

**REPUBLIC OF TRINIDAD AND TOBAGO**

IN THE HIGH COURT OF JUSTICE

CV2015-01375

BETWEEN

**GASCO LTD**

Claimant

AND

**TRINIDAD AND TOBAGO HOUSING DEVELOPMENT CORPORATION**

Defendant

**Before the Honourable Mr. Justice R. Rahim**

**Appearances:**

Mr. K. Mattis for the Claimant

Mr. S. Bidaisee instructed by Ms. R. Jaggernauth for the Defendant

## Reasons

1. On the 24<sup>th</sup> May, 2017, the Court dismissed an application filed by the claimant on the 4<sup>th</sup> November, 2016 (“the said application”). By the said application, the claimant sought the following relief;
  - i. *A declaration that the claimant may avail itself of an equitable set-off against the defendant’s judgment debt.*
  - ii. *An order that there be a stay of the enforcement proceedings dated and filed on the 9<sup>th</sup> June, 2016 and scheduled for hearing on the 26<sup>th</sup> September, 2016.*
  
2. The following are the reasons for the dismissal of the said application.

### Brief background

3. This application arose out of an original claim filed on the 30<sup>th</sup> April, 2015 in which the claimant claim damages in the sum of \$3,201,862.00 against the defendant. The claim was however withdrawn by the claimant by way of notice of discontinuance filed on the 13<sup>th</sup> October 2015. Before the date of discontinuance however, the defendant had filed its defence on the 29<sup>th</sup> July 2015. In that defence, the defendant pleaded limitation and also denied owing any money to the Claimant.
  
4. On the 19<sup>th</sup> January, 2016 a consent order (properly initialed by the parties) was entered in the following terms;
  - i. *The Claimant do pay to the Defendant prescribed costs of the claim in the sum of \$103,975.60; and*
  - ii. *There be a stay of execution of 28 days.*
  
5. By letters dated the 7<sup>th</sup> March, 2016 and 4<sup>th</sup> April, 2016, the defendant wrote to the claimant requesting payment of the sum of \$103,975.60. There was no response by the claimant.

Consequently, on the 10<sup>th</sup> June, 2016 the defendant filed an application for an oral examination of the claimant's secretary in order to determine its means and assets.

6. On the morning of the 26<sup>th</sup> September, 2016 at the scheduled hearing of the oral examination, almost one year after the discontinuance, the claimant filed an application of even date seeking, 1) a declaration that the claimant may avail itself of the defence of equitable set-off and 2) an order that the enforcement proceedings be dismissed. Subsequently, the claimant amended its application.
7. In support of its application, the claimant relied on an affidavit filed on the 4<sup>th</sup> November, 2016 and sworn by Kevaughn Mattis, Instructing Attorney at law ("the Mattis affidavit"). The court noted that Mr. Mattis being the advocate attorney on record for the claimant ought not to have sworn an affidavit in his client's cause except in limited circumstances. No such reason was provided to this court. Nonetheless, so as not to deprive the claimant from being heard the court permitted Mr. Mattis to continue to advocate on behalf of his client. It must be made clear however that this practice is not to be encouraged particularly where the deponent swears to facts which are within the knowledge and purview of the client and which are material to the application though not necessarily determinative. In opposition to the claimant's application, the defendant relied on an affidavit filed on the 12<sup>th</sup> January, 2017 and sworn by Rachael Latchme Jaggernauth, Instructing attorney at law ("the Jaggernauth affidavit").

### **Equitable Set-off**

#### Law

8. Where A has a claim for a sum of money against B and B has a cross-claim for a sum of money against A such that B is, to the extent of his cross-claim, entitled to be absolved from payment of A's claim and to plead his cross-claim as a defence to an action by A for

the enforcement of his claim, then B is said to have a right of set-off against A to the extent of his cross-claim: *See Halsbury's Laws of England, Volume 11, 5<sup>th</sup> Edition, paragraph 386.*

9. According to *Halsbury's Laws of England, Volume 11 (2015), paragraph 410,* for equitable set-off to be permissible, there is a single test which involves a 'formal requirement' of close connection between the dealings and transactions which give rise to the claim and the cross-claim and a 'functional requirement' that it would be unjust to enforce the claim without taking into account the cross-claim. The effect of equitable set-off is to produce a net balance in favour of one party or the other; and the original claims are subsumed into that net balance. Where equitable set-off is available the defendant relying on the set-off is not legally obliged to pay the claimant's claim in full, but only has a legal liability to pay the net balance (if any) in the claimant's favour. A tribunal finding that the requirement of 'manifest injustice' is not satisfied is a value judgment akin to the exercise of a discretion and a court will only interfere with such a finding where it is shown that it was premised on an error of law or that it was one which no reasonable arbitrator could reach.
  
