REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV NO. 2010 -03594

EXPORT-IMPORT BANK OF TRINIDAD AND TOBAGO

Claimant

AND

WATER WORKS LIMITED

Defendant

AND

WATER WORKS LIMITED

Ancillary Claimant

AND

WATER AND SEWERAGE AUTHORITY OF TRINIDAD AND TOBAGO

Ancillary Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JONES

Appearances:

Mr. S. Marcus, S.C., and Ms. D. James instructed by Mr. J. Herrera for the Ancillary Claimant.

Mr. F. Hosein S.C., and Ms. S. Bridgemohansingh instructed by Ms. N. Alphonso for the Ancillary Defendant.

RULING

1. The application before me, dated 30th January 2012, is in respect of an ancillary claim brought by Water Works Limited ("the Claimant") against the Water and Sewerage

Authority of Trinidad and Tobago ("the Defendant"). By the ancillary claim the Claimant seeks relief in respect of a number of claims made against the Defendant.

2. By this application the Defendant seeks orders pursuant to Part 26.2(a) (d) and/or(c) striking out:

1. Those parts of the amended statement of case ("the statement of case") relevant to a claim for money owed pursuant to (a) a written contract dated the 10th December 2008 with respect to the Drilling and Equipping of Production Wells for the Dry Season (North) package 1 Wallerfield #9 ("the wallerfield contract"); (b) an oral contract made around November/ December 2007 ("the oral contract"); (c) WASA reference 61/2004; and (d) deductions made from the sums paid with respect to WASA reference WTC 06/2008 ("the deductions");
2. paragraph 3 of the reply and defence to counterclaim;
3. paragraph 6 of the reply and defence to counterclaim

3. The Defendant submits that with respect to these claims the pleaded case:

(a) fails to comply with Part 8.6 of the rules, which requires a Claimant to include on the claim form or in his statement of case a short statement of all the facts upon which the Claimant relies: **Part 8.6(1)**, and to identify or annex a copy of any document which the Claimant considers necessary to the case: **Part 8.6 (2)**;

(b) does not disclose any legally recognised claim against the Defendant and is wholly deficient in that it fails to set out the essential aspects of the claim; and

(c) is wholly defective resulting in the Defendant being unable to properly understand and respond to the allegations made against it;

4. Insofar as the Defendant seeks orders pursuant to Part 26.2 of the CPR the rules relied on permit the court to strike out a statement of case or part of the statement of case where (i) there has been a failure to comply with a rule: **Part 26.2 (1) (a)**;(ii) it discloses no grounds for bringing or defending the claim: **Part 26.2 (1) (c)**; (iii) it is prolix or does not comply with the requirements of Parts 8 or 10: **Part 26.2 (1) (d)**.

5. The power to strike out a case or part of a case as disclosing no grounds for bringing or defending the claim may be employed where a party advances a case which is without merit or bound to fail. According to Zuckerman, dealing with the equivalent UK rule:

> "The normal pre-trial and trial processes are necessary and useful to resolving serious or difficult controversies. But where a party advances a groundless claim or defence it would be wasteful to put the case through such processes since outcome is a foregone conclusion. A more appropriate response in such cases would be to strike out the groundless claim or defence at the outset and spare the unnecessary expense and delay that the employment of the normal process would involve: Zuckerman: **Civil Procedure Principles of Practice, Second Edition, paragraph 8.30 at page 279.**

6. Insofar as the Defendant's submissions are based on a failure to place before the court by way of the statement of case the essential elements which comprise the cause of action the Defendant relies on the first instance judgement of Rampersad J. in **Real Time Systems Limited v Renraw Investments Ltd and Ors CV 2010-01412**. In the Real Time case the first instance judge concluded that the statement of case did not comply with Part 8.6 of the CPR in that it failed to set out all of the relevant facts, and in accordance with Part 26.2 the trial judge struck out the statement of case. This decision was subsequently appealed. On appeal, however, the Court of Appeal took a somewhat different view of the duty of the court in these circumstances.

