THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Sub-Registry San Fernando

Claim No. CV2019-04243

Between

Namalco Construction Services Limited

Claimant

And

Estate Management & Business Development Company Limited

Defendant

Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Delivered on: 22 September, 2021

Appearances:

Mr. Roger-Mark Kawalsingh and Ms. Ashley Roopchansingh, Attorneys-at-Law for the Claimant

Mr. Jonathan Walker and Ms. Cherie Gopie, Attorneys-at-Law for the Defendant

RULING

A. Introduction

1. This Ruling determines an application for striking out of a re-amendment to the Claimant's Statement of Case contained in paras. 19, 34, 38, 42, 45, 48, 53, 63, 72, 75, 93, 114, 126,

134 and 148(c). The re-amendment was filed on 7 October, 2020 and the Defendant's application for striking out was filed 14 January, 2021.

2. It is the Defendant's submission that the re-amendment introduced a new cause of action for *quantum meruit*. It is submitted that this new claim ought to be struck out pursuant to Rule 26.2(1)(b) of the Civil Proceedings Rules, 1998, as amended ("CPR") as it is either:
    a. Invalid due to inconsistency with the Claimant's other claims; and/or
    b. Statute-barred by the date of the re-amendment.

B. Factual Background

3. The parties agree that the Claimant and the Defendant entered into two agreements for certain works to be executed by the Claimant- the contractor, for the Defendant- the employer. The first agreement was in respect of the construction of certain works in connection with the Cedar Hill Residential Development, Princes Town - Phase B Infrastructure Works (Cedar Hill Project) and is dated 24 July, 2015. The second agreement was in respect of the construction of certain works in connection with the Hermitage Residential Development Infrastructure Works (Hermitage Project) and is dated 10 August, 2015.

4. The main thrust of the Defence is that the Claimant's claim was not in accordance with various provisions of the contract, including provisions that required the approval of the Defendant (which approval, the Defendant avers, had not been obtained) and which effectively capped the accepted contract sum. The position of the Defendant is not that it disputes that the contracts exist, but rather that the Claimant is not entitled to the claimed sums under the provisions of those contracts.

C. Issues

5. The issues to be determined are, therefore, whether the re-amended claim amounts to an abuse of process as it is:
    a. Inconsistent with the Claimant's initial claim; and/or
    b. Statute-barred as at the date of re-amendment.

D. Law and Analysis

6. **Rule 26.2(1) of the Civil Proceedings Rules 1998**, as amended ("CPR") provides:

> *(1) The court may strike out a statement of case or part of a statement of case if it appears to the court—*
>
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the court;*

7. **Blackstone's Civil Practice 2012** at para. 33.12 described the Court's power to strike out a pleading or part thereof on the grounds of "abuse of process" as:

> *"The first half of CPR, r. 3.4(2) (b), gives the court power to strike out a statement of case which is an abuse of the court's process. This is a power 'which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people' (per Lord Diplock in Hunter v Chief Constable of the West Midlands Police [1982] AC 529 at p. 536)."*

Abuse of process: Inconsistency with initial claim

8. The Defendant's first argument is that the *quantum meruit* claim contained in the re-amendment cannot be made where a contract exists between the parties. The case of **Diamandis v. Wills and Anor [2015] EWHC 312 (Ch)** is cited wherein the court considered

that a claim for restitution ought not to be allowed where a contract setting out remuneration exists between the parties:

> *"… the relevant principle is that where there is a contract between the parties relating to the benefit transferred, no claim in unjust enrichment will generally lie whilst the contract is subsisting: Goff and Jones, supra, §3-13. This general principle is justified on the basis that the law should give effect to the parties' own allocation of risk and valuations, as expressed in the contract and should not permit the law of unjust enrichment to be used to overturn those allocations or valuation: Goff and Jones, §3-16 citing Re Richmond Gate, where Plowman J stated: "since there was an express contract with the company in regard to the payment of remuneration it seems to me that any question of quantum meruit is automatically excluded". Goff and Jones accept that the same principle applies today. Goff and Jones continue (at §3-29):*
>
> > *'The terms of the contract between the parties will frequently provide for payment to be due only once specified conditions are satisfied. Where the conditions for payment are not satisfied, a party who has done work or incurred expense in some other way in a failed attempt to complete the contractual performance is not permitted to have recourse to a claim in unjust enrichment for the value of that work or expense'."*

