THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2016-02606

Between

D. RAMPERSAD & COMPANY LIMITED

Claimant

And

KALL CO LIMITED

Defendant

And

KALL CO LIMITED

Ancillary Claimant

And

COMMUNITY IMPROVEMENT SERVICES LIMITED

Ancillary Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: October 30, 2018

Appearances:

Claimant: Ms. L. Kisto instructed by Ms. J. Rogers

Defendant: Ms. K. Bharath

REASONS

1. On October 30, 2018 the Court gave the following order;

    i. Judgment on Admission for the claimant against the defendant on the issue of liability for breach of contract;
    ii. Damages to be assessed and costs to be quantified by a Master on a date to be fixed by the Court Office;
    iii. Notice of Application dated October 30, 2018 is dismissed.

2. The following are the reasons for this decision.

THE APPLICATIONS

3. Before the court for its determination were two applications. The first was the claimant's Notice of Application dated September 7, 2018 by virtue of which the claimant sought the following relief;

    i. There be judgment in the sum of $2,085,157.69 in favour of the claimant to be paid by the defendant within twenty-eight days from the making of the said order;
    ii. Such further and/or other orders that the court deems just and fit;
    iii. The costs of the entire action including the costs of this application herein be paid by the defendant to the claimant on summary assessment in default of agreement within twenty-eight days from either the date of agreement or the date of summary assessment.

4. The main ground of the claimant's application which was supported by affidavit of Valmiki Frankstan-Paul was that the defendant clearly admitted

its claim in the matter CV2018-00416 Kall Co. Limited v Community Improvement Services Limited which is that the defendant remained indebted to third parties, one of whom is the claimant for the waste water treatment plant in the sum of $1,853,473.50 plus VAT.

5. The second application which was before the court was that of the defendant's Notice of Application dated October 30, 2018 by virtue of which the defendant sought to file a re-amended defence. The main ground of the defendant's application which was supported by affidavit of Michael Arjune was that the equipment which formed the substance of the claimant's claim against the defendant, namely two waste water treatment systems, had been sold by the manufacturer abroad to recover their costs and that at present all that was owed for the waste water treatment systems and legal costs were $350,000.00.

6. The court found it prudent to determine the claimants' application first as same was filed first in time and if the claimant's application was unsuccessful then it would consider whether or not it should allow the defendant to file a re-amended defence.

7. Before proceeding, the court pauses to note that the defendant failed to any affidavits in opposition to the claimant's application. The defendant simply filed its application approximately one month after the filing of the claimant's application on the day the application was to be heard.

THE CLAIM

8. By Claim Form filed on July 28, 2016 the claimant claimed that in or about July 28, 2015 it received from the defendant a request for quotation ("the

RFQ") for the supply, installation and commission of two ECOPOD Wastewater Treatment Systems ("the systems") for the Maracas Beach Facility Improvement Works ("the project"). In response to the RFQ, the claimant sent to the defendant its initial budgetary proposal dated August 21, 2015 ("the initial proposal").

9. The claimant alleged that during the period of September 16, 2015 and October 6, 2015 by reason of the defendant having made several material changes to the RFQ, the claimant issued a revised tender proposal dated October 6, 2015 ("the revised proposal") for the systems.

10. According to the claimant, it subsequently received from the defendant the following;

    i. The defendant's purchased order No. 21125 dated October 13, 2015 (the purchase order") wherein the price stated in the purchase order mirrored that of the claimant's revised proposal and at the same time;
    ii. A copy of the claimant's revised proposal duly stamped, agreed and approved by the defendant's Chief Operating Officer, Roger Ganesh ("Ganesh").

11. The claimant claimed that upon receipt of the aforementioned documents, there was a binding contract for it to supply the defendant with the systems for the price of $4,633,683.76 VAT exclusive. In keeping with the terms of the contract, the claimant awaited the first milestone payment from the defendant which was *"30% upon receipt of purchase order, Net cash"* before placing an order for the systems as the contract afforded the defendant no credit facilities for the first payment. In order to facilitate the

defendant in making the first payment and upon the defendant's request for supplemental terms and conditions to the contract, the respective duly authorized representatives of the claimant and the defendant signed mutually agreed supplemental terms and conditions to the contract on February 22, 2016 ("the supplemental terms").

12. According to the claimant, pursuant to the defendant's request, the supplemental terms was dated December 8, 2015 which coincided with the date of the first payment received by the claimant from the defendant by way of cheque. The funds representing the first payment were eventually made available to the claimant's bankers in or about December 18, 2015 and so in or about January 13, 2016 the claimant placed the requisite order for the systems from its third party supplier in compliance with the contract.

