THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2012-00541

BETWEEN

NICON & ASSOCIATES LIMITED

Claimant

AND

NATIONAL COMMISSION FOR SELF HELP LIMITED

Defendant

Before the Honourable Mr. Justice V. Kokaram

Appearances:
Ms. Karen Singh for the Claimant
Mr. Faraaz Mohammed for the Defendant

JUDGMENT

1. At the case management conference, the Court on its own motion identified a preliminary issue to be determined that is whether the Claimant is entitled to judgment on admissions as contained in the amended Defence or whether the Defence should be struck out as disclosing no reasonable ground for defending the claim. In its duty to actively manage cases, the Court must further the overriding objective by ensuring the benefits of managing cases towards a trial justify the costs in doing so. Indeed the Court must in dealing with cases justly not only apply the principles of proportionality, economy and equality espoused in rule 1 CPR but ensure that it allots an appropriate share of the Court's resources in dealing with the

particular case. Our courts have repeatedly underscored the ethos of court driven case management as the core of the case management system under the CPR. The latest being that the Court of Appeal in **Real Time Systems Limited vs. Renraw Investments** C.A.CIV.238/2011. The process of issue identification, admissions, determining the nature of the evidence to be led at trial, narrowing the dispute between the parties, discussions as to the most appropriate use of technology or alternative dispute resolution mechanisms is actively engaged at the case management conference. Not only is it the Court's duty to actively manage cases but parties are required to help the Court in furthering the overriding objective. Chief Justice S. Sharma in his foreword to the CPR sounded the death knell to the old days of parties merely attending court "for directions" without actively engaging in this management exercise. "The case management conference, therefore, is at the heart of the new procedural code and is central to the success of the noble objectives embodied in Part 25." If the culture of civil litigation is allowed to slip back to the 'old days' then parts 25 and 26 of the CPR will be rendered obsolete drawing out the marrow of the reformed civil litigation system.

2. One of the principal objectives of the case management exercise enunciated in several recent judgments is to investigate the facts and issues that need further investigation. This underscores the need for parties to properly formulate their respective cases for determination. Justice of Appeal P. Jamadar in **Realtime Systems Limited** stated:

> "Moreover, the duty on both claimant and defendant to set out fully all facts which ought to be stated in the statement of case and defence respectively, is also so as to allow a judge to properly manage a matter in the context of the CPR, 1998, with its court driven mandate and the extensive case management powers and responsibilities bestowed on judicial officers.10 Thus, a court is responsible for "identifying the issues at an early stage," and "deciding promptly which issues need full investigation and trial …", and "ensuring that no party gains an unfair advantage by reason of his failure to give full disclosure of all relevant facts …".11 The first two of these duties are given priority by placement in the order of responsibilities set out at Rule 25.1, CPR, 1998. Discharging this duty is only possible if both a claimant and a defendant set out fully all relevant facts in support of and in denial of a claim and of the issues that they reasonably know will likely arise."

3. In **Realtime Systems Limited** the Court of Appeal highlighted the Court's curative powers to order particulars as implicit in Part 26 (1) (w) CPR which are steps or directions necessary to manage the case and deal with a case justly. Equally on the other hand there are some cases, such as this one, where the formulated case is beyond saving and because of the deficiency, inconsistency and ambiguity of the pleaded Defence a Court must intervene on its own motion and have the party consider actively whether any benefit can be derived in preparing for a trial at all.

4. The Claimant in the claim was awarded a contract by the Defendant to construct a community centre at Prisgar Lands, Laventille. The contract was subsequently terminated by the Defendant. The Claimant's claim is for the payment of the sum of $431,903.32 based, as it would appear from paragraphs 7 and 8 of the Statement of Case, on an agreement by the parties for the payment of a total sum of $804,473.15 by two payments with an initial payment of $372,569.72. The sum of $804,473.15 represented the Claimant's loss of profits and expenses as a result of the formation of contract. The initial payment having been made by the Defendant, the claim is for the outstanding balance of $431, 903.32.

5. Admittedly the Statement of Case is poorly pleaded, but there is a kernel of a cause of action in contract. Although the Defendants in the amended defence puts the Claimant to strict proof of the contract referred to in paragraph 3 of the Statement of Case, that contract refers to the contract to construct the community centre which is not in dispute. It does not refer to the agreement which is relied upon by the Claimant in paragraphs 7 and 8 of the Statement of Case, that is the agreement of the Defendant to remit to the Claimant the sum of $804,473.15. Paragraphs 7 and 8 states as follows:

   "7. On the 4th of July, 2011, the Claimant received a telephone call from the Defendant Company stating that upon legal advice they would at that stage give no more than 8% to the Claimant; going back on the previously agreed 9%. The Claimant still agreed to this, and met the C.E.O of the Defendant Company who signed to indicate his agreement. He also signed to remit an initial amount of ***Three Hundred And Seventy Two Thousand, Five Hundred And Sixty Nine Dollars And Ninety Five Cents ($372,569.72).*** *Hereto*

annexed and marked "C" is a true and correct copy of a breakdown of the agreed amounts amounting to ***Eight Hundred And Four Thousand, Four Hundred And Seventy Three Dollars and Fifteen Cents ($804,473.15).***

8. The initial amount as stated above was paid to the Claimant two weeks later as the parties agreed, with the remainder to be paid within a further two weeks. The Defendant Company to date has not remitted the balance owing to the claimant despite efforts by the Claimant to recover same."