9. The Defendant highlights the application of this principle to *quantum meruit* claims - **Taylor v Bhail [1995] 50 Con LR 70; Gordon Winter Co. Ltd. v NH International (Caribbean) Ltd, CV2006-03875**. Lord Justice Millet (as he then was) stated as follows in **Taylor**:

> *"A claim in quantum meruit lies in restitution or, as it was formerly called, in quasi-contract. It arises whenever one party supplies goods or services to another in expectation of payment but no enforceable contract for payment has been entered into.* ***In the absence of such a contract, the court enforces the implied promise of the recipient of the goods or services to pay a reasonable sum (quasi-contract)***

or orders restitution to prevent his unjust enrichment. But the existence of a valid contract for payment is a bar to the remedy. *If there is no contract at all, or if there is a contract which is void for a reason other than illegality, a claim in quantum meruit will lie."* [emphasis added]

10. In the present circumstances, the Defendant submits that, as there were contracts in existence between the parties and that the terms of those contracts were not in dispute, there can be no dispute that those terms set out the work to be performed, how the work was to be valued and how the Claimant was to be paid. In the absence of uncertainty in the existence of a contract as well as the terms of the contract, the claim for *quantum meruit* cannot be permitted.

11. In answer to this, the Claimant submits that where the price of works is not fixed by reference to the contract, a *quantum meruit* claim can be based on contract. The Claimant cites **Halsbury's Laws of England, Volume 40(1) 2011, Additional Materials: Restitution,** para. 8 which provides strong support for this contention:

> *"The different senses in which the term 'quantum meruit' is used. The term 'quantum meruit' is used in different senses at common law. For example, in some cases, quantum meruit is used to express the measure of recovery in a contractual claim. In other cases it is used to denote a restitutionary claim. The claim is clearly contractual in nature where it is one to recover a reasonable price or remuneration in a contract where no price or remuneration has been fixed for goods sold or work done. Where, however, no contract is ever concluded between the parties or the contract is void or otherwise unenforceable, the claim cannot be contractual in nature and is likely to be restitutionary. In other cases it can be difficult to discern whether the claim is contractual in nature or restitutionary. Where the implication of an obligation to pay a reasonable sum is a genuine one on the facts, reflecting the intention of the parties, the claim is contractual, but where the obligation is imposed as a matter of law, the claim is more likely to be restitutionary."*

12. In **Chitty on Contracts General Principles 26th Ed.,** the learned authors examine *quantum meruit* to fix a price or remuneration at para. 2145:

> *"If no price for goods sold has been fixed in the contract for sale, the law will imply that a reasonable price has been paid, and, in an action for quantum valebant, the court will, as "a question of fact dependent on the circumstances of each particular case," decide what is a reasonable price. Similarly, in a contract for work to be done, if no scale of remuneration is fixed, the law imposes an obligation to pay a reasonable sum (quantum meruit)."*

13. The Claimant submits that the prices stated on the two agreements were *not fixed* having regard to Sub-Clause 12 of the FIDIC Red Book which rendered the two agreements *re-measurable,* which required:
    a. the Claimant to carry out the works;
    b. the engineer to measure and value the works carried out by the Claimant and issue an IPC certifying the works carried out and measured accordingly; and
    c. the Defendant to pay to the Claimant the sums certified on the IPCs being the sums for the actual quantities of works so carried out and measured.

14. The Defendant in its reply submissions argues that the price of the works in the present agreements are ascertainable by reference to the contractual provisions. However, it does not appear that the Defendant disputes that the agreements were re-measurable as contended by the Claimant. In its defence at para. 15, it is stated that at "all material times the sums set out in the Bill of Quantities were based on an estimate of the work that was required to be done and were subject to being remeasured".

15. Therefore, it is clear that the Claimant's claim for *quantum meruit* is used to express the measure of recovery in its contractual claim, i.e. to recover a reasonable price or remuneration in two agreements where the price for the works executed is not fixed by

the agreements. In relation to the re-measuring of the works carried out, there was no ascertainable fixed price.