13. Further, in accordance with the contract, the second milestone payment was to be made to the claimant by the defendant in the manner of *"40% upon equipment readiness to ship, Net cash"*. As with the first payment, the contract afforded the defendant no credit facilities for the second payment.

14. The claimant claimed that the systems were eventually ready to ship on or about April 27, 2016 which was a delay of about forty days than what was agreed to in the contract and which the defendant agreed and acknowledged as an agreed extended time for same.

15. By reason of the expected date of the readiness of the systems to be shipped, the claimant invoiced the defendant for the second payment in the amount of $2,085,157.69 VAT inclusive ("the invoice") so that the

defendant could be notified and make the necessary arrangements for the second payment on a timely basis . The invoice was received by the defendant on or about March, 10, 2016.

16. It was the claim of the claimant that in breach of the contract and/or the supplemental terms, the defendant failed and/or neglected to pay the second payment to the claimant despite the claimant's several and/or repeated demands to the defendant to so do. Consequently, the claimant claimed the following relief;

i. *Specific performance of the contract in accordance with the provisions of the contract and/or the supplemental terms;*
ii. *Interest pursuant to section 25 of the Supreme Court of Judicature Act Chap. 4:01 at such rate and for such period as the court shall deem fit;*
iii. *Such further and/or other relief as the court may deem fit; and*
iv. *Costs.*

17. The claimant claimed the following relief in the alternative;

i. *Damages in lieu of specific performance or at common law;*
ii. *Damages arising from any consequential loss suffered by the claimant;*
iii. *Interest pursuant to section 25 of the Supreme Court of Judicature Act Chap. 4:01 on any sum found due at such rate and for such period as the court shall deem fit;*
iv. *Such further and/or other relief as the court may deem fit; and*
v. *Costs.*

THE AMENDED DEFENCE & COUNTERCLAIM

18. By Amended Defence and Counterclaim filed on February 22, 2017 the defendant claimed that the contract governing the parties' respective obligations was only executed on February 22, 2016 and dated December 8, 2015. This is the document referred to by the claimant as the supplemental terms. According to the defendant, the first payment made to the claimant was by cheque payment dated December 11, 2015 and was made pursuant to the claimant's invoice of October 19, 2015 for the sum of $1,598,620.90.

19. The defendant put the claimant to strict proof that the systems were ready for shipment on or about April 27, 2016. The defendant denied that it agreed and/or acknowledged as an agreed extension of the time for same. According to the defendant, the claimant was in breach of the agreement between the parties for failure to meet the time schedules as set out by the agreement and its continued delays in the execution of its obligations under the agreement.

20. The defendant admitted that it received an invoice from the claimant for the sum of $2,085,157.69 Vat inclusive. However, the defendant averred that the invoice which the claimant claims to have been sent by reason of the expected date of readiness of the systems to be shipped was issued in breach of the agreement between the parties which expressly provided for the second milestone payment of *"40% upon equipment readiness to ship".*

21. As such, it was the case of the defendant that by reason of the breaches of the terms of the contract, it was entitled to rescind the contract and reject

the goods or in the alternative it was entitled to treat the contract as having been repudiated by the claimant.

22. The defendant further admitted that it did not make any payment to the claimant for invoice dated March 8, 2016. According to the defendant, the main reason it did not make any payment to the claimant under that invoice was because the ancillary defendant, Community Improvement Services Limited ("CISL") terminated the substantive contract for the Maracus Beach Facilities Improvement Works ("the project"). The water waste treatment plant for which the defendant contracted the claimant was for the project.

23. According to the defendant, the claimant was well aware of the termination of the substantive contract between CISL and the defendant and so the claimant was under a duty to mitigate its losses. The defendant therefore averred that by reason of the aforesaid the performance of the contract became impossible and it was discharged from further performance of the contract in circumstances where the contract was frustrated.

24. Further and/or in the alternative, the defendant claimed that as CISL wrongfully terminated the substantive contract, it is entitled to be indemnified by CISL in respect of any liability of it to the claimant.

25. The defendant counterclaimed for the following relief;

    i. *Damages for breach of contract and/or loss of profit in the value of 15%-20% of the Water Waste Treatment component of the project in the sum of $695,052.56-$926,736.75 plus VAT;*

ii. *Further and/or in the alternative damages arising from any consequential loss suffered by the defendant;*

iii. *Interest pursuant to Section 25A of the Supreme of Judicature Act Chapter 4:01;*

iv. *Such further relief as the Honourable Court may deem fit;*

v. *Costs.*

26. For the avoidance of doubt there are two claims in existence in relation to the same contract and circumstances. A claim was filed by Kall Co in 2018 against Community Improvement Service LTD (CV2018-00416). That matter is also before this court. The first claim however is the present claim by D. Rampersad Co Ltd against Kall Co in which Kall Co filed an ancillary claim against the same Community Improvement Service Ltd based on the very same facts and circumstances. As a consequence of the duplication of Kall Co's claim, the ancillary claim in this case was stayed pending the outcome of the 2018 claim.

