

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV: 2015 – 01135

BETWEEN

SL CONSTRUCTION LTD

Claimant

AND

TOBAGO HOUSE OF ASSEMBLY

DIVISION OF SETTLEMENTS AND LABOUR

Defendant

Before The Hon. Madam Justice E. Donaldson-Honeywell

The Claimant self-represented as litigant in person by Ms. Jermaine Raymar

Mr. Kimba Anderson, Attorney-at-Law for the Defendant

Dated this 24th June, 2016

ORAL RULING

I. Factual Background

1. The Claimant Company claimed several reliefs in the instant Claim arising from the alleged failure of the Defendant to engage the Claimant Company as a contractor in a dwelling house construction project. The majority of the reliefs sought were struck out during Case Management on dated March 11, 2016. The parts of the Claim that remained for consideration were firstly, a claim for constitutional reliefs for infringement of the right to equality of treatment and secondly, a claim for damages based on alleged promissory estoppel. The instant ruling addresses viability of these remaining aspects of the Claim.

2. Additionally, the Claimant was given the opportunity by directions issued on March 11, 2016 to include some of the pleadings inappropriately put into an Amended Statement of Case in a Reply. The Claimant Company has not only filed the Reply but made further applications to the Court. The first such application is by Notice dated April 5, 2016 and it seeks injunctive relief mandating the First Defendant to immediately cease the construction project at Adventure Housing Development Phase Two in Plymouth, Tobago.
3. The second application is by Notice dated May 23, 2016 seeking an order that the order made striking out parts of the Claim and Statement of Case be varied to exclude the striking out of pleadings at paragraphs 67 and 68 of the Statement of Case and reliefs N and W of the Claim. Essentially this Application, supported by a lengthy supporting Affidavit introducing new facts, seeks to reintroduce as a cause of action an alleged breach of contract. The Claimant has taken action by filing, without seeking permission of the Court, a Re-Amended Claim form and Re-Amended Statement of case dated June 22, 2016. The Ruling herein also addresses the two Notices of Application and the newly filed pleadings.

II. Consideration of the Notices of Application and the filing of new pleadings

4. The Defendant's affidavit in response raises in opposition to the grant of injunctive relief the fact that preventing the construction project to continue will result in substantial cost implications affecting not only the Defendant but other contractors. On the other hand any loss that may be sustained by the Claimant can be compensated for in damages, should her Claim ultimately succeed. Having considered all the circumstances herein and the balance of convenience it is my determination that no injunctive relief should be granted to the Claimant.
5. The Application to vary the striking out order made on March 11, 2016 is supported by an Affidavit of Mr. Lennox Smith dated May 20, 2016. The Affidavit seeks to introduce new evidence recently recovered from files of the Claimant that had been left with an Attorney-at-Law. The files are said to provide information on contracts whereby the Claimant Company was engaged for the second phase of the housing project in relation to which it is contended the Claimant has not been allowed to work. It is based on this new information that the Claimant asks that the parts of the pleadings on breach of contract that

were struck out because no contract governing the relevant aspect of the works was pleaded, be re-instated into the Claim.

6. The order claimed cannot however be granted as it would amount to granting permission to the Claimant to make a new claim by amendment. To allow such a change would be unjust as the Defendant already filed pleadings and made submissions in relation to the prior deficient Statement of Case. Furthermore, the first case management conference has long been concluded so amendments to the pleadings cannot be made without permission of the Court. It is for this reason as well, that the Re-Amended Claim Form and Statement of Case dated June 22, 2016 ought not to have been filed without seeking permission in accordance with **Part 20.1(3) of the Civil Proceedings Rules 1998 (as amended) [CPR]**.
7. Even if such an application had been made it would in my view cause undue prejudice to the Defendant if permission to make such a major change were to be given at this late stage. This determination is based on the fact that the Defendants have thus far incurred time and expense for approximately one year defending the Claim. The Defendant presented submissions raising the absence of pleading of a Contract by the Claimant to the attention of the Court. It would be unfair to allow an amendment for the Claimant to rectify the deficiency after the fact as it would mean that the Defendants must now face a new case outside the context of the Claim they have been addressing.

III. Consideration as to whether the remaining parts of the Claim and Statement of Case are viable

A) The Claim for Constitutional Reliefs

8. The Claimant Company alleges that the Defendant has discriminated against the company on the basis of sex as it is a company run by a woman.
9. The Claimant alleges that it was invited to tender for Phase I of a certain project of the Defendant and was subsequently hired to do certain works. The Claimant further alleges that it was promised by the Defendant that it would be considered for Phase II of the project. The Claimant was not considered at all for the tendering process thereafter and the Claimant now claims that it was subjected to discrimination by the Defendant on the basis of the sex of the director of the Claimant Company.

