

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain

Claim No. CV2019-00383

Between

Jokhan General Contractors Limited

Claimant

And

National Infrastructure Development Company Limited

Defendant

Before The Honourable Madame Justice Eleanor Donaldson-Honeywell

Delivered on: August 25, 2021

Appearances

Mr. Stephen A. Singh and Ms. Shalini Campbell, Attorneys at Law for the Claimant

Mr. Douglas Mendes SC, Mr. Ravi Nanga and Ms. Savitri Maharaj, Attorneys at Law for the Defendant

RULING

A. Introduction

1. This ruling determines the Defendant's application to set aside the default judgment obtained by the Claimant on July 31, 2019. The application is made under Part 13 Civil Proceedings Rules 1998, as amended ("CPR").
2. By Claim Form and Statement of Case filed on January 29, 2019, the Claimant filed a claim against the Defendant for, inter alia, the agreed sum of TT\$48,642,600.00, together with interest at the rate of 5% from October 17, 2014 to the date of judgment as specific performance of the agreement contained in letters dated February 13 and 14, 2017.
3. The Claim Form and Statement of Case were served on Mr. Richard Maule, the Defendant's Financial Comptroller and Acting Vice President of Finance on the January 30, 2019 at the Atrium, Don Miguel Road, San Juan. An Affidavit of Service was filed on behalf of the Claimant on February 5, 2019.
4. Having been served with the Claimant's documents, the Defendant failed to enter an Appearance and on February 18, 2019 the Claimant filed a request for Judgment in Default of Appearance.
5. Further to the receipt of Query Notices from the Court dated March 12, 2019 and April 4, 2019, the Claimant filed an Amended request for Judgment in Default of Appearance and Affidavit in support on April 18, 2019. The Claimant's request for Judgment in Default of Appearance filed on April 18, 2019 was subsequently withdrawn by the Claimant on the April 24, 2019 and an application for Judgment in Default was filed on June 12, 2019.
6. On July 31, 2019, the Honourable Mr. Justice Ronnie Boodoosingh ordered that Judgment be entered against the Defendant in the total sum of \$53,730,013.96 and said Judgment was registered against the Defendant on August 6, 2019.

7. By letter dated October 9, 2019, the Claimant wrote the Defendant advising of the order of the Court made on July 31, 2019 and attached a copy of the Court Order stamped October 2, 2019. This letter was received by the Defendant on October 15, 2019.
8. Three days after receipt of the Default Judgment Order, by application dated October 18, 2019, the Defendant applied to the Court for an order to set it aside and that there be a stay of the Judgment pending the hearing and determination of its Application. An affidavit of Melicia Tara John, the Defendant's Senior Legal Office, was filed in support of its Application ("the John Affidavit"). Subsequently, an Affidavit opposing the Defendant's Application was filed by the Claimant's instructing Attorney-at-Law, Ms Shalini Campbell, on November 1, 2019 ("the Campbell Affidavit").

B. Factual Background

9. The Claimant's case, as set out in its Statement of Case filed on January 29, 2019, is that the State began acquiring the subject land by virtue of a Legal Notice 15 in the Trinidad and Tobago Gazette i.e. a section 3 notice under the Land Acquisition Act Chap 58:01. Subsequently and on November 29, 2014, in accordance with section 4 of the Act, another legal notice entitled THE LAND ACQUISITION (POSSESSION OF LAND PRIOR TO FORMAL VESTING IN THE STATE) (NO. 188) ORDER 2014 was issued authorizing the Permanent Secretary, Ministry of Works and Infrastructure "to take possession of the parcel of land".
10. Beginning in 2014, the Commissioner of Valuations wrote to the Claimant and had indicated that he was authorised by the Defendant to negotiate a sale under the "shadow of Compulsory Acquisition". The Commissioner of Valuations did settle with the Claimant for "value of land taken" in the amount of \$23,236,883.00 and, in correspondence dated February 13, 2017 and February 14, 2017, the "unconditional offer" on outstanding compensation in the amount of \$48,642,600.00 was made by the Commissioner of Valuations and accepted by the Claimant.

