THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-00204

BETWEEN

DANIEL JOHNSON'S SCAFFOLDING COMPANY LIMITED

Claimant

AND

K.G.C. COMPANY LIMITED

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Ms. Kandace Bharath for the Claimant

Mr. Abdel Ashraph instructed by Ms. Shalini Dhanipersad for the Defendant

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JUDGMENT

I. Background:

[1] The parties have been engaged in a business relationship since sometime in 2006/2007 whereby the Claimant Company would supply scaffolding equipment along with the necessary man-power to construct same at various sites as requested by the Defendant Company. As part of this business relationship, the Defendant had a running account open with the Claimant whereby the Defendant would periodically make payments towards the

outstanding balances. This running account would be continuously updated by the Claimant and a statement of accounts would be prepared and sent to the Defendant. Accordingly, on the 12th January, 2010, a statement of accounts covering the period of June, 2007 to December, 2009 was prepared and sent to the Defendant revealing an outstanding balance of **$2,278,912.86**. The Defendant, however, has sought to deny any liability and has refused to pay the alleged outstanding balance.

[2] The Claimant's case is that its Director, Daniel Johnson, entered into a business relationship with the Defendant's Director, Keith Arjoon, on the 9th June, 2007 for the provision of scaffolding equipment and services pursuant to a contractual agreement. The course of dealings between the parties involved the Claimant Company supplying scaffolding at various sites as requested by the Defendant and providing the necessary man-power to erect and dismantle same. After the scaffolding was dismantled, the Claimant would invoice the Defendant for its services, which were to be paid in a reasonable time. The Claimant averred that on the 12th January, 2010, it prepared and issued a statement of accounts for its services performed during the period of June, 2007 to December, 2009 in the sum of **$2,278,912.86**. However, the Defendant has failed and/or refused to settle this outstanding balance.

[3] The Defendant stated that the parties entered into a business relationship on the 19th December, 2006 but that there was no written contractual agreement as one was drafted but never signed by either party. Further, the parties' normal business relationship was based on a strict procedure which involved the Defendant requesting the Claimant's services by email and the Claimant responding with a quotation. If the Defendant agreed with the quotation, it will notify the Claimant and produce a purchase order. The Claimant would proceed to supply the services based on this purchase order. The Defendant averred that most times, the job would be paid for in advance or during the duration of the jobs and invoices would be sent approximately four to five months after the work was completed.

The Claimant performed services for the Defendant from 2006 to 2014 and upon receiving the statement of accounts for the period of June, 2007 to December, 2009, the Defendant notified the Claimant by email of its disagreement with some of the figures

thereon. In particular, the Defendant alleged that the parties entered into a verbal agreement whereby the Defendant would advance to the Claimant the sum of **$495,000.00**, which would cover all work for the period of January, 2009 to June, 2009. This advance payment comprised **$300,000.00** for the Claimant to purchase scaffolding from Dubai and another **$195,000.00** to pay the necessary duties and charges to clear the scaffolding. The Defendant further averred that in 2013, it submitted various cheques that were expressed to be in full and final settlement of monies due and owing and therefore, all outstanding balances were settled.

II. Issues arising for determination

1. **Did the parties follow a strict retention procedure when contracting with each other?**

2. **Was there a verbal agreement for the Defendant to make an advance payment of $495,000.00, which would cover the costs of all contracts from January, 2009 to June, 2009?**

3. **Does the Defendant owe the sum of $2,278,912.86 to the Claimant in unpaid invoices for the period of June, 2007 to December, 2009?**

III. Law:

[4] This is a matter that largely concerns issues of fact which are in dispute between the parties. Accordingly, the Court must satisfy itself as to which version of events is more probable in light of the evidence. To do so, the Court is obliged to check the impression of the evidence of the witnesses against the: (i) contemporaneous documents; (ii) the pleaded case; and (iii) the inherent probability or improbability of the rival contentions. (**Horace Reid v Dowling Charles and Percival Bain**[1] cited by Rajnauth-Lee J (as she then was) in **McClaren v Daniel Dickey**[2])

[5] In analysing the evidence, the Court is reminded that the burden rests on the Claimant to prove its entitlement to the monies claimed.

[1] Privy Council Appeal No. 36 of 1897
[2] CVB 2006-01661

<u>Issue 1</u>: Did the parties follow a strict retention procedure when contracting with each other?

[6] The Claimant has pleaded that the parties engaged in a very informal business relationship that did not follow any strict procedure for the retention of the Claimant's services. The Defendant, in response, pleaded that the parties followed a strict procedure for contracting and such procedure was further outlined in Keith Arjoon's witness statement at paragraph 3.