16. The Claimant further argues that the claim for *quantum meruit* arises in this case as there is a valid and subsisting contract, the parties have agreed the scope of work under the said contract, and the work carried out falls outside that scope. The Claimant relies on the decision in **Diamandis** cited by the Defendant, which went further to expound two exceptions to the exclusion of *quantum meruit* at para. 84:

> *"There are two principal exceptions to this principle: (a) the provision of services over and above those contracted for (emphasis ours) and (b) in anticipation of a contract which does not result: Chitty on Contracts (8th edn.) ßß29-075, 29-076."*

17. **Chitty on Contracts 26th Ed.** lends support to this contention at para. 2147:

> *"The principle of quantum meruit may allow recovery of a reasonable sum as additional remuneration for extra work by a building contractor, where, although the contract permitted the owner to order extra work, the amount of extra work actually ordered was so great as to go beyond the scope of the contract and entitle the builder to claim that he should not be limited to the maximum profit fixed by the contract."*

18. In addition to the above mentioned submission, the Claimant includes alternate grounds to persuade the Court that the challenged parts of the re-amended claim and Statement of Case ought not to be struck out. One submission in the alternative underscores that it is part of the defence that the sums claimed covers quantities of works executed by the Claimant which far exceeded the quantities provided for in the bill of quantities, specifications and/or drawings and are not sums which fall within the two agreements at all. Counsel for the Claimant submits that it follows (if this defence succeeds) that the Claimant is entitled, in the alternative, to have the value of its works executed at the Defendant's request, assessed on a *quantum meruit* basis.

19. The Claimant further outlines that the terms and conditions of the contract that are applicable to the determination of this issue allowed for:
    a. the Claimant to make an application for an Interim Payment Certificate (IPA) by submitting a statement and supporting documents after the end of each month showing in detail the amount to which the Claimant considered itself to be entitled (Sub-Clause 14.3 of the FIDIC Red Book);
    b. the engineer to issue an Interim Payment Certificate (IPC) to the Defendant stating the sum which the engineer fairly determined to be due to the Claimant not later than 28 days after receiving the Claimant's statement and supporting documents (Sub-Clause 14.6 of the FIDIC Red Book); and
    c. the sum as certified on the IPC by the engineer as due to be paid by the Defendant to the Claimant, under the Cedar Hill Project, within 77 days after the engineer received the statement and supporting documents (Conditions of Particular Application which amended Sub-Clause 14.7 of the FIDIC Red Book) and, under the Hermitage Project, within 56 days after the engineer received the statement and supporting documents (Sub-Clause 14.7 of the FIDIC Red Book).

20. In light of these terms, it is the Claimant's alternative submission that these IPCs are in their nature provisional liabilities - per Lord Hoffmann in **Melville Dundas Limited (in receivership) and Ors. V George Wimpey UK Limited & Ors. (2007) UKHL 18**. As such, the Claimant's cause of action *ab initio* and as contained in its re-amended Statement of Case is for monies due and owing on each IPC issued pursuant to each of the agreements and not on the sums stated in each of the agreements.

21. The Claimant's contention is, therefore, that the IPCs gave rise to a separate cause of action, upon which both the initial claim and the re-amendment are based. The South African cases of **Joob Joob Investments (Pty) Ltd v Stocks MavundlaZek Joint Venture (161/08) (2009) ZASCA 23** and **Basil Read (Proprietary) Limited v Regent Devco**

(Proprietary) Limited (41108/09) (2010) ZAGPJHC 75 were cited. These cases have held that payment certificates give rise to a new cause of action.

22. According to the Claimant, its claim is predicated on the IPCs which originated from the two agreements. The re-amended claim, as set out in paragraphs 31, 33, 52, 55, 58, 59, 62, 69, 71, 76, 79, 117 and 119, is for the sums certified as due and owing on the IPCs issued pursuant to the two agreements and not for the sums as set out in the two agreements.

23. It is pointed out that the Defendant's contractual defences (that the engineer exceeded the bounds of its authority in certifying the sums set out in the IPCs and/or the Defendant's approval was needed before the sums stated on the IPCs were certified, and was not given), if successful, would render the IPCs void and unenforceable. In such an instance, the Claimant cannot claim for monies due and owing under the IPCs.

24. As there is no dispute that the works were done, the Claimant submits it is entitled, in the alternative, to have the works executed under the Cedar Hill Project and the Hermitage Project for the benefit of the Defendant assessed on a *quantum meruit* basis and entitled to be paid the sums so assessed. Indeed, in the case of **AG v Trinsalvage Enterprises Limited CA 9/2014,** the Court of Appeal upheld the trial judge's decision to award damages on a *quantum meruit* basis where the contract between the parties was found to be ultra vires and void.