11. The Claimant, in submissions, summarises its claim as one for breach of an agreement to pay the sum of \$48,642,600.00 for the following heads of damage as prescribed in the Land Acquisition Act - severance, injurious affection, disturbance and interest.
12. At para. 5 of the Defendant's submissions, the Defendant sets out the following planks as making up its Defence:
- i. the Land was never acquired under the Land Acquisition Act;
 - ii. the Claimant continues to be in occupation of the subject land;
 - iii. the Defendant never approved any payment and also that the agreement relied upon was subject to approval; and
 - iv. at the time of the offer there was a mutual mistake of law and fact that the Land Acquisition Order, was still subsisting when it had in fact lapsed.
13. The Defendant attaches a draft defence to its written submissions. The Claimant submits that no credence ought to be given to this draft defence. However, the case cited in support of this submission relates to the circumstance where a draft defence is attached to an affidavit which did not testify to the facts set out in the defence. This, as pointed out in the Defendant's reply, is not comparable to the present case where the affidavit in support of the Defendant's application supports the facts of the Defence and is deposed to by the Senior Legal Officer of the Defendant's company.
14. The Claimant also puts forward an argument that Ms. Melicia Tara John was not a competent deponent to the contents of her affidavit. They submit that she was not present or directly involved in the matters on which the defence is based. The Defendant's submission in reply is persuasive.
15. The Defendant underscores that it is accepted that Ms. John is an employee and duly authorised representative of the Defendant. Further and importantly, the Claimant did not apply to strike out her evidence or seek permission to cross-examine her as to the

extent of her knowledge on these matters. At para. 2 of the John affidavit, she swears to having personal knowledge of the matters stated within. This is uncontested in any evidence by the Claimant.

16. In addition, the Defendant has pointed out that Ms. John was the author of the letter dated June 28, 2018 annexed as “M.J.12” to her affidavit. The letter, written on behalf of the Defendant’s company, demonstrates Ms. John’s knowledge of this matter and the dealings between these parties in relation to the land. It has not been sufficiently demonstrated by the Claimant that Ms. John does not have the ability and competence to speak to the matters set out in her affidavit.

C. Issues

17. The parties are in agreement that in order for the Defendant's Application to succeed, the Defendant must establish that (a) it has a realistic prospect of success and that (b) it acted as soon as reasonably practicable when it found out that judgment was entered – **Part 13.3 CPR; The Caribbean New Media Group Limited v Isaac Civil Appeal No. S- 209 of 2013.**
18. Though it is argued by the Claimant in submissions, at para. 10.41, that the overlooking by attorneys of the deadline is not a good reason for failure to meet deadlines, the Claimant makes no submission that the application was not brought as soon as reasonably practicable after finding out judgment was entered. There is, in fact, no basis for such a challenge to the Defendant’s application as it was promptly filed within 3 days of receipt of the Judgment.
19. Therefore, the only issue to be determined is whether there is a realistic prospect of success in the Defendant’s defence.

D. Law and Analysis

20. Part 13.3 CPR provides:

“(1) The court may set aside a judgment entered under Part 12 if—

(a) the defendant has a realistic prospect of success in the claim; and

(b) the defendant acted as soon as reasonably practicable when he found out that judgment had been entered against him.”

21. Section 5A **Land Acquisition Act, Chap. 58:01** (“the Act”) provides:

“(2) On receipt of the Notice referred to in subsection (1), the Registrar General shall—

(a) if the land is unregistered land, register the notice as if it were a Deed within the meaning of the Registration of Deeds Act made between the claimant and the Commissioner; or

(b) if the land is registered land, enter a caveat in respect of the land.”

