THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No CV2014-03403

BETWEEN

TAMASH ENTERPRISES LIMITED

Claimant

AND

NORTH WEST REGIONAL HEALTH AUTHORITY

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Ms. Saira Lakhan instructed by Ms. Karina Singh for the Claimant

Ms. Kandace Bharath for the Defendant

DECISION

ON CLAIMANT'S OBJECTION TO THE APPOINTMENT OF AN EXPERT

I. **Background:**

[1] On the 17th September, 2014, the Claimant brought a claim against the Defendant for damages in the sum of **$4,281,636.16** along with interest in the sum of **$923,603.86**. These sums represented the monies due and owing under several oral contracts allegedly entered into by the parties during the period of September, 2012 and March 2013 and which the Defendant has failed to liquidate.

[2] The Defendant denied much of the facts pleaded by the Claimant in its Defence. In particular, it denied and/or made no admission to the claim that: (i) the parties ever entered into any contracts[1]; (ii) any of its agents and/or representatives ever authorised the works done; (iii) it ever received the invoices for the works that had been issued by the Claimant;[2] and (iv) the value of the works amounted to the $4.2 million claimed[3].

[3] Despite these disagreements, the parties engaged in settlement negotiations in an effort to resolve the matter[4]. It was undisputed from both parties' pleadings that an agreement was reached to recruit a jointly selected quantity surveyor and in pursuance of that agreement one Mr Willie Roopchand was selected. Accordingly, it was evident that a material issue to be settled in the negotiations concerned the value of the works completed. This initial plan, however, fell through when the Defendant found that the fee quoted by Mr Roopchand was exorbitant[5].

[4] The matter proceeded to a CMC on the 14th July, 2015, where the Claimant sought and received permission to file a Reply to the Defence. Attendant to this Order were directions for disclosure as well as the filing of witness statements and evidential objections, if any.

[5] Despite the initial setback in the settlement process, negotiations continued and the parties were zeroing in on appointing another quantity surveyor. As such, By Notice of Application by consent[6], the parties sought to have the Court's previous directions

[1] At para 3 of the Defence.
[2] At para 6 of the Defence.
[3] At para 11 of the Defence.
[4] At para 10 of the Defence and para 14 of the Statement of Case.
[5] At para 10 (xi) of the Defence and para 8 of the Reply.
[6] Filed on the 30th October, 2015.

along with the set trial dates vacated pending these settlement discussions. In this Consent Application, it was expressly stated that the parties *"…agreed that a quantity surveyor would be appointed by the parties to facilitate settlement of this matter."* This Consent Application was granted on the 4th November, 2015 and it was further ordered that the Pre-trial Review fixed for the 17th February, 2016 be converted to a Status Hearing.

[6] The Status Hearing was convened on the 7th June, 2016. In closing, the Court ordered that a formal application for the appointment of a quantity surveyor to value the works done by the Claimant be filed and served on or before the 21st June, 2016. Provision was also made for any objection to this application to be filed by the 13th July, 2016.

[7] In pursuance of this Order, on the 21st June, 2016, the Defendant applied to this Court to appoint Mr Girja S Tiwary as the single expert quantity surveyor for this matter and further offered to bear the costs of this valuation. However, on the 13th July, 2016, the Claimant filed an Objection to the Defendant's application arguing that the quantity surveyor's report would not assist the Court in determining the issues and therefore, should not be allowed.

[8] At the hearing of the 27th July, 2016, this Court granted permission for the Defendant to file and serve its response submissions and if necessary, for the Claimant to file and serve submissions in reply.

[9] An extension of time for the Defendant to file its response submissions was later sought and granted by Court Order dated the 1st November, 2016. In pursuance of this extension, the Defendant's submissions were filed on the 4th November, 2016.

II. Law & Analysis:

[10] In its objection, the Claimant stated that pursuant to **Part 33.8 of the CPR**, the Court can order a party to appoint a single expert but that this rule will not apply unless the Court applies the test laid out in **Christianne Kelsick v Dr Ajit Kuruvilla & Ors**[7].