25. The Claimant submits, therefore, that the re-amendment introduces, in the alternative, entitlement to payment on a *quantum meruit* basis. A party is entitled to plead inconsistent factual alternatives provided that they can be supported by evidence - **Clarke v Malborough Fine Art Ltd [2002] 1 WLR 1731**; **CA 98/2011 Adriana Ralph & Lee Ralph v Weathershield Systems Caribbean Limited v Petroleum Company of Trinidad and Tobago Limited**. Therefore, it is argued that what the Claimant is affirming in its re-

amended Statement of Case is its honest belief that, on the basis of *either one set of facts or the other*, it is entitled to be paid for the works executed for the Defendant under both the Cedar Hill Project and Hermitage Project.

26. The Claimant has succeeded in demonstrating the validity of its claim for *quantum meruit* in all three of its alternative contentions. Firstly, it is clear that notwithstanding the validity of the two agreements, the Claimant is entitled to plead *quantum meruit* as the two agreements are not for fixed prices. Secondly, if this Court finds that the works carried out by the Claimant fell outside of the scope of works provided for within the two agreements, it would be entitled to make a claim in *quantum meruit* for the value of such works. Finally, as the Claimant's cause of action is based on the IPCs issued pursuant to the two agreements, the Claimant is entitled to plead *quantum meruit* in the alternative if this Court finds, in favour of the Defendant, that the IPCs issued are void and unenforceable. Therefore, although inconsistent, the Claimant's re-amended claim for *quantum meruit* is permissible in these circumstances and will not be struck out.

Abuse of process: the statute bar

27. The Defendant submits that the claim for *quantum meruit* is a new cause of action which the Claimant introduced in the paragraphs of the re-amended Statement of Case after the expiry of the limitation period – s.3(1) of the **Limitation of Certain Actions Act Ch.7:09**. Consequently, the Defendant submits that if the Claimant's claim for *quantum meruit* is permitted to stand, it will be deprived of the limitation defence and will suffer an injustice not compensable by an order for costs.

28. The Defendant contends that the Claimant's original claim was based on the terms of a specific, pleaded contract, which had been breached. On the other hand, the Claimant's claim for *quantum meruit* in its re-amended Statement of Case, is in quasi-contract. It is based on an implied promise of the recipient of goods or services to pay a reasonable sum for the goods, to prevent his unjust enrichment.

29. The Defendant submits that the claim for *quantum meruit* is a different cause of action to the one for breach of contract. The Defendant further submits that the fact that the Claimant has sought to introduce the claim for *quantum meruit* in its re-amended Statement of Case as an alternative claim, confirms that they are different causes of action.

30. The Claimant submits in response that in determining whether its claim for *quantum meruit* as contained in the re-amendment seeks to add a new cause of action, the case of **Diamandis** is instructive. In that case, the Court, after considering the recent analysis of the authorities on the issue by Longmore LJ in **Berezovsky v Abramovich (2011) 1 WLR 2290**, found that the following principles must be considered in determining whether the proposed amendment seeks to add a new cause of action:

> *"48. As regards Stage 2 (new cause of action) from the recent analysis of the authorities by Longmore LJ in Berezovsky v Abramovich ßß59 to 69, the following principles arise:*
>
> *(1)* ***The "cause of action" is that combination of facts which gives rise to a legal right****; (it is the "factual situation" rather than a form of action used as a convenient description of a particular category of factual situation: Lloyds Bank v Rogers at 85F and Aldi Stores at ß21).*
>
> *(2) Where a claim is based on a breach of duty, whether arising in contract or tort, the question whether an amendment pleads a new cause of action requires comparison of the unamended and amended pleading to determine (a) whether a different duty is pleaded (b) whether the breaches pleaded differ substantially and (c) where appropriate the nature and extent of the damage of which complaint is made: Darlington at 370C-D and see also Berezovsky ß59. (Where it is the same duty and same breach, new or different loss will not be new cause of action. But where it is a different duty or a different breach, then it is likely to be a new cause of action).*