7. While accepting the first instance judge's conclusion that the statement of case did not comply with Part 8.6, the Court of Appeal held that in circumstances the judge "ought to have first considered whether an appropriate order for 'further and better particulars' of what was set out in the statement of case could have facilitated the disclosure of what was required to allow the appellant to continue pursuing its claim, and to also to allow the respondents a fair opportunity to know the case it had to answer and be able to state all the facts necessary to admit, explain and/ or dispute the claims made against it": per **Jamadar JA at paragraph 7 at page 4.**

8. In the opinion of the Court of Appeal the duty to deal with the case justly as required by the overriding objective demands such a consideration. In those circumstances the matter was remitted to the first instance judge to consider "whether an appropriate order for particulars of the statement of case can further the overriding objective". Since I am bound by the Court of

Appeal decision in the Real Time case I must consider the submissions of the Defendant in this light.

9. According to Zuckerman:

> "The Claimant must state in the particulars of claim facts that establish a complete cause of action. The test is whether the facts relied upon would, if proved, entitle the Claimant to the remedy he seeks, or possibly to a different remedy. A claim for damages for breach of contract, for example, must allege a contract, a breach thereof and a resulting loss.": **Civil Procedure Principles of Practice, Second Edition paragraph 6.17 at page 240.**

10. The Real Time decision, therefore, requires the court to perform a delicate balancing act so as to determine whether the facts presented establish a complete cause of action but are merely lacking sufficient particulars to allow a Defendant to properly defend the case or whether the lack of particularity has resulted in the Claimant failing to establish a complete cause of action.

11. It would seem to me that what is required is a consideration of whether the facts pleaded by the Claimant establish a cause of action with respect to the various claims. If a cause of action is established but the claim lacks particularity, then an order for further and better particulars is usually appropriate. If, however, no cause of action is established or the claim is groundless, in the sense of having no merit or being doomed to fail in any event, then particulars of the pleading will not assist and an order for further and better particulars is inappropriate.

The Wallerfield contract

12. With respect to this claim it is worth repeating verbatim the relevant paragraphs of the statement of case:

> "3. On 30th January, 2004 and 1st July, 2005 respectively the Ancillary Claimant submitted tenders to the Ancillary Defendant in an attempt to successfully procure the contracts for:
>
> (a) Package 1-the Drilling and Equipping of Cumoto Wells number 2-5 and Observation Well at a total cost of $7,035,211.00; and
>
> (b) The Drilling and Equipping of Production Wells for the Dry Season (North) Package 1-Wallerfield #9 at a total cost of $1,407,777.90.
>
> 4. By a letters of award dated 7th September 2006, (WASA Reference 112/2003) and the 27th September 2006, (WASA Reference WTC 108 /2003) the Ancillary Defendant wrote to the Ancillary Claimant indicating acceptance of the Ancillary Claimant's aforesaid offers to tender. True copies of the aforesaid letters of award are hereto annexed in a bundle and marked "A".
>
> 6. On 10th December 2008 the Ancillary Claimant and the Ancillary Defendant executed contracts for the Drilling and Equipping of Cumoto Wells number 2- 5 and Observation Well (hereinafter referred to as "the Cumoto Contract") and the Drilling and Equipping of Production Wells for the Dry Season (North) Package 1- Wallerfield #9 (hereinafter referred to as the "Wallerfield Contract") subject to the terms and conditions thereto. The Ancillary Claimant will at the trial of the matter rely on the contracts for their full terms meaning and effect.

7. After completion of some of the work the Ancillary Defendant terminated this project under the aforesaid Cumoto and Wallerfield Contracts there was and still is owing and payable to the Ancillary Claimant an outstanding balance of $73,168.75."

13. It is clear from the statement of case that the case presented is in respect of payment due for work done pursuant to a written contract dated 10th December 2008. The statement of case does not however annex the written contract nor does it recite the relevant terms. Neither does the Claimant identify the work completed by it pursuant to the contract nor the sums due to it for the work completed under this contract. As far as the money due is concerned the Claimant merely claims a lump sum with respect to two separate contracts.

14. Insofar as the Claimant has identified the document upon which it relies, that is the written contract dated 10th December 2008, in my view, the Claimant has complied with Part 8.6(2). The problem here is not so much that by failing to annex the relevant contract the Claimant has failed to comply with that rule, but that by failing to annex the relevant contract or pleading the relevant parts of the contract the Claimant has failed to provide a statement of all the facts upon which it relies as required by Part 8.6(1).

