

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2012-03512

BETWEEN

CROWN J'S LIMITED

CLAIMANT

AND

WATER AND SEWERAGE AUTHORITY

DEFENDANT

BEFORE THE HONOURABLE MR. JUSTICE FRANK SEEPERSAD

Appearances:

1. Mr. Prescott S.C. and Ms. Donawa for the Claimant
2. Mr. Nanga instructed by Mrs. L. Mendonca for the Defendant.

Delivered 25th July, 2013

DECISION

1. This action was commenced by Claim Form and Statement of Case filed on the 27th August, 2012 claiming damages for breach of contract for the provision of certain road and pipe related services in the sum of \$1,169,703.12.
2. The Defendant filed its Defence on 19th December, 2012 and at paragraph 1 thereof raised the issue of limitation. The Claimant filed a Reply on 22nd February, 2013.
3. The Court directed that submissions were to be filed with respect to the issue as to whether or not aspects of the Claimant's claim ought to be disallowed pursuant to the provisions of sec. 3(1) of the Limitation of Certain Actions Act. Chapter.7.01
4. After the Claimant filed its submissions the Court ordered that the Defendant was to be furnished with the invoices and particulars thereof of the sums claimed as retention as outlined in the Claimant's submissions and leave was granted to the Defendant to serve submissions in response. The Defendant filed submissions in response and annexed the invoices which were -forwarded by the Claimant.
5. The Defendant initially submitted that the cause of action in respect of invoices Nos. 258, 259, 260 and P290 under which the Claimant claimed specified sums, accrued more than 4 years prior to be commencement of this action and that the claims under these invoices were statute barred.
6. The Claimant submitted that sums claimed under the said invoices related to retention sums and that the payment thereof was provided for under Clause 60 of the General Conditions of Contract annexed to its statement of case. The Claimant further submitted that it was relying on clause 60 (6) b and c of the contract and advanced that the work referred to in the invoices were substantially completed but that the Defendant failed or neglected to issue the respective certificate of substantial completion in accordance with the contract.

7. In its Reply filed on the 22nd February, 2013, the Claimant at paragraphs 4 and 5 thereof pleaded that the sums under the relevant invoices were in relation to retention moneys that were due and owing. At paragraph 4 d of the said Reply the Claimant pleaded as follows:

“The claimant further contends that the retention payment represents 10% of the earnings of the Claimant which were withheld by the Defendant for a six month period to guarantee that the job is successfully completed. Once the six month period has expired the Claimant is then entitled to invoice the Defendant for payment of the retention sums.”

8. The retention sums under the relevant invoices were sums with respect to specific customer orders as follows:
1. In relation to invoice 258, this invoice related to customer order 71365 and two invoices for the sums owed (less retention) under the said work order were issued on the 4th April 2006 and on the 30th May 2006 under invoice Nos. 106A and 129B.
 2. In relation to invoice No. 259, this invoice related to work order 73289 and the invoice for the sums owed (less retention) was issued on the 4th April, 2006 under invoice 106B.
 3. In relation to invoice No. 260, this invoice related to work order 71367 and the invoices were issued for the sums owed (less retention) under invoice Nos. 133A and 129A dated 15th October, 2006 and 30th May 2006 respectively.
 4. In relation to invoice No. P290, this invoice related to work order 71867 and this invoice was issued for the sum owed (less retention) order invoices 146, 147A and 147B dated 12th December, 2007, 12th March, 2007 and 2nd January, 2007.

9. In its submissions the Claimant said that despite the fact that works relative to the issued invoices were substantively completed, the Defendant failed or neglected to issue the certificate of substantial completion in accordance with the contract and that a first demand was made for the outstanding retention sums in 2009 and 2010 when invoices Nos. 258, 259, 260 and P290 were issued and further argued that for the purposes of the Limitation of Certain Acts Act, the cause of action in respect to these invoices accrued in 2009 and 2010 respectively when the said invoices were issued to the Defendant and that the claim was therefore within the 4 year limitation period from the date at which the said invoices were in fact issued.

10. The Defendant in its Response submitted that the payment of retention is not based upon the issuing of an invoice by the Claimant but rather by the issuing of a certificate of substantial completion. The Defendant further submitted that the Claimant did not establish that it is entitled to payment under the invoices in question as there is no evidence as to when the payment was triggered, that is when the certificate of Substantial Completion was in fact issued. Further the Defendant argued that there is no basis for the issuing of invoices in respect of retention alone.

Resolution

11. The Court noted that under the previous invoices issued in 2006 and 2007 the retention sums were in fact not claimed. It cannot be said that invoices 258, 259, 260 and P290 are reissued invoices. Clause 60 (6) c of the contract provides inter alia that at the end of the Defects correction period the remainder of the retention money shall be paid to the contractor within 14 days notwithstanding that at that time there may be outstanding claims by the contractor against the employer. Under the contract 'Defects correction period' is defined as that period calculated from the date on which the contractor becomes entitled to a certificate of substantial completion for the works or any section or part thereof.

12. In order to determine the issue of when retention payments became due, the terms and conditions of the contract must be considered. Under the contract the Claimant is entitled to the retention sums upon the expiration of the Defects Correction period.
13. Having regard to the pleaded position of the Claimant at paragraph 4 d of the Reply, the entitlement to call for payment of the retention sums is after expiration of the 6 month period after the works were completed.
14. Invoices were issued for the completed jobs as outlined earlier in 2006 and 2007, the sums claimed as retention would have become due, according to the Claimant's pleaded case, no later than 6 months after the said invoices were generated and not when the Claimant issued invoices 258, 259, 260, and P290. The initial invoices were issued when the relevant work had been completed and on the said jobs the Claimant was entitled to receive and/or claim the retention payment as follows:
 - a. Under work order 71365 which is now claimed under invoice 258 i.e. the retention sums would have become due on the 4th October 2006 and 30th November 2006.
 - b. Under work order 73289, the retention sum which is claimed under invoice 259 would have become due and owing as at the 4th October 2006 (i.e. 6 months after the invoice for the work completed which was issued 4th April 2006.)
 - c. Under work order 71367 the retention sums which is now claimed under No. 260, became due and owing on the 30th November 2006 and 15th April 2007 (i.e. 6 months after the Claimant was invoiced for the work completed under the said work order)
 - d. Under work order 71867, the retention sums which are now claimed under invoice No. P290, became due and owing on the 12th June 2008, 12th September 2007 and 2nd July 2007.
15. All the aforementioned retention sums were due and owing prior to the 27th August, 2008, which said date, by virtue of the operation of s. 3 of the Limitation Act was the 'cut

off' date for the institution of the claims made under an action instituted on the 27th August, 2012.

16. Accordingly the claims in relation to the said retention sums were statute barred at the date of the filing of the instant action and the Claimant is therefore not permitted to pursue its claims in relation to invoice Nos. 258, 259, 260 and P290.

17. The Claimant is to pay to the Defendant's cost in relation to the hearing and determination of this limitation issue which is to be assessed in default of agreement.

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FRANK SEEPERSAD

JUDGE