22. The Defendant and Claimant agree that the relevant considerations in this application are set out in **Redbourn Group Limited v Fairgate Development Limited [2017] EWHC 1223 (TCC)**. Justice Coulson, at para. 22, stated that the test (in an application to set aside) is the "same as that which applies on an application for summary judgement..." and used the "helpful exposition" of Lewison J in **Easyair Ltd v. Opal Telecom Ltd [2009] EWHC 339 (Ch)** at para. 15:

“(i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v. Hillman [2001] 1 All E.R. 91;

(ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim 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 claimant 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 [2003] EWCA Civ 472 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 exists 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 3;

(vii) On the other hand, it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not

*enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v. TTE Training Ltd *2007+ EWCA Civ 725."*

Land Acquisition

23. The Claimant contends that the land was acquired under the provisions of the Act. Its contention is supported by:

- i. Legal Notice No. 15 of 2012 being a NOTICE OF LANDS LIKELY TO BE REQUIRED FOR A PUBLIC PURPOSE published in the Trinidad and Tobago Gazette (Extraordinary) under section 3(1) of the Land Acquisition Act Chap. 58:01, annexed as "S.R.C. 13" to the Campbell affidavit.
- ii. Legal Notice No 322 of 2014 THE LAND ACQUISITION (POSSESSION OF LAND PRIOR TO FORMAL VESTING IN THE STATE) ORDER published by the State on 17 October 2014 pursuant to section 4 (1) of the Act, annexed as "S.R.C. 15" to the Campbell affidavit.

24. The Defendant contends that the correspondence between the parties demonstrates that the sale of the land in question took place via private treaty. The Defendant's contention is also supported by documentary evidence:

- i. The letter dated June 11, 2018 by the Claimant's attorneys, annexed as "M.J. 11" to the John affidavit which states at para. 1.2, that "despite the compulsory notice pursuant to the Act having been issued, the parties negotiated the sale of the said lands by way of private treaty".
- ii. The Memorandum of Transfer annexed as "S.R.C. 20" to the Campbell affidavit which makes no reference to the Act.

25. The Claimant further submits that the caveat lodged and the preparation of the Memorandum of Transfer are acts performed pursuant to the Land Acquisition Act.

However, the Defendant points out that the caveat was lodged by the Defendant's Attorneys-at-Law and not the Registrar as provided for at Section 5A of the Act, and further, that the Act makes no provision for the preparation of a Memorandum of Transfer.

Valid Agreement

26. The Claimant cites the dicta of Lord Wright in **G Scammel & Nephew Ltd v. JG Ouston [1941] AC 251**, at p. 268:

"The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract to give effect to that intention, looking at substance and not mere form".

27. The Defendant contends that there was no agreement between the parties in relation to the sum claimed as the offers made were "subject to contract upon approval being granted". The Claimant contends that, based on the correspondence between them, this is entirely without merit. The Claimant relies on the letters of February 13, 2017 and February 14, 2017 as proof of an "unconditional offer" by the Commissioner of Valuations and acceptance by the Claimant. This, the Claimant argues, is uncontroverted proof of a valid contract between the parties.
28. The Defendant relies on wording within the letter dated February 13, 2017 that states "I shall advise the National Infrastructure Development Company Limited accordingly" as well as the letter of October 10, 2014 attached at "M.J.6" to the John affidavit which references the need to obtain the Defendant's approval.
29. The Claimant also relies on the lodging of a caveat at the Registrar General's Office, an executed Memorandum of Transfer and a cheque in the sum \$23,236,883.00 as demonstrating the existence of an agreement between the parties.

30. The cheque, the Claimant submits, evidences part payment for Acquisition. However, this amount is *not referenced* in the letter of February 13, 2017 which the Claimant relies on as the unconditional offer in the agreement. This sum is referenced in previous correspondence between the parties. As the Defendant submits, there is no evidence of part performance if the Claimant is relying on an agreement as contained in the February 13 letter.

31. The Defendant also relies on the correspondence of the Defendant's then attorney dated June 6, 2014 and August 8, 2014 (annexed as "S.R.C. 17" and "S.R.C. 18") arguing that the wording of the letters implies that there was a need for agreement/approval by the Defendant's Board in concluding agreements between the parties.