10. Several issues arise out of the Claimant's claim for constitutional relief in the determination of whether the statement of case discloses no grounds for bringing the claim and should therefore be struck out.

- i. Whether the constitutional right to equality of treatment and not to be discriminated against on the grounds of sex protects a corporate body;
- ii. Whether the failure to name the Attorney General as a party to this claim would be fatal to the Claimant's claim; and
- iii. Whether there is any alternate remedy available to the Claimant that bars this constitutional claim.

11. The **Constitution, Chap. 1:01** provides at Section 4(d):

"4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions".

12. A person alleging an infringement of his right under section 4(d) by a public authority must establish that he has been treated differently from some other similarly circumstanced person or persons. According to Mendonça JA (citing *Bhagwandeem v. The AG* [2004] UKPC 21) in *Graham v. Police Service Commission and the AG of Trinidad and Tobago*, Civil Appeal No. 143 of 2006 at paragraph 58: *"this does not mean that the comparison must reveal no differences between them. What it does mean is that the comparison must be such that the relevant circumstances in one case are the same or not materially different in the other"*.

13. The Claimant therefore has the burden of proving that it was similarly circumstanced to the other companies that were considered for the tender process and that it was treated differently. In the Court of Appeal decision of *Boxhill v Port Authority of Trinidad and Tobago*¹ it was held that: *"Discrimination on justifiable grounds does not infringe section*

¹ CA 11/2008

4(d). It is those choices which are based on some colourable ground or criterion which offend section 4(d).”

14. The Defendant in the present case has alleged that the basis of its decision lies in the quality of the Claimant’s previous work. The Claimant claims that it had no prior indication that the work it had done was substandard. This is a question of fact upon which the Claimant’s case hinges. The Court, if the issue is to be heard, must determine whether the decision was based upon the quality of the Claimant’s previous work as alleged by the Defendant (a justifiable ground) or upon the mere fact of the sex of the director of the Claimant company (a criterion which offends against S.4(d)).

Discrimination against a Body Corporate

15. The first issue that arises in the present case is whether the Claimant as a company can bring a constitutional motion for discrimination on the grounds of sex. The Defendant in written submissions filed on April 26, 2016 posed the question “Are the Section 4 rights in the Constitution which refer to an individual applicable to a company?” The Defendant indicated in response that they have found no authority to suggest same.
16. This issue was however, considered as far back as 1980 in the case of *Percival Smith & AG v LJ Williams Ltd*². That case involved an allegation of discrimination brought by a company that its business was treated less favourably than others by the Chief Immigration Officer.
17. The Court of Appeal considered the question of whether the word “individual” used in the section could encompass anything other than a natural person. The Court examined the provisions of the Constitution and the Interpretation Act, 1962 to determine the meaning of “individual”. The word “person” is used elsewhere in the Constitution. The Interpretation Act defines “person” as inclusive of corporate bodies whereas the word “individual” is defined as excluding such bodies. The Court, however, considered the cases of *Minister of Home Affairs v Fisher*³ and *Ong Ah Chuan v Public Prosecutor*⁴ and determined that the provisions of the Constitution, particularly those affecting the

² CA 19/1980

³ [1980] AC 319

⁴ [1981] AC 648

fundamental rights of the individual were to be interpreted generously to afford the full measure of fundamental liberties.

18. Hassanali, JA stated:

“In our society there is a conceptual relationship between "rights" and human interests, since a right is the right of him for whose benefit it exists; and it is recognised and protected as such. Even the rights of the corporation ultimately affect the interests of human beings.”

The ultimate question for determination was considered by him to be whether the respondent may under section 6 (the redress clause) allege and prove that the provisions of the relevant sub-sections have been contravened in relation to it.

19. The Court further referred to the *Antigua Times* decision⁵, a case which also determined that a corporation had standing to bring an action for contravention of its right to freedom of expression. The Court concluded that the applicant/respondent Company was competent to seek redress for contravention of its rights. Similarly, in the present case, the Claimant Company can be considered competent to bring the action against the Defendant, following the Court of Appeal’s decision on this point.

Proper party to Proceedings

20. The second issue for determination is whether the proper Defendant in the present case would be the Attorney General as contended in the Defendant’s written submission. Section 14 (1) of the Constitution makes provision for applications to the High Court for redress where one is alleging that there has been or is likely to be a breach of any of his fundamental rights secured by section 4:

“For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.”

21. Section 14(3) provides that the **State Liability and Proceedings Act Ch 8:02** shall have effect for the purpose of any proceedings under this section. Section 19(2) of the State

⁵ Attorney General and Minister of Home Affairs v. Antigua Times Ltd (1975) 21 W.I.R. 560

Liability and Proceedings Act provides: “*Subject to this Act and to any other written law, proceedings against the State shall be instituted against the Attorney General.*” Further, Section 19(8) provides that “proceedings against an authority established by the Constitution or a member thereof arising out of or in connection with the exercise of the powers of the authority or the performance of its functions or duties are deemed to be proceedings against the State.”