[11] **Part 33.8** states as follows:

[7] CA P277 of 2012.

1) *The court may order a party—*

a) to arrange for an expert to prepare a report on any matter and, if appropriate, to arrange for an examination to be carried out in relation to that matter; and

b) to file the report and serve a copy on any other party.

2) *On giving such a direction, the Court may—*

a) identify the person who is to prepare the report; and

b) specify which party is to be responsible for the cost of preparing it.

3) *The court's powers under this rule may be exercised only on the application of a party.*

[12] Contrary to this submission, however, the Defendant's Application is stated as being made pursuant to **Part 33.5 & 33.6 of the CPR** and not Part 33.8.

[13] **Part 33.5** essentially requires the Court's permission for a party to call an expert witness whereas **Part 33.6** deals with, inter alia, what is to occur when the Court grants such permission. For ease of reference, these Rules are set out below:

Part 33.5:

1) *No party may call an expert witness or put in an expert's report without the court's permission.*

2) *The general rule is that the court's permission should be given at a case management conference.*

3) *The court may give permission on or without an application.*

4) *No oral or written expert's evidence may be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert intends to give.*

5) *The court must direct by what date such report must be served.*

6) *The court may direct that that evidence be given by one or more experts—*

a) chosen by agreement between the parties;

b) appointed by the court; or

c) appointed in such way as the court may direct.

7) *The court may direct that part only of an expert's report be disclosed.*

Part 33.6 states:

1) *Where the court gives permission to call an expert witness or put into evidence an expert's report, it may direct that evidence is to be given by a single expert appointed—*

a) jointly by the parties;

b) by the court;

c) by the court from a list prepared by the parties; or

d) in such manner as the court may direct.

2) *If the court gives such a direction the parties must, so far as is practicable, agree—*

a) the questions to be submitted to the expert;

b) the instructions to be given to him; and

c) arrangements for—

(i) the payment of the expert's fees and expenses; and

(ii) any inspection, examination or experiments which the expert wishes to carry out.

3) *If the parties cannot agree these matters any party may apply to the court to decide them.*

4) *A single expert may be appointed by the court—*

a) instead of the parties instructing their own experts;

b) to replace experts instructed by the parties;

c) in addition to experts instructed by them; or

d) to assess the evidence to be given by experts instructed by them.

[14] The "test" in ***Kelsick*** *supra* referred to by the Claimant is not so much a test, but rather guidelines for the Court's discretion to receive an expert's evidence[8].

That case concerned a claim by an infant, through her Next Friend, that the Defendants were negligent during the course of her birth and in their subsequent care and treatment of her. At trial, the judge had refused to grant permission for her to call a medical expert to give evidence. In determining the appeal, Jamadar, Bereaux and Rajnauth-Lee JJA discussed the operation of **Part 33.4** as follows:

(i) *"In determining whether permission should be granted to use expert evidence and what expert evidence is reasonably required to resolve the issues that arise for determination, a court ought to weigh in the balance the likelihood of the following (assuming admissibility):*

a) how cogent the proposed expert evidence will be; and

b) How useful or helpful it will be to resolving the issues that arise for determination.

(ii) In determining whether this evidence is reasonably required to resolve the proceedings justly, the following factors that allow one to assess proportionality should also be weighed in the balance:

c) the cost, time and resources involved in obtaining that evidence, proportionate to the quantum involved, the importance of the case, the complexity of the issues, the financial position of each party involved in the litigation, and the court resources likely to be allocated to the matter (in the context of the court's other obligations);

[8] Para 12.