[7] The Court has noted the following inconsistencies in the Claimant's case on this issue:

In both the pleadings and the witness statement of Daniel Johnson, the Claimant outlined a very simple procedure that did not involve the issuing of quotations before the job was completed[3]. However, at trial, Marsha Johnson contradicted the pleadings by stating that in the normal course of business a quotation would be requested before the parties would negotiate the cost. Thereafter, the client would issue a purchase order and begin work[4]. Daniel Johnson also contradicted the pleadings by stating under cross-examination, that most times the client would ask for a quotation before starting work and that sometimes a purchase order would be issued. The Claimant would then supply what is specifically ordered and based on what was ordered, an invoice would be issued[5].

[8] In her submissions, counsel for the Claimant relied on one contemporaneous document- an email attached at number 33 of the agreed bundle. This email was drafted by Shandon Arjoon, the son of Keith Arjoon. In the email, Shandon requested from Daniel Johnson the Claimant's services for the installation of a deck/hallway for three days. The email stated as follows:

> *"Good Day Gentlemen. I'm requesting the services of Johnson scaffold co to supply [ ] and labor for the installation of deck/walkway for #3 days. Be on alert for [ ]. Thank."* (sic)

[3] Para 5 of the Amended Defence, para 6 of D.J's witness statement
[4] NOE Page 13- 14
[5] NOE Page 19

Counsel submitted that there was no request for a quotation nor was there evidence of any purchase order. Accordingly, this document serves as evidence that the alleged *'strict procedure'* described by the Defendant in his witness statement was not always followed. Mr Arjoon, however, was questioned about this email and its lack of any reference to a quotation or purchase order and the Court finds that the following explanations given in response were probable:

a. That he did not draft the email but from his reading, the email appears to be merely an initial request to see if the Claimant would be available for the job[6];

b. That although there is no purchase order mentioned, the Defendant would eventually issue a purchase order[7];

c. That the email does not refer to any quotation because it may have been a standard job that did not require a quotation[8].

[9] The Court does appreciate that Mr Arjoon seemed nervous and evasive under cross-examination on this issue as he continuously asked Counsel to repeat the question[9]. However, at the end of the cross-examination on this issue, Mr Arjoon stated in clear terms that the Defendant Company would never depart from the strict procedure outlined in his witness statement[10]. Further, the Court agrees that because this email was not sent by Keith Arjoon directly and that it seems a very brief and superficial email, the Court is not willing to find that the Claimant discharged its burden to prove that the Defendant Company departed from the strict procedure.

[10] Accordingly, the Court finds that:

a. The parties were engaged in an informal and flexible business relationship that commenced in 2006 and that there was no written contractual agreement as the Claimant pleaded.

[6] NOE Page 55, Line 29
[7] NOE Page 55, Line 43.
[8] NOE Page 57, Line 18.
[9] See NOE Page 58, Line 41 to page 61, Line 10
[10] NOE Page 61, Line 10.

b. The normal business practice between the parties involved the Defendant requesting a quotation by email or telephone and the Claimant issuing one in response followed by negotiations as to the price. Once a price was agreed to, a purchase order would be submitted by the Defendant which would form the basis of the scope of works and the subsequent invoices.

c. Mr Johnson's evidence in his witness statement that *"it was not normal practice for me to give a quotation before the job was completed as the cost was dependent on what was required for particular jobs…"* is not credible. Indeed, this evidence was contradicted by both witnesses for the Claimant at trial.

d. The contemporary documents and the inconsistencies in the pleaded case suggest that the Defendant's version on this issue is more inherently probable

Issue 2: Was there a verbal agreement for the Defendant to make an advance payment of $495,000.00, which would cover the costs of all contracts from January 2009 to June 2009?

The contentions of the Claimant are inherently more probable:

[11] The Defendant raised the allegation in his pleadings that there was a verbal agreement between the parties that all contracts for the period January, 2009 to June, 2009 would cost **$495,000.00**, which would comprise **$300,000.00** loaned to the Claimant to purchase scaffolding in Dubai and **$195,000.00** to pay duties and charges. Mr Arjoon added in his witness statement that he was of the view that cost of works for that period would have amounted to $**700,000.00** and therefore, this arrangement would have been beneficial to the Defendant Company. However, when questioned at trial, the following evidence given by Mr Arjoon was not considered to be probable to this Court:

a. That he considered himself a prudent business man yet did not think it prudent to have his attorneys put this verbal agreement into writing[11];

b. That when asked how could he possibly estimate the cost of services provided by the Claimant from January, 2009 to the end of March, 2009, he responded that it

[11] NOE Page 34

was a gamble for his company and that if the Claimant had no work to do then the Claimant would get away with the money free[12];

c. That it was never discussed between the parties that if the Claimant failed to perform any work during that period, the Defendant would lose the money that he loaned[13].