JUDGEMENT ON ADMISSION

27. In determining whether the claimant was entitled to obtain a judgment on admission the court considered ***Part 14 of the Civil Proceedings Rules 1998*** (as amended) ("the CPR") which provides as follows;

"14.1 (1) A party may admit the truth of the whole or any part of any other party's case.

(2) He may do this by giving notice in writing (such as in a statement of a case before or after the issue of proceedings.

…

14.3 (1) Where a party makes an admission under Rule 14.1(2) (admission by notice in writing), any other party may apply for judgment on the admission.

(2) The terms of the judgment shall be such that it appears to the Court that the applicant is entitled to on the admission.
(3) An application to determine the terms of the judgment must be supported by evidence…"

28. In the case of ***Claude Denbow and Donna Denbow v Attorney General of Trinidad and Tobago and Ors.*** Pemberton J (as she then was) had the following to say on judgment on admissions;

"[8] What is the nature of this admission…The admission must speak to facts pertinent to the claim between parties to a cause or matter. The admission may be expressed or implied but it must be clear. Usually such an Order is made to save time and costs. There must be an admission as to all the constituent parts of the claim made."

29. The claimant's application was premised upon the fact that at paragraph 29 of page 36 of its Statement of Case in CV2018-00416 Kall Co. Limited v Community Improvement Services Limited, Kall Co. stated as follows;

"As a result of the non-payment of the Interim Payment Certificates as set out above and the wrongful termination of the Agreement by the defendant, the claimant has suffered severe financial losses and remain indebted to certain third-parties whose goods and services had been procured for the purposes of carrying out the claimant's obligations under the agreement and the claimant is entitled to damages for losses."

30. Further at row 20 of the table on page 37 of the Claim in CV2018-00416 under the heading "Particulars of Loss", Kall Co. listed the waste water treatment plant in the sum of $1,853,473.50 as one of the debts it owes to

a third party. According to the claimant herein, the aforementioned sum is the exact sum (VAT exclusive) owed to it by the defendant herein under the second payment for the systems.

31. In order to determine whether paragraph 29 together with row 20 of the table was an admission on the part of the defendant, the court perused the Claim in CV2018-00416. At paragraphs 4 and 5 of the Statement of Case in CV2018-00416 it was stated that there was an agreement whereby CISL engaged Kall Co. to carry out, design and build works defined within the agreement as the "Maracus Beach Facilities Improvement Works" ("the project"). At paragraph 9 of the Statement of Case it was stated that the scope of works for the agreement included the construction of a new waste water treatment plant.

32. The Statement of Case in CV2018-00416 then went on to state that there were certain delay in the works through no fault of Kall Co. and certain non-payment of Interim Payment Certificates ("IPCs") by CISL. By letter dated April 12, 2016 CISL gave notice to Kall Co. Limited to terminate the contract. As such, at paragraph 29 Kall Co. stated that as a result of the non-payment of the IPCs and the wrongful termination of the agreement by CISL, Kall Co. suffered severe financial losses and remain indebted to certain third-parties whose goods and services had been procured for the proposes of carrying out its obligations under the agreement. Kall Co. then set out a table of the particulars of loss which included the IPCs, financing charges and claims/variations. Under claims/variations, the waste water treatment plant was listed with the sum of $1,835,473.50.

33. As admitted by the defendant herein, the water waste treatment plant for which the defendant contracted with the claimant was one and the same project.

34. Consequently, paragraph 29 together with row 20 of the table as set out in the Claim of CV2018-00416 were pertinent to the claim of the claimant herein. As such, the court found that paragraph 29 together with row 20 of the table as set out in the Claim of CV2018-00416 amounted to a clear and unequivocal admission and acceptance by the defendant that it owed monies to the claimant for the waste water treatment plant.

35. In so finding the court was cognizant of the fact that it appeared that the court was not in a position to quantify the precise measure of damages so that the issue of quantum was referred to a Master.

36. The court having found that there was a clear, unequivocal admission by the defendant, and having ordered judgment for the claimant, the defendant's application dated October 30, 2018, made the very morning of the court's hearing of the application for judgment was rendered otiose and was accordingly dismissed.

Ricky Rahim
Judge