(3) ***The cause of action is every fact which is material to be proved to entitle the claimant to succeed****. Only those facts which are material to be proved are to be taken into account; the pleading of unnecessary allegations or the addition of further instances does not amount to a distinct cause of action.* ***At this stage, the selection of the material facts to define the cause of action must be made at the highest level of abstraction****. Berezovsky ß60 citing Cooke v Gill (1873) LR 8 CP 107 and Paragon Finance, supra.*

*(4****) In identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading****: Berezovsky ßß61 and 62.*

(5) The addition or substitution of a new loss is by no means necessarily the addition of a new cause of action: Berezovsky ß64 and Aldi ß26. Nor is the addition of a new remedy, particularly where the amendment does not add to the "factual situation" already pleaded: Lloyds Bank v Rogers per Auld LJ at 85K." [emphasis added]

31. The Claimant submits that its *quantum meruit* claim does not give rise to a new cause of action for the following reasons:
    a. The claim as initially pleaded and subsequently amended, although based on a duty arising from a contract, is not a duty to pay a contractually agreed sum;
    b. The claim as initially pleaded is based on a duty to measure and value the works executed by the Claimant under both the Cedar Hill Project and the Hermitage Project; to issue IPCs which shall state the amount that has been fairly determined to be due to the Claimant following the measurement and valuation; and to pay to the Claimant the sum as certified on the IPCs as due and owing to the Claimant; and
    c. By reason of (ii) above, the duty upon which the *quantum meruit* claim in the re-amended Statement of Case is based arises out of the contract as well; it is a duty

to pay a reasonable price or remuneration where the price for the works executed is not fixed.

32. In light of these submissions, it cannot be said that a comparison of the Claimant's claim as initially pleaded with its claim as re-amended shows that the re-amended Statement of Case pleads a new duty in respect of payment and a new and different failure to pay. In fact, the challenged paragraphs of the re-amended Statement of Case do not add to the factual situation already pleaded.

33. Further, it cannot be said that the facts relating to the objective market value, i.e. the basis upon which the Claimant's alternative claim of *quantum meruit* is to be assessed, are, at the highest level of abstraction, conceptually different from the facts relating to the sums as certified as due and owing on the IPCs.

34. As is convincingly argued by Counsel for the Claimant, the Claimant's claim of *quantum meruit* is considered to be the addition of a new remedy and not an entirely new cause of action.

35. The Claimant also raised the point that the Defendant ought to have pleaded its limitation defence in its amended defence. However, this technical submission fails. It defies logic as it is clear the Defendant has not overlooked the defence. Contrary to the case of **Ketteman v. Hansel Properties (1987) AC 189** cited, the Defendant decided to raise the defence in an application instead of pleading it, but it did so at the beginning of the proceedings not at the end at Trial. Notably, the court in **Anil Maharaj v Rudy Roopnarine CV 2012-04524** held:

> *"It is clearly established in this jurisdiction that an application that the Claim Form and Statement of Case be struck out pursuant to Part 26 (2) of the Civil Procedure Rules 1998 (the CPR) is permissible in relation to a defendant's preliminary issue*

that a limitation defence applies. See Civil Appeal No. 171 of 2012 Kenneth Julien Et Al and Evolving Tecknologies v Enterprise Development Company Limited."

E. Conclusion

36. The Claimant has succeeded in demonstrating that its claim is valid even after re-amendment. There are several instances where *quantum meruit* is allowable in a contract claim, including where the price of services is not fixed and where the works done fall outside of the scope of works provided for in the contract. Further, the Claimant has shown that, arguably, the payment certificates as provisional liabilities (and not the agreements) gave rise to the cause of action in both the initial and re-amended claim.

37. The Claimant has also successfully demonstrated that its claim of *quantum meruit* does not entail a new duty in respect of payment or a new and different failure to pay. It is not conceptually different from the facts of the initial claim. It does not introduce a new cause of action, but rather an alternative remedy. As such, the need for pleading a limitation defence would not arise as the claim was originally filed, with all the factual details relevant to seeking a *quantum meruit* remedy, prior to the expiry of the statutory period.

38. In light of the considerations outlined above, the Defendant's application filed on 14 January, 2021 is dismissed with costs to be paid by the Defendant to the Claimant in an amount to be assessed, if not agreed.

……

Eleanor Joye Donaldson-Honeywell

Judge