[12] In the alternative, the Claimant made no mention of such agreement in its pleadings or witness statement. However, Mr Johnson stated under cross-examination that Mr Arjoon did pay him **$495,000.00** on the running account before the job started but he maintained that there was no agreement that the money paid in advance would cover all jobs from January to June, 2009[14].

[13] What this Court finds most improbable about the Defendant's evidence is the allegation that Mr Johnson would come to Mr. Arjoon's house on the 6th February, 2009 informing him that the Claimant needed $300,000.00 to pay for the scaffolding from the supplier in Dubai yet Mr. Johnson would then agree to accept the $300,000.00, not for the scaffolding, but for all invoices from the period of 1st January, 2009 to 31st March, 2009[15]. Similarly, it is inconceivable that Mr Johnson would return on the 26th February, 2009 to the Defendant's house and state that he *"urgently needed the sum of $195,000.00 to clear scaffolding..."* yet agree to accept the $195,000.00, not for the purpose of paying the stated duties and charges, but on the condition that it would represent payment in full for all invoices for the period 1st April, 2009 to the 30th June, 2009"[16].

The Court finds that the Defendant has failed to establish any connection between the purpose for which the money was requested and the purported terms of the alleged verbal agreement.

[12] NOE Page 33, Line 3.
[13] NOE Page 33, Line 15.
[14] NOE Page 23, Lines 22- 34.
[15] Defendant's witness statement at para 4 (a).
[16] Para 4 (b)

The contemporaneous documents do not evidence a verbal agreement:

[14] Further to the above, the Defendant in his witness statement referred to two cheques attached at **"K.A.2"** and **"K.A.3"** of the Amended Defence as evidence of his two advance payments to the Claimant in the sum of $495,000.00. However, when looking at the attachments to the Amended Defence, only one cheque is attached, being a cheque dated the 6th February, 2009 in the sum of $300,000.00. There was no indication and/or notation as to its purpose.

[15] Alternatively, attached to Daniel Johnson's witness statement is the Statement of Accounts which shows a payment of $300,000.00 made by the Defendant to the Claimant on the 26th February, 2009 for the purpose of *"clearing the scaffolding material on the port."* No record is given of any payment in the sum of $195,000.00 from the Defendant.

Accordingly, the contemporaneous documents do not support the Defendant's case that there was an agreement that the sum of $495,000.00 paid by the Defendant to the Claimant would represent the cost of works for the period January, 2009 to June, 2009.

Issue 3: Does the Defendant owe the sum of $2,278,912.86 to the Claimant in unpaid invoices for the period of June, 2007 to December, 2009?

The contentions of the Defendant are inherently more probable:

[16] The Court does not find that there were any inconsistencies between the Claimant's pleaded case and his evidence on this issue. The Claimant pleaded that on the 12th January, 2010, he delivered to the Defendant a Statement of Accounts covering all transactions between the 9th June, 2007 and the 15th December, 2009, which totalled $2,278,912.86 and that the Defendant, in breach of contract, has failed to pay the balance due[17].

The Claimant's case was maintained in its witness statements. Further, Marsha Johnson stated that she was the person who prepared the statement of accounts on behalf of the

[17] Paras 8 & 9 of the Amended Statement of Case.

Claimant and sent it to the Defendant[18]. Under cross-examination, neither witness contradicted themselves or the pleadings and maintained that the Claimant issued a statement of accounts in the said amount which remains outstanding. However, other evidence was revealed under cross-examination that the Defendant submitted undermined the inherent probability of the Claimant's case as follows:

a. That there is no evidence as to what the final balance on the account is because the account is still running[19];

b. None of the invoices are signed as being received by the Defendant nor are the invoices dated[20];

c. The invoices prepared by Marsha are based on what Daniel Johnson told her[21];

d. The invoices do not indicate to which purchase order they relate[22];

e. That the cheque attached as **"K.A.4"** to the Amended Defence dated the 23rd August, 2013 in the sum of **$110,000.00** says in full and final settlement of any monies owed to the Claimant Company up to the 23rd August, 2013 and is signed by a "go for" of the Claimant Company[23];

f. That a cheque payment voucher dated the 30th September, 2011 in the sum of **$20,000.00** which states *"payment on account and settlement of all outstanding",* which was signed as being received by Daniel Johnson[24].