Occupation of Land

32. The Claimant submits that there is overwhelming evidence that the State had taken possession of the land. It is an important point as the sums claimed by the Claimant are for specific losses entitled "Injurious Affection", "Disturbance" and the interest thereon. These terms remain to be construed within the context of the agreement as to determine whether they are linked to the facts relating to the use and occupation of the land. The dispute as to fact on this point is foreshadowed in the submissions herein. The Defendant, in the draft defence attached as part of its submission, states that, due to the continued occupation by the Claimant, there was no consideration moving from the Claimant to support the offer.

33. The Claimant relies on the preparation of the Memorandum of Transfer, the money paid to the Claimant and the lodging of the caveat as proof of possession. The Claimant cites the case of **Shaffiath Ali and Rosatine Ali v. Juliet Abraham, Nadram Canaan the Commissioner of State Land and Nandram Sookhan CV2015-02904** as authority for the proposition that in the absence of evidence to the contrary, the owner of land with the

paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession.

34. The Defendant's submission on this point is that there is, in fact, 'evidence to the contrary' at paras. 30, 36, 38, 43 & 48 of the John affidavit. This is undisputed in the Campbell affidavit. The Defendant also relies on a letter dated January 13, 2015, annexed at "M.J. 7" to the John affidavit, in which the Claimant acknowledges that the State had not yet entered onto the lands.

35. It is notable that the Claimant points at para. 10.17 of submissions to a policy of the Defendant to avoid hindrance of access to the property and the Claimant's own indication that its acceptance of a previous offer was based on the assumption that it would continue to have access to entry on the land. The Claimant appears, here and in the Campbell affidavit, to be admitting that it continued to have access to the land at the very least.

Mutual mistake

36. The Defendant submits that since there was never any compulsory acquisition, when the offer was made by the Commissioner pursuant to the Act, there was a mutual mistake of fact and/or law that the provisions of the Act were triggered thereby entitling the Claimant to compensation.

37. Further, it is submitted that where there is no acquisition under the Act, pursuant to section 4(4)(b) of the Act, all the owner of the land is entitled to are reasonable expenses. The Defendant contends that in making the offer that he did in respect of other compensation, the Commissioner was operating under a mistake of fact and/or law. The Defendant argues that the mistake was mutual as the Claimant was also operating under the belief that there was a compulsory acquisition.

38. The Claimant's submission on this point focuses on the purported part-performance in payment of the cheque and the preparation of the Memorandum of Transfer to demonstrate that the Defendant took steps in compulsory acquisition.
39. However, these submissions are dependent on the Claimant's success in proving that the sale of the land was compulsorily acquired under the Act.
40. In the circumstances and on the face of the evidence outlined above, the planks of the Defendant's defence – sale via private treaty, lack of valid agreement, occupation of the land by the Claimant and mistake of fact/law – do carry some degree of conviction. The documentary evidence and uncontested statements of Ms. John in relation to occupation are considered to have a realistic prospect of success. This is bolstered by the fact that further evidence of occupation can be reasonably be expected to be provided as the case progresses.

E. Conclusion

41. The Defendant has succeeded in proving a defence with a realistic prospect of success at trial. There is sufficient evidence in the John affidavit and in the documents of both parties to suggest with some degree of conviction that:
- i. The land was conveyed via private treaty; and/or
 - ii. a valid agreement had not been concluded; and/or
 - iii. there was some mutual mistake of law and fact; and/or
 - iv. the Claimant is still in occupation of the land.
42. In these circumstances, the Claimant's judgment in default will be set aside.

43. IT IS HEREBY ORDERED:

- i. The Default Judgment entered herein on July 31, 2019 against the Defendant in Default of Appearance and all subsequent proceedings are set aside
- ii. The time for the filing of the Defendant's Defence is extended to 28 days from the date of this Order
- iii. The costs of the Application to set aside the Default Judgment will be costs in the cause.

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Eleanor Joye Donaldson-Honeywell

Judge