10. The parties herein agreed that the test to determine whether an equitable set-off is available is whether there are cross-claims so closely connected with the claim that it would be manifestly unjust to allow the claimant to enforce payment without taking into account the cross-claim: *See Federal Commerce & Navigation Co. Ltd v Molena Alpha Inc (The "Nanfri") (1978) 2 QB 927 at 975, per Lord Denning*
  
11. Accordingly, for a right of set-off to be enforceable, the following two essential requirements must be met;
  - i. there must be 'mutuality' as between the parties, that is, each party must have a debt owed by and to the other: *See Edlington Properties Ltd v JH Fenner & Co [2006] EWCA Civ 403; [2006] 3 All ER 1200;* and

- ii. The claim and cross claim must arise out of the same contract or contracts connected with one another: *See Government of Newfoundland v Newfoundland Railway Co (1888) LR 13 App Cas 199.*

### Discussion and findings

12. Upon an analysis of the facts in this case, the court found that having filed a Notice of Discontinuance, the claimant brought its claim subsisting against the defendant to an end. Pursuant to *Part 38.5(1) of the CPR*, discontinuance against any defendant takes effect on the date when the notice of discontinuance is served on him under rule 38.3(1)(a). Further, *Part 38.5(2) of the CPR* states that the proceedings are brought to an end as against the defendant on that date.
13. According to the claimant, it withdrew its claim for \$3,201,862.00 against the defendant because it could not defeat the defendant's limitation defence. In summary, the claimant's case was that upon the withdrawal of its claim, it was still open to it to avail itself of any self-help remedy for the recovery of its demand of \$3,201,862.00. The claimant argued that it would be manifestly unjust to permit the defendant to enforce its judgment debt before the claimant's cross claim for \$3,201,862.00 was validated or invalidated by a court. The claimant submitted that this invalidation process would be made possible by the defendant simply seeking a declaration that it has paid its debts in full and permitting the claimant to state otherwise in legal proceedings.
14. Having so discontinued its case, the court neither adjudicated upon any issues emanating from the case nor did it make any findings that the defendant owed the claimant any sums. Moreover, there was no agreement or acknowledgment by the defendant that it owed the claimant any sums. In fact, the position was that the defendant denied owing any sums claimed by the claimant. As such, one of the essential elements of an equitable set off, that is, each party must have a debt owed by and to the other was not satisfied in the present

circumstances, the period of limitation for the recovery of such debt having debarred the defendant from any rights surrounding the recovery of such money owing.

15. Further, even if the court was to apply the test as set out by the claimant, namely whether in the circumstances of this case, there were cross claims so closely connected with the defendant's judgment debt that it would be manifestly unjust or unconscionable to allow it to enforce payment without taking into account the claimant's cross-claim, the answer to the question was no, since there were in law no cross claims. The said application in no way established, reinstated and/or revived the claimant's discontinued claim against the defendant. There was simply an order for costs which came into existence when the claimant discontinued its claim against the defendant and only because the claim was in fact discontinued.
16. Moreover, a finding of the court that equitable set off applied, would be tantamount to a finding that the defendant in fact owed the claimant the sums it claimed without hearing the evidence or without giving the defendant the opportunity to defend itself. This would be both manifestly unfair and prejudicial to the defendant.
17. Further, to permit a claimant to withdraw its claim on the basis that it is statutorily barred from pursuing it, consent to the payment of costs, refuse to honour its agreement and then almost one year later, avail itself of equitable set off is itself unfair to the defendant. He who comes to equity must do so with clean hands and the actions of the claimant demonstrate otherwise.
18. Additionally, the claimant's attempt to raise the issue of equitable set off in the circumstances of this case amounted to an abuse of the court's process as the claimant was attempting to revive and/or re-litigate a claim which of it discontinued of its own volition. The law is that a successive action may amount to an abuse of process even though there has been no determination of the merits of the issues emanating from a case: *See Henderson v Henderson [1843-60] All ER 378 and David Walcott v Scotia Bank Trinidad and Tobago Limited Claim No. CV 2012-04235.* In this case, should the claimant

have been permitted to avail himself of equitable set off, such a process would have been highly prejudicial to the defendant in the manner set out above. In this regard the court noted that the claimant may have invoked the court's jurisdiction to dis-apply the limitation period but chose instead to discontinue by notice. In those circumstances the claimant would have had to stand by his choice. Consequently, the claimant was not entitled to an equitable set off.

### **Stay of Proceedings**

19. One of the relief sought by the claimant in the said application is an order to stay the defendant's enforcement proceedings. The court having found there to be no legal basis for equitable set off, it means that equitable set off could not provide a basis for a stay.
20. Additionally, the court noted that the argument of the claimant on the stay of enforcement proceedings was somewhat premature. The defendant was not in fact seeking to enforce the order for costs but was seeking to ascertain the claimant's means and assets via an oral examination of the claimant's secretary pursuant to **Part 45 CPR** as a tool to aid in subsequent enforcement. This is a pre-requisite to enforcement in circumstances where a judgment creditor wishes to have relevant information as to the means and assets of the judgment debtor. No enforcement order is made at the conclusion of those proceedings which are inquisitorial by nature.
21. Further, at paragraph 18 of the Affidavit of Mattis it was deposed that, "*The Claimant company is experiencing financial hardship and payment of the sum of \$103,975.60 would be significant strain*". The court agreed with the defendant's submission that the claimant's allegation of financial hardship was not supported by any evidence, such as bank statements and/or other documents. In that regard the court is of the view that the oral examination of the secretary of the claimant would have provided the opportunity for such evidence of hardship to be forthcoming thereby assisting the defendant in making an informed decision as to whether this is in fact the case for the purpose of deciding whether to enforce.

22. Therefore even if the court was to disregard its findings on the merits of equitable set off, the unsupported allegation of financial hardship and/or strain was in these circumstances an insufficient basis for a grant of a stay of the oral examination.

Dated this 21<sup>st</sup> day of June, 2017

Ricky Rahim

Judge