With respect to the cheque dated the 23rd August, 2013, which purports to be in full and final settlement of outstanding monies, the Court notes that at paragraph 20 of Marsha Johnson's witness statement, she stated that the payment was really a part payment in liquidation of the entire debt. The law on this area has long been settled that such part payment does not amount to a discharge of the whole debt even though the creditor purports to release the remaining obligation since there is no consideration for

[18] Para 14 of M.J's witness statement.
[19] NOE Page 12, Line 15
[20] NOE Page 12, Line 29 and page 20, Line 14.
[21] NOE Page 13, Line 33
[22] NOE Page 21, Line 6.
[23] NOE Page 21, Line 32.
[24] NOE age 22, Line 6.

the release[25]. The issue of the cheque being part payment was not addressed by the Defendant in its evidence or submissions and therefore, remains unchallenged.

Further, the Court finds that although the Claimant has admitted that it cannot state what the current final balance on the account is because it is still running, the Claimant has only claimed for outstanding monies on the statement of account as at December, 2009 and has provided a final figure of **$2,278,912.86** in this regard.

The most significant challenges to the Claimant's case of its entitlement to the money therefore are the following evidence given at trial which suggest that the figures due and owing are not proven because:

a. They were not prepared pursuant to any objective supporting document such as a purchase order or daily report, but rather on the word of Daniel Johnson;

b. That there is no evidence that the invoices issued to the Defendant were ever received; and

c. That Daniel Johnson signed as receiving and accepting a cheque dated the 30th September, 2011 in settlement of outstanding monies.

[17] Notwithstanding, these salient points, the Court must also balance these opposing undisputed facts:

a. That, as admitted by all three witnesses, the parties were engaged in and were accustomed to a very informal and flexible relationship;

b. That prior to the filing of this claim, Mr Arjoon was aware that the Claimant was claiming invoices due and owing for the period 2007 to 2009 and despite his alleged disagreement with this debt, he continued doing work with the Claimant[26]; and

c. That Mr Arjoon admitted under cross-examination that nowhere in his witness statement did he indicate that he settled all outstanding amounts for the period of June, 2007 to January, 2009[27].

[25] Chitty on Contracts 32nd Edn. Vol. 1 at para 21—054.
[26] NOE Page 49, Line12.
[27] NOE Page 38, Line 43.

Further, the Court also notes that although there was no signature on the invoices indicating that the invoices were received by the Defendant, by email dated the 15th December, 2009, Mr Arjoon wrote saying that he has *"…received your submitted invoices and subsequent statements…"*.

[18] However, the Court finds that the Claimant has failed to address the cheque payment voucher dated the 30th September, 2011, attached as **number 41** of the agreed bundle that was raised in the Defendant's witness statement and submissions. This voucher bears the signature of Daniel Johnson as the recipient and states that it represents *"payment on account and settlement of all outstanding"*. Further, under cross-examination, Mr Johnson admitted that he personally signed as receiving the cheque payment cash voucher[28]. No further explanation for this lacuna in the Claimant's case was given as Defence Counsel did not question Mr Johnson further as to why would he sign as accepting a payment that purports to settle all outstanding balances when he is bringing a claim for unpaid invoices. Most importantly is the fact that counsel for the Claimant failed to address this cheque payment voucher in her submissions and did not seek to re-examine Daniel Johnson on that issue at trial. Further, neither of the Claimant's witnesses specifically addressed this cheque voucher in their witness statements and it is a matter of record that no Reply was filed.

Accordingly, the evidence of this cheque payment voucher remains unchallenged and therefore, as at the 30th September, 2011, Mr Johnson has accepted, by his signature, that all outstanding monies prior to that date have been settled. I find that this unchallenged evidence proves fatal to the Claimant's case.

IV. Disposition:

[19] In light of the above analyses and findings in relation to the issues for determination, the Court finds that the Claimant's claim ought to be dismissed and that the Defendant is entitled to costs on the prescribed scale basis to be quantified in accordance with **CPR Part 67.5(1).** In determining such costs the **"value"** of the claim must be decided, which

[28] NOE Page 22, Line 3

in this case, where the Defendant has won, by the amount claimed by the Claimant in the Claim Form (**CPR Part 67.5(2)(b)(i))** which is **$2,278,912.86**. Consequently, in accordance with the prescribed scale of costs at **CPR Part 67 Appendix B**, prescribed costs would be quantified in the sum of **$165,972.82**.

[20] Accordingly, the order of the Court is as follows:

ORDER:

I. The Claimant's Claim filed on 17th January, 2014 be and is hereby dismissed.

II. The Claimant shall pay to the Defendant costs of the Claim quantified on the prescribed scale of costs in accordance with CPR Part 67 Appendix B, in the sum of $165,972.82.

Dated this 9th day of November, 2017

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Robin N. Mohammed
Judge