22. The Defendant in the present case is in fact an authority established by Section 140 of the Constitution and therefore the State is a proper party to these current proceedings. However, the failure to make the State a party does not mean that the claim must fail. The State can still be joined as a party to the proceedings at this stage⁶.
23. Further, in the case of *Jhagroo v Teaching Service Commission*⁷ the Privy Council determined that although the Attorney General had not been joined as a party to proceedings, the damages resulting from the decision would be payable by the State and therefore the Attorney General would be joined as a necessary party to the further proceedings for assessment of damages.
24. In the present case, therefore, if the case were to proceed, the State could be joined as a party as provided for by the State Liability and Proceedings Act.

Alternate Remedies

25. Another hurdle the Claimant must overcome in a constitutional motion is to prove that there is no alternate remedy that can be accessed in order to get the reliefs sought. Although the Constitution contains no proviso in its redress clause for availability of an adequate, alternative remedy, the courts have determined that there is an inherent jurisdiction to prevent abuses of process in this way⁸. The Privy Council in *Jaroo v AG*⁹ held that where a parallel remedy existed, the right to apply for redress under *section 14(1) of the Constitution* was to be exercised only in exceptional cases. It was held that an originating

⁶ See CPR 19.2

⁷ [2002] UKPC 63, [45]

⁸ See *Maharaj v AG (No. 2)* (1978) 30 WIR 310

⁹ [2002] UKPC 5

motion under section 14(1) was appropriate in cases where the facts were undisputed and only questions of law were in issue.

26. According to Lord Hope in that case:

“Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse.”

27. Further the Privy Council in *AG v Ramanoop*¹⁰ at page 310 noted that where the case contains a special feature which renders it appropriate for constitutional action, a claim made in good faith should not be barred:

“In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court’s process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.

That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But ‘bona

¹⁰ [2005] UKPC 15

vide resort to rights under the Constitution ought not to be discouraged': see Ahnee v DPP [1999] 2 LRC 676 at 687 per Lord Steyn and see Observer Publications Ltd. v Matthew [2001] UKPC 11, [2001] 4 LRC 288 at 305 per Lord Cooke of Thorndon."

a. Equal Opportunities Commission

28. In the present case, Jermaine Raymar, the director of the Claimant Company has already made an attempt at accessing the Equal Opportunities Commission [EOC] for a remedy based on the Defendant's alleged unequal treatment to her as a Principal of one of the contractors in the First Defendant's housing projects. However, Ms. Raymar has withdrawn the complaint as evidenced by a letter from the Equal Opportunities Commission dated March 20, 2015 attached to the Defendant's submissions. There are no proceedings at the EOC in relation to the Claimant Company and the Defendant.

29. **S.34 Equal Opportunity Act, Chap. 22:03** provides:

"Where upon investigating a complaint the Commission finds that there is no evidence of discrimination it shall inform the complainant in writing and shall give its reasons therefor, whereupon no further action shall be taken by the Commission."

30. If the Commission had so determined, the Claimant could not have this remedy still available to it. There has been no determination and the complaint brought to the EOC was by Ms. Raymar as the director of the Claimant Company and not by the Claimant Company. The Act protects "an aggrieved person" from discrimination. A "person" under the Interpretation Act may include a corporation and therefore it may still be open to the Claimant company to seek redress under the Equal Opportunities Commission.

b. Judicial Review

31. The Claimant has not in the instant claim sought leave to apply for judicial review of the Defendant's decision to exclude it from consideration in the tendering process. Judicial review invokes the supervisory jurisdiction of the courts over public bodies and allows a

person to challenge the acts or omissions of a public body on the grounds of ‘illegality’, ‘irrationality’ and ‘procedural impropriety’, as distilled by Lord Diplock¹¹.

32. It is possible that the Claimant could claim that the decision of the THA was irrational as the Claimant says it was unreasonably excluded from consideration¹². This type of claim, if successful, may in fact give the Claimant an appropriate remedy in the form of a mandamus order as well as damages.
33. Accordingly therefore the Claimant ought to have exhausted access to alternate recourses instead of pursuing constitutional relief. The Claimant has not submitted that there is any special feature in this case which makes it appropriate for constitutional redress even where there exists an alternate remedy. As at least one alternative remedy exists and there are no exceptional circumstances, the recourse to constitutional motion is inappropriate for further consideration and that aspect of the claim must be struck out.