15. In other words, it is clear from the pleading with respect to these works that the Claimant has not provided any details of the relevant contract, save that it was a written contract dated 10th December 2008, or the facts upon which it relies to show that money is due from the Defendant or the amount of money due. Insofar as the Claimant has failed to plead all the facts

upon which it relies in order to obtain the relief sought it is open to me to strike out the portions of the statement of case pertaining to this claim pursuant to Part 26.2(1) (a) or (d).

16. The real question here is whether, in the circumstances, I ought to strike out the statement of case or give the Claimant the opportunity to provide further and better particulars of the claim. In this regard it would seem to me that, while the claim is lacking particularity, the Claimant has put before the court sufficient facts to establish a cause of action. In other words, the Claimant has established that there was a written contract between the parties; that it did work under the contract and that monies are due and owing to it. If this was the only consideration, then, in my view, an order for further and better particulars to allow the Defendant to properly answer the claim and to limit the generality of the pleading would be appropriate.

17. Unfortunately for the Claimant the matter does not end here. The answer to this question, that is, whether an order for further and better particulars will more readily allow this court to deal with the matter justly rather than an order striking out the statement of case in my opinion involves a consideration of another point raised by the Defendant. The case presented by the Claimant is for the payment of money for work done pursuant to a written contract between the parties. In answer to the Defendant's allegation contained in its defence that there was no executed or concluded contract with respect to these works the Claimant, in its reply, admits that there was no executed or concluded contract and avers that the Cumoto contract encompassed the construction of the Wallerfield project therein as a package.

18. This is clearly not only inconsistent with the plea in the statement of case that there was a written contract with respect to these works but it is also inconsistent with the facts contained in paragraphs 3 and 4 to the effect that there were at all material times, commencing with the tenders and the letters of award, two separate contracts, one for the works referred to in paragraph 3(a) of the statement of case and the letter of award dated 7th September 2006 and the other for the works referred to in paragraph 3 (b) of the statement of case and the letter of award dated 27th September 2006.

19. In these circumstances, it would seem to me that to allow the Claimant to supply further and better particulars of the claim as presented by the statement of case will serve no useful purpose since it is admitted by the Claimant that there was in fact no Wallerfield contract as pleaded. Accordingly it seems to me that the Defendant is entitled to an order striking out those parts of the statement of case that relate to the Wallerfield contract. In so far as paragraph 7 of the statement of case makes a claim for a lump sum with respect to monies owing on both the Wallerfield and the Cumoto contracts it would seem to me however that in the circumstances the Defendant is entitled to further and better particulars of the sum outstanding pursuant to the Cumoto contract.

The oral contract

20. With respect to the oral contract the Claimant pleads:

> "7A. Pursuant to an oral contract made around November-December, 2007 by and between the Ancillary Defendant, acting by and through its representative Curtis Critchlow, and Emmanuel Romain, representative of the Ancillary

Claimant, the Ancillary Claimant completed the contracted work at Production Well # 1, Factory Road, Diego Martin at a total cost of $1,286,144.19 ($63,762.04 plus $245,822.15 plus $976,580.00)"

21. Except that a demand was made for this payment this comprises the totality of the plea with respect to the oral contract.

22. Apart from the fact that the numbers in brackets make absolutely no sense it is clear that this plea is defective and does not comply with Part 8.6 of the CPR in that the Claimant does not state the terms of the oral contract or what work was done pursuant to that contract. The real question here however is whether the Claimant has adduced sufficient facts to establish a cause of action, albeit with insufficient particularity.

23. It seems to me that in this case the Claimant has pleaded a contract; has pleaded that it completed work pursuant to the contract and, by virtue of its demand for payment, that it is entitled to recover the costs of the work done. This to my mind establishes the cause of action. In the circumstances it seems to me that an order which will give the claimant the opportunity to provide further particulars of this claim is appropriate.