(iii) *Depending on the particular circumstances of each case additional factors may also be relevant, such as:*

i. fairness;

ii. prejudice;

iii. bona fides and

iv. due administration of justice

(iv) *Under cogency, the objectivity, impartiality and independence of the proposed expert, together with the qualifications and experience of the proposed expert, in relation to both the specific subject under consideration and the particular issues to be resolved, are material considerations. At this stage of the proceedings a trial judge is simply required to assess how cogent the expert evidence is likely to be. That is, how convincing and compelling it is likely to be based on the stated considerations. Under usefulness or helpfulness, the technical nature of the evidence to be reconciled and the focus of the issues to be determined, as well as the familiarity of the expert with the areas under scrutiny, are material considerations, especially when that expertise is relevant for necessary fact and/or inferential findings. As with cogency, at this stage of the proceedings the trial judge is only required to assess the likelihood of usefulness or helpfulness.*

(v) *These two factors (of cogency and usefulness/helpfulness) contain some commonalities and there will often be overlap in what one considers under these two heads. Proportionality involves a comparative assessment of the multiple considerations stated in the Overriding Objective (Part 1.1, CPR, 1998). These considerations are not exhaustive and only serve to assist the court in determining what is required to deal with a case justly.*

In summary, the panel noted that for expert evidence to be appropriate and for permission to be granted to use it, three things should be present: (i) that evidence ought to be relevant to the matters in dispute and therefore, reasonably required to resolve the

proceedings; (ii) the proposed expert must be impartial and have the required expertise relevant to the issues to be decided; and (iii) the use of the expert must be proportionate.

[15] Before getting into an analysis and application of these guidelines, the Court notes that the Claimant has submitted preliminarily, that the Defendant has omitted to include certain information in his Application as follows:

(i) **The Defendant has failed to obtain an estimate for the expert's services;**

(ii) **The Defendant has failed to address who will be paying for the expert; and**

(iii) **The Defendant has failed to provide a CV of the proposed expert to provide the Court with sufficient evidence of his competence and availability.**[9]

[16] With respect to (i) & (ii), the Court observes that nowhere in these Rules is it a requirement that the Defendant, when making its application, obtain an estimate for the expert's services. Rather, all that is required under **Part 33.6 (2) (c) (i)** is that *arrangements be made for payments of the expert's fees and expenses*. In this light, it is noted that at (iii) of the Defendant's Application, it is stated that the Defendant would ***bear the costs of the appointment of the proposed expert— QS Services Limited.***

[17] With respect to the submission that no CV has been submitted, the Court agrees that one is required before it can determine the suitability of the expert to be appointed. Moreover, in ***Kelsick*** *supra*, the panel relied primarily on the expert's curriculum vitae in its assessment of the cogency of his evidence[10]. Accordingly, the Court will sustain this aspect of the Claimant's objection to the Defendant's Application.

[18] The Claimant's objection with respect to the second of the ***Kelsick*** guidelines, however, was not as convincing. Ms Karina Singh submitted that the evidence of Mr Girjar would not be relevant to the issues for determination in this matter, which, she submitted, were as follows[11]:

(i) Whether the Defendant contracted the Claimant to do the works?

[9] Para 9 of the Claimant's objection.
[10] See para 26.
[11] Para 4 of the Claimant's objection.

(ii) Whether the Claimant performed the works according to any contract?

(iii) Whether the Defendant's agents or servants supervised the works according to the Claimant's report on all the jobs performed?

(iv) Whether the Defendant breached its contract?

(v) If there was a contract, whether the Claimant is entitled to compensation for works done at the Defendant's premises?

(vi) Whether the Claimant is entitled to interest on the damages owed to him*?*

[19] While the Court does find that these issues arise from the pleaded case, they are not all the issues in this matter. In fact, based on the settlement discussions and the parties' expressed agreement to appoint a joint quantity surveyor[12], it is clear that this list omits a material issue that was the focus of the settlement talks—what is the value of the works completed by the Claimant. The fact that the parties seemed close to settling this issue was precisely why this Court vacated its directions so as to facilitate the appointment of an agreed quantity surveyor. It is therefore apparent that at all material times prior to this objection, the Claimant consented to the appointment of an agreed quantity surveyor in order to value the works it allegedly completed.

