for LMCS own protection and to assure payment, required strict compliance.

17. The conduct relied on was insufficient against the stringent requirement of clause 3.1, a particular condition added for the first time in a contract between these parties. Further, the minutes of the progress meetings reflect that LMCS had a representative through its own Chairman, Mr. Kazim Ali at nearly all of the meetings. There is no record of any request for compliance with 3.1 or any reminder on his part.

18. The mere presence of other representatives of NEC in these circumstances was insufficient to infer a waiver of the condition. The minutes reflect no significant input by NEC's representatives on matters which fell within the external engineer's authority. What the NEC's representatives did consistently was to remind that **"comprehensive and detailed cost projections and justification had to be submitted because Board approval was required for additional expenditure"**. This reminder appears from the Minutes of Meetings No.1 and continues through meetings (12), (29) (30) which was held on 22nd July 2009 mere months before completion.

19. Even when the issue of variations or increased costs were mentioned – there was no note in the minutes of any details of the works or the justifications or the estimated or final costings. No documents were recorded as having been submitted at the meetings by LMCS or RMEL. The note on the minutes, even of the final meeting held on 25th November 2009 indicated:-

> "the submission on the final cost of the project is yet to be submitted.
> RMEL will submit the document by 30th November 2009."

20. In an email dated 21st January 2011, to the Defendant's Gabrielle Haynes, LMCS reminded of "outstanding <u>works to be invoiced</u>" Item No.2 listed: -

> "Variation works re Demolition and Reconstruction
> <u>of Berth 1 Labidco estimated at $18,500,000.00."</u>

This statement was made well over a year after the date on which the Engineer should have submitted the final cost of the project to NEC and well after the completion and handing-over. Significantly up to the date of this email, the Claimant was presenting an "estimated figure". By the time this claim was filed, that estimated figure had increased to more than TWENTY-SIX MILLION DOLLARS. (This only underscores the importance of strict compliance with the terms of the contract for entitlement to payment and notice of claims). This claim had been increasing over the passage of time.

21. Perhaps the most compelling reason for rejecting the claim of waiver condition of 3.1 is that in the course of the works – LMCS submitted a claim for a contract variation agreement to the Defendant for the relatively small sum of $16,100.00. This was approved by the Board in accordance with Clause 3.1. Against this background, the Claimant's decision to perform additional works and to incur a price increase of TWENTY SIX MILLION DOLLARS outside of the process prescribed by the contract hardly seems credible but if it did, LMCS assumed a risk, liability for which should not now be foisted on the Defendant.

22. The claim also failed because of LMCS's neglect to give notice of its claim in accordance with Clause 20. 1. The learning in **Hudson's** (supra) states at page 909 paragraph 7.051: -

(3) Notice of claims

7.051

> While, therefore, it will very frequently be possible, for a number of different reasons, for the contractor to recover payment for a variation notwithstanding his failure to comply with any contractual requirements of form such as an order in writing, and the courts have proved flexible and sympathetic in that regard, it has already been seen that contractual provisions requiring *notice* of claims within a stipulated period are treated very differently, and that the courts will frequently interpret them as conditions precedent to any claim and apply them relatively strictly so as to defeat contractors who fail to comply with such requirements.

23. The learning above against the timeline and when it applied to the facts of this case militates against any softening of the position. Counsel for NEC referred to the case of **NH. International v. NIPDEC [2015] UKPC** as authority for the proposition that LMCS should be held to the strict terms of 20.1. I considered the authority applicable.

24. In **NH v NIPDEC** one of the issues which the Privy Council dealt with arose out of an Appeal from the Arbitrator's award. Dr. R Gartskill Q.C was appointed to determine disputes which

arose out of an agreement dated March 6 2003 under which NIPDEC engaged NH to construct the new Scarborough Hospital in Tobago. Following disagreements between the parties NHIC suspended work and finally determined the Agreement. The parties differences were referred to the Arbitrator and the appeal arose out of the awards granted. In particular, relevant and applicable to this case one of the issues which arose involved the interpretation of clause 2.5 of that agreement.

25. Clause 2.5 in essence provided that if the Employer considers itself to be entitled to any payment under any Clause in the contract it should subject to certain exceptions give notice and particulars as soon as practicable. The Board found that the words of clause 2.5 could not be clearer and that its purpose is to ensure that claims which an employer wishes to raise should not be allowed unless they have been the subject of notices which must have been given as soon as practicable. Applying the reasoning of the Privy Council, I find that the language of clause 20.1 in the instant contract, could not be clearer and in the circumstances LMCS should be held to the terms.

26. LMCS gave no notice of a claim within the period prescribed. The minutes of the last meeting indicated that final pricing was yet to be submitted. It was expected on 30th November 2009. No evidence of whether it was so submitted or what was submitted was elicited. This is not a claim on that submission.

27. The Claimant's difficulties therefore went beyond the failure to communicate the notice of its claim in writing in accordance with clause 20.1 within the timeframe. A more fundamental question arose as to whether there was a claim at all. What the contract stipulated was the submission of a fully detailed claim with full supporting particulars of the basis of the additional payments claimed. Mere references in minutes to additional costs even variations and invitations for re-costing submissions could hardly fall within the definition of a claim by the contractor. In the absence of the presentation of detailed submissions with supporting documents, the machinery for dealing with a claim could not activated. LMCS having failed to invoke the proper machinery under 20.1 this boiled down to substantial claim on an invoice

prepared and submitted eight years on, the justification for which has not and cannot be value. When clause 20.1 is read comprehensively the need for strict compliance with the notice requirement becomes even clearer. The structure of the clause even when proper notice is given, then lays down a regime for record keeping – supporting particulars, the role of the Engineer after receiving notice of it and the monitoring and inspecting of the records, and further for the Engineer no doubt after his investigations and assessments to respond with approval or disapproval and detailed comments. He is given a relatively short time frame of 42 days after the claim to respond.

28. By the time the attempt was made to formalize a claim the project was over and the Engineer long gone. There was no longer any process for valuing the works or justifying the new bill. Consequently, no payment certificates could be issued. LMCS agreed that no payment certificates had in fact been issued. The submission of a proper claim in strict compliance with the format with supporting documents within the timeframes can therefore be regarded as a condition precedent to the entitlement to payment.

29. In the circumstances, the Claimant's case was dismissed and an order for prescribed costs to be paid by LMCS to NEC was made.

Carol Gobin

Judge