WASA reference 61/2004

24. In this regard the Claimant pleads:

"29B. Pursuant to a written agreement made between the Ancillary Claimant and the Ancillary Defendant, WASA Reference 61/2004, the Ancillary Claimant

refurbished the filters Clarifiers and Chlorination Equipment at Aripo, Caura and L&N Treatment Plants at a total cost of $363,300.00 notwithstanding the demands for payment made by the Ancillary Claimant, the Ancillary Defendant has failed, neglected and/or refuse to pay the said sum. (A true letter dated July 26th 2004 is hereto annexed and marked "H").

25. The letter annexed confirms the Defendant's acceptance of the Claimant's tender for the refurbishing of filters, clarifiers and chlorination equipment at Aripo, Caura and L&N water treatment plants at a total cost of $363,330.00. According to the letter as a pre-requisite for the binding effect of the award the Claimant was required to provide a performance security in the name of the Authority in the amount of $36,333 within seven days of the letter and to enter into a written agreement with the Authority within 21 days.

26. From the terms of the letter therefore it is clear that this letter does not constitute the binding contract between the parties. The Claimant has not provided any information with respect to the written agreement upon which it sues either by way of annexure of the agreement referred to or by the recitation of the terms of the agreement. Again with respect to this claim it is clear that not only has the Claimant failed to give a short statement of all the facts on which it relies, but it has not identified or annexed all the documents necessary to its case. In this regard therefore it has failed to comply with Part 8.6 of the CPR.

27. That said, it would seem that by pleading the contract; the performance of the work and the monies due the Claimant has established a cause of action. The question here is whether

any useful purpose would be served by allowing the Claimant to provide further particulars of the claim. By its defence filed on 17th October 2011 the Defendant avers that the refurbishing work was completed in January 2005 and raises the applicability of the Limitation of Certain Actions Act to this claim. By its reply the Claimant treats with this allegation by merely stating that the contract is not barred by the Limitation of Certain Actions Act.

28. In my opinion the provision of further and better particulars will not assist the Claimant in this claim since at the end of the day the Claimant will still be faced with the limitation point. In this regard the Claimant has not denied that the work was completed in the year 2005 and has not raised any facts directed to the date of completion of the contract or which will allow it to avoid the application of the Limitation of Certain Actions Act to this claim. The claim is a claim based on contract and accordingly must be pursued within four years of the accrual of the cause of action: **Section 3** of the **Limitation of Certain Actions Act Chap 7:09**. In the circumstances the provision of further and better particulars of this claim will not assist the Claimant and is in my view not appropriate. Accordingly this claim is struck out.

The deductions

29. The Claimant pleads:

> "29C. The Ancillary Defendant made deductions totalling $192,091.67 (One Hundred and Ninety-Two Thousand and Ninety One Dollars and Sixty-Seven Cents) from sums paid directly to the Ancillary Claimant respecting award WASA reference WTC 06/2008 by way of retention sums, which sums became due and payable to the Ancillary Claimant."

By way of particulars provided pursuant to the paragraph the Claimant merely lists 10 invoices, identified only by invoice number, and provides a sum of money with respect to each invoice. The total of the sums amount to the sum of $192,091.67 claimed.

30. The problem with this pleading is that it is totally incomprehensible. The paragraph gives no explanation with respect to the reference to WASA reference WTC 06/2008 nor is there any other reference to this in the statement of case. Further the Claimant has not shown any basis for its entitlement to these sums by way of contract or otherwise. The Claimant submits that the words "retention sums" must be taken to mean retention money which it submits is a term of art known to the law and has a meaning in the law of contract, that is, money retained by the employer from the contract payment or payments for period beyond completion as a guarantee for the contractor's correcting defects of the work.

31. I do not accept the submission. Even if "retention money" is a term of art of which I can take judicial notice, which I do not accept, these are not the words used in the statement of case. In my opinion no cause of action is disclosed by the pleading with respect to the sum of $192,091.67 claimed and there are no grounds shown for bringing this claim. In the circumstances further and better particulars are not appropriate. Accordingly, this claim is struck out.

Orders sought with respect to the reply and defence to counterclaim.