B] The Claim seeking damages for Promissory Estoppel

34. The Claimant has also claimed relief under the head of promissory estoppel. “Estoppel” is defined in the **Halsbury’s Laws of England**¹³ as “*a principle of justice and equity which prevents a person who has led another to believe in a particular state of affairs from going back on the words or conduct which led to that belief when it would be unjust or inequitable (unconscionable for him to do so)*”.
35. Further at [308] **Halsbury’s** explains that “*promissory estoppel is an extension by equity of common law estoppel by representation. The principle of promissory estoppel is that, when one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced.*”

¹¹ *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374

¹² See *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223

¹³ Estoppel (Vol. 47 (2014)) [301]

36. This doctrine was first established in the case of *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439 at 448, HL, per Lord Cairns LC and was subsequently interpreted in *Birmingham and District Land Co v London and North Western Rly Co* (1888) 40 Ch D 268 at 286, CA, per Bowen LJ.
37. The principle is only applicable in circumstances where there are legal rights between the parties and the representation made by one party to the other is that that party will not enforce certain of those rights against the other. The principle often arises in a contract relationship between A and B, and B subsequently grants to A the concession, not supported by consideration, that he will not enforce a particular provision of their contract.¹⁴ In the present case, this type of representation was not made as there was no existing contract between the Claimant and the Defendant. Furthermore the words of promise alleged by the Claimant were did not consist of an unequivocal promise that the Company would be engaged for the second Phase of the Project. The alleged words were referred to at paragraph 47 of the Amended Statement of Case as follows:

“The Claimant’s representatives met with the then Secretary of Settlements, Mr. Whitney Alfred on the 2nd of February 2010 on another matter. The matter of moving to Adventure Phase 2 was discussed among other things. It was clearly stated to the Claimant that they will be recommended to move to the Adventure Phase 2”

This alleged wording does not fall within the ambit of promissory estoppel.

38. Further, it has been established that promissory estoppel is not a cause of action in itself¹⁵. It operates as a “*shield, not as a sword*”¹⁶. It is mainly used as a defence to prevent a concession that was promised from being withdrawn and can also be used to prevent the use of a defence such as limitation where there was a promise not to invoke that defence. As such, the Claimant cannot rely on the doctrine of promissory estoppel as the basis for an award of damages in her claim.

¹⁴ *Tungsten Electric Co Ltd v Tool Metal Manufacturing Co Ltd* (1950) 69 RPC 108, CA

¹⁵ *Moorgate Mercantile Co Ltd v Twitchings* [1975] 3 All ER 314

¹⁶ *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256

IV. Determination

39. The Claimant's Applications dated April 5, 2016 and May 23, 2016 are without merit and must be dismissed. The Re-Amended Statement of Case must be struck out as an abuse of process. As it relates to the remaining parts of the existing Amended Claim and Statement of Case it is my determination that these must also be struck out.
40. The Claim for damages based on Promissory Estoppel is without merit as there has been no pleading of an unambiguous promise by the Defendant. In any event the claim of Promissory Estoppel is not a cause of action per se. Its established use is as a shield not a sword. The Claim for relief based on Promissory Estoppel must therefore be struck out as disclosing no reasonable cause of action.
41. There is less of an absence of merit in the Claimant's claim for constitutional relief. It is properly instituted by a body corporate and the rights claimed therein are enforceable by a company as held in **Percival Smith**. The Claimant's failure to name the State as a party to these proceedings is not fatal to its case at this stage in proceedings and the State can be properly joined before the case management conference is complete.
42. There may be a genuine claim by the Claimant for Constitutional relief if the Claimant can prove that based on the gender of its Principal it was subjected to unequal treatment by the Defendant in not being included as a Contractor in housing development projects. However, the Claimant has failed to exhaust all alternative remedies. There has been no suggestion by the Claimant that the case exhibits a special feature/exceptional circumstance making it appropriate for constitutional action despite the existence of an alternate remedy. The Claimant's claim for Constitutional Relief in the statement of case must also therefore be struck out on the grounds of abuse of process.
43. Additionally, the Claimant's Statement of Case has been pleaded in a manner that is prolix to the extent that a fair determination of the issues would be prejudiced if the matter were to proceed. Accordingly a further basis for striking out the Statement of Case of the Claimant is pursuant to **CPR 26.2. (1)(d)**.

44. **IT IS HEREBY ORDERED** as follows:

- a. The application for injunctive relief in the Notice of Application dated April 5, 2016 is dismissed with costs to the 1st Defendant assessed at \$1400.00 to be paid by the Claimant.
- b. The application dated May 23, 2016 to vary the striking out order made herein on March 11, 2016 is dismissed with costs to the 1st Defendant assessed at \$1400.00 to be paid by the Claimant.
- c. The Re-amended Claim and Re-amended Statement of Case filed on June 22, 2016 are struck out.
- d. All remaining parts of the Claim Form and Statement of Case filed herein not struck out on March 11, 2016 are struck out and the Claim herein is dismissed with prescribed costs to be paid by the Claimant to the 1st Defendant in the amount of \$14,000.00.

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely
Judicial Research Counsel I