[20] Against this background, the Claimant's attempt to now object to the Defendant's application on the grounds of lack of relevance was perplexing, to say the least. It attempted to support this objection by making contradictory submissions that confused the issues that are in dispute in this matter:

> *"it is respectfully submitted that the Court would first have to* ***make a finding of fact on whether approximately 4.2 million dollars*** *of work was done for the Defendant without knowledge and approval of its CEO…If a finding was made that there was a valid contract…****then the amount would stand and there would be no need for a QS****."*[13]

[12] See paras 2 & 3 of the NOA by consent filed on the 30th October, 2015.
[13] Para 11 of the Claimant's objection.

[21] Not only is this submission contradictory but it is also illogical. Unless it was pleaded that the parties agreed to a fixed price of $4.2 million for the works, the only way to determine the true value of the works completed by the Claimant is to have the works valued by a licenced quantity surveyor. Secondly, Ms Singh has not explained the link between a finding that there was a valid contract and the result that the $4.2 million debt claimed would stand.

[22] The problem in her reasoning seems to lie with the fact that she has incorrectly attempted to merge separate and distinct issues. Determining the factual issues in dispute between the parties requires a careful comparison of the pleadings. On the Claimant's version, it was pleaded that, upon completion of the works, the Claimant would invoice the Defendant for the works and the Defendant would pay the Claimant *"within 30 days from the date of the Claimant's invoice submitted for each job…"*[14] Therefore there was no pleading that a fixed price of $4.2 million was agreed which would warrant a finding on same. In rebuttal, the Defendant not only denied the existence of any oral contract, but further denied that it received any invoices from the Claimant[15] or that it owes the amount claimed[16].

[23] Therefore, there are, in reality, three separate issues contained in this submission: (i) the existence, validity and terms of the oral contracts; (ii) the receipt of the invoices by the Defendant and (iii) the accuracy of the amounts on those receipts and/or of the value of the works completed. They are separate and distinct because a positive finding of one does not necessarily mean that a positive finding would be made on the others. It therefore cannot be said that a finding that a valid contract existed automatically means that the Defendant owes $4.2 million to the Claimant for the works completed.

[24] It therefore follows that the Claimant's objection to the relevance of the quantity surveyor is wholly misconceived. Determining the value of the works completed by the Claimant has been the focus of the settlement negotiations and the sole issue preventing the conclusion of this matter. It can only be achieved by the appointment of a quantity surveyor.

[14] Para 5 of the Statement of Case.
[15] Para 6 of the Defence.
[16] Para 11 of the Defence.

[25] Accordingly, on the second limb of the ***Kelsick*** guidelines, the Court finds that the appointment of a quantity surveyor to be relevant to the issues in dispute and therefore, reasonably required to resolve the proceedings justly.

III. Disposition:

[26] Given the reasoning and analyses above, the Court ORDERS as follows:

1. **That the Claimant's objection to the appointment of an expert quantity surveyor on the grounds of relevance is dismissed.**
2. **Accordingly, pursuant to CPR Part 33.6 (a), the parties are to prepare and submit an agreed list of quantity surveyors to the Court together with their qualifications and suitability for appointment within 28 days of this Order.**
3. **The parties will then convene before this Court on the 28th September, 2017 in courtroom POS 04 whereupon the Court shall endeavour to appoint a joint expert quantity surveyor from the agreed list provided.**
4. **Since the Defendant has agreed to pay the costs of the appointed expert quantity surveyor, there is no requirement for arrangements to be made for the payment of the expert's fees and expenses pursuant to CPR Part 33.6 (2) (c) (i);**
5. **That the costs of the Defendant's Notice of Application filed on the 21st June, 2016 be paid by the Claimant to the Defendant to be assessed pursuant to CPR Part 67.11, in default of agreement.**

Dated this 24th day of August, 2017

Robin N. Mohammed
Judge