32. The orders sought here ultimately affect the Claimant's ability to defend the

counterclaim with respect to the Cumoto contract. The Defendant seeks to strike out two paragraphs of the reply and defence to counterclaim, paragraph 3 and paragraph 6, on the ground that they do not comply with the requirements of Part 10.5(4) of the CPR. **Part 10.5(4)** requires a defendant who denies any of the allegations in the claim form or statement of case to state his reasons for doing so and if he intends to prove a different version of events to that given by the claimant he must state his own version. In addition the Defendant says that paragraph 6 does not comply with **Part 10.5(1)** of the CPR in that the rule requires a defendant to include in his defence a statement of all the facts on which he relies to dispute the claim against him.

33. To my mind, the issue here is whether the paragraphs provide a defence to the corresponding allegations made by the Defendant by way of counterclaim. If they do not, then it would seem to me that it is open to me to strike out those paragraphs as disclosing no grounds for defending the counterclaim with respect to the Cumoto contract.

34. In the case of **MI 5 Investigations Ltd v Centurion Protective Agency Ltd CA No. 244 of 2008** Mendonca JA held that: "Where a defence does not comply with rule 10.5(4) and set out reasons for denying an allegation or a different version of events on which the reasons for denying the allegation will be evident the court is entitled to treat the allegation in the claim form or statement of case as undisputed or the defence as containing no reasonable defence to that allegation.": **Paragraph 10 page 5**. Mendonca JA was of the view however that once a defendant sets out a different version of events that could be sufficient denial for the purposes of 10.5(4) (a) without the need for specific statement of the reasons for denying the allegation.

35. For the purpose of clarity and in order not to confuse the pleadings I will use the word “reply” to refer to the Claimant's reply and defence to counterclaim. At paragraph 3 of its reply the Claimant merely denies paragraphs 5, 6 and 7 of the defence and counterclaim and repeats paragraph 6 and 7 of its statement of case. Similarly by paragraph 6 of the reply the Claimant denies paragraphs 10, 11, 12 and 14 of the defence and counterclaim and repeats paragraph 7 of its statement of case.

36. It is clear therefore that, save insofar as the Claimant refers to the facts as pleaded at paragraphs 6 and 7 of its statement of case, the Claimant has merely provided a blanket denial to the allegations pleaded by the Defendant at paragraphs 5,6,7, 10 11, 12 and 14 of the defence and counterclaim. In accordance with the MI 5 case therefore I would be entitled to treat the allegations in the counterclaim as undisputed unless by virtue of its reference to paragraphs 6 and 7 of the statement of case the Claimant has set up a different version of the events.

37. In order to understand the factual position as set up by the Defendant, it is necessary to look at the defence and counterclaim with respect to the Cumoto contract as a whole. Paragraphs 4 and 5 of the defence and counterclaim deal with the Wallerfield contract and are not important in the context of my earlier finding with respect of this contract and the claims made in the counterclaim. Paragraph 6 of the defence and counterclaim merely denies that the sum of $73,168.75 is due and owing under the Cumoto contract. It is paragraph 7 of the defence and counterclaim that contains facts relevant to the issue for my determination.

38. Paragraph 7 of the defence and counterclaim recites the relevant clauses in the Cumoto contract. The Claimant treats with paragraph 7 by denying it and repeating paragraphs 6 and 7 of its statement of case. As we have seen paragraphs 6 and 7 of the statement of case do not in any way treat with the terms of the written contract. In those circumstances no different version of the facts is presented by the Claimant. In accordance with the MI 5 case therefore I am entitled to treat the allegations in paragraph 7 of the defence and counterclaim as undisputed. In other words the Claimant has not disputed the relevant clauses in the Cumoto contract.

39. Paragraphs 8 and 9 of the defence and counterclaim deal with matters leading up to and the termination of the contract. In this regard the Claimant specifically admits the facts contained in paragraphs 8 and 9 but with respect to paragraph 8 says that pursuant to a request by the Claimant, it made adjustments to the drilling and construction of the "wells germane" which caused it further expenditure and accordingly cash flow difficulties and security hardship. In my opinion these new facts are irrelevant to the issues for my determination. It is clear therefore from the facts either admitted or undisputed that the Defendant was entitled to terminate the contract pursuant to its clause 65(5).