6. However rather than deny the making of any agreement with the Claimant, or rely on any lack of authority of the CEO to enter into any contract, the Defendant admits paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the Statement of Case. The upshot of those admissions is that it is admitted and it is not in dispute that:
    - The Claimant's tender for the construction of the community centre was accepted by the Defendant.
    - The project was terminated on 8th November 2011.
    - The Defendant agreed to pay the Claimant for actual work done and "costs associated with the project".
    - By letter dated 4th April 2011 the Claimant indicated a loss of earnings of 20% of the contract value as well as expenses incurred up to the date of termination.
    - The Claimant and the Defendant met subsequently where the Defendant indicated that it was the policy of the Defendant to pay 9% of the loss earnings of contractors and so the Claimant will be paid 9%.
    - On 4th July 2011 the Claimant was offered 8% to which it agreed and the Defendant's CEO signed to indicate his agreement. The agreed sums are reflected in a letter annexed as "C" to the Statement of Case comprising an initial sum of $372,569.72 and a balance of $431,903.32.
    - The initial amount of $372,569.72 was paid with the remainder to be paid within a further two weeks.
    - The Defendant has not to date remitted the balance owing to the Claimant.

7. The amended Defence in paragraphs 4 (i) to (vi) made references to 'contractors' or a 'contract' which is simply irrelevant to these proceedings. At the very least the Defendant has not sought to connect the dots with this Claimant or to the contracts referred to in those paragraphs. Counsel for the Defendant conceded that there is no reference in those paragraphs of the Defence to a contract made between this Claimant and the Defendant.

8. The Defendant goes on to plead that it received advice from the Chief State Solicitor that the issue of loss of profits should not be considered as it is not contained in the standard form agreements. Quite apart from the fact that there is no plea that those standard form contracts comprise the actual contract made by the parties in this claim, when one examines clause 16.4 of the condition of contract it specifically provides for payment by the employer on termination of the agreement of any loss or damage including loss of profit.

9. Furthermore the Defendant compounds its admission in paragraph 4 (vi) of the amended Defence after pleading that it did pay the initial amount referred to by the Claimant, it contends that there was no time line of two weeks for the balance of payment "agreed to". This is a confusing plea at the very least as it suggests that the dispute is not that a balance of payment as alleged by the Claimant is in fact due to it but that there was no agreed time line for payment.

10. Having regard to these pleas there is simply no basis upon which at paragraph 6 of the amended Defence the Defendant can contend that it is not lawfully required to pay the Claimant for any loss of profit.

11. There are many ways the Court can deal with this. Identify a preliminary issue for determination that is whether there should be judgment on admission, or whether there should be summary judgment for the Claimant or the Court can exercise its own powers under 26.2 to strike out the Defence "where it appears to the court that there is no ground for defending the claim or an abuse of the process." In **ED and F Man Liquid Products Limited v Patel** [2003] EWCA Civ 472 a defence which might have had a real prospect of success was destroyed by clear, written admissions made by the defendant. In **Soir**

Contracting and General Trading Company v Desai [2006] EWCA Civ 245 despite a lack of documentary evidence substantiating the claim clear signed acknowledgments of the debt by the defendant meant that there was no real prospect of success.

12. I am cognizant of the fact however that inexplicably there is no application by the Claimant for judgment on admissions pursuant to rule 14.3 CPR nor any oral or written application to strike out the defence or seek summary judgment. Despite this the Court cannot however shirk its responsibility to actively manage this case and must ask the question is there any dispute at all based on the pleaded case?

13. It is a convenient place to repeat the sentiments of Chief Justice Sharma as observed by JA Jamadar in **Realtime Systems Limited**:

> "The CPR are founded on a system of case flow management with active judicial case management.17 Case management under the CPR is predicated upon a system which gives control and management of the pace and shaping of litigation to the courts removing it from the hands of the parties and their attorneys. Under the traditional adversarial system promoted by the 1975 Rules the pre-action process was exclusively occupied with preparation for the trial and was largely controlled by the parties with minimal court intervention. In fact, the final outcome of cases was shaped not during the pre-trial stages but at the trial itself primary because the decision-making process formed no material part of the pre-trail process. With the advent of the new system there has been a functional convergence of the pre-trial and trial process. The intense focus will be on the pre-trial stages since the adjudicative process begins as soon as the court assumes control over the case, which is at the case management conference."

14. Jamadar JA observed that: "judicial officers now have the responsibility not just for managing the pace of litigation but also the shape of litigation."

15. In my opinion, the pleadings in the Defence examined above are at best inconsistent, embarrassing and quite simply as explained above simply fail to set out any ground for defending the claim. In effect the defence as set out by the Defendant is merely a capitulation

to the Claimants claim for monies due and owing to it. The amended Defence discloses no ground for defending the claim and pursuant to rule 26.2 CPR the most effective way of dealing with this anomaly is to strike it out.

16. The amended Defence is therefore struck out on the grounds that it discloses no grounds for defending the claim and there be judgment for the Claimant in the sum of $431,903.32 with interest thereon at the rate of 3% per annum from 5th July 2011 to the date of judgment.

17. I have noted that the Claimant made no attempt to apply for judgment nor did it appear at the last case management conference. Further neither the Claimant nor its Attorney at Law appeared at the date scheduled for the Court's decision in this matter. This conduct signals to the Court no great desire to pursue its rights to judgment. Taking this conduct into account pursuant to rule 66.6 I make no order as to costs.

Dated this 4th day of October 2012

Vasheist Kokaram

Judge