40. Paragraph 10 deals with the Defendant's computation of the sums due to it from the Claimant pursuant to clause 65 (5). In particular it deals with that part of the clause, which (a) allows the Defendant to deduct from any amount owing to the Claimant the cost of completion, damages for delay in completion, if any, and all other expenses incurred by the Defendant and (b) provides that if the amount due to the Defendant as a result of (a) is more than the sum payable to the Claimant on completion then that sum shall be deemed a debt due by the Claimant

to the Defendant. The Defendant says that the sum of $642,686. 25 was fixed by it as the sum due by the Claimant to the Defendant under the contract. In support of this conclusion the Defendant gives details and provides supporting documentation as to the manner by which it arrived at that sum.

41. Paragraph 12 denies that monies are due to the Claimant and avers that the sum of $73,168.75 was in fact taken into account in determining the amount due to the Defendant pursuant to the contract.

42. In answer to these allegations the Claimant makes a blanket denial and refers to paragraphs 6 and 7 of its statement of case. It seems to me therefore that in accordance with the MI 5 case I am entitled to treat the allegations made in paragraphs 10, 11, 12 and 14 of the defence and counterclaim as undisputed unless by its reference to paragraphs 6 and 7 of the statement of case the Claimant has provided a different version of the events recited by the Defendant by these paragraphs.

43. In this regard paragraph 7 of the statement of case is the relevant paragraph, paragraph 6 merely refers to the fact that contracts for both projects were executed. By paragraph 7 the Claimant states that after the completion of some of the work the Defendant terminated this project under the contracts and that there was and still is owing and payable to the claimant an outstanding balance of $73,168.75. It would seem to me therefore that the question is whether the fact that the Claimant states that there was and still is due and payable to it an outstanding balance is in fact a different version of events.

44. In my opinion it is not. In my view it is here that the Claimant's failure to provide adequate particulars of its claim makes a difference. The Claimant provides no version of events but merely concludes that a certain sum not identified is due to it under the contract. It seems to me that the Claimant's referral to the outstanding balance by way of its reply can at best only be taken to mean that it alleges that despite what the Defendant says there is still due and owing to it under those contracts an outstanding balance of $73,160.75. In this regard therefore it merely answers paragraph 12 of the defence and counterclaim.

45. In these circumstances, it would seem to me that the Claimant has provided no grounds for defending this claim. On the allegations made in the defence and counterclaim which are either admitted or undisputed the Defendant would be entitled to an order on its counterclaim with respect to the Cumoto contract. In my opinion on the pleadings as they stand the only outstanding issue with respect to the Cumoto contract is whether that sum, being a portion of the $73,160.75 claimed, was in fact taken into consideration in determining the Defendant's entitlement under the counterclaim or is still due and owing.

46. While the Defendant has not by its application sought an order for summary judgement on its counterclaim it would seem to me that not only would the Defendant be entitled to such an order, but it is open to me pursuant to my case management powers to make such an order for the purpose of managing the case and furthering the overriding objective.

47. In accordance with my determination herein therefore there will be struck out from the statement of case:

(i) all references to the Wallerfield contract;

(ii) paragraphs 29B and 29C and all references any sums payable pursuant to these claims;

48. With respect to the reply and defence to counterclaim the reply and defence to counterclaim discloses no grounds for defending the counterclaim with respect to the Cumoto contract, and accordingly paragraphs 3 and 6 of the reply and defence to counterclaim are struck out. The Defendant is entitled to an order on its counterclaim for the Claimant to pay to it the sum of $642,686.25 pursuant to the Cumoto contract. In order to facilitate a determination of the issue of whether the Claimant is entitled to as yet any money under this contract there will be a stay of execution of this part of my order until the final determination of these proceedings.

49. In addition the Claimant is to be given the opportunity to provide to the Defendant in accordance with Part 8.6(a) and (b) particulars of:

(a) the monies it says are due and owing under the Cumoto contract;

(b) its claim pleaded at paragraph 7A of the statement of case;

50. These particulars are to be filed and served on or before 31st May 2012.

Dated this 1st day of May, 2012.

Judith Jones
Judge