IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2016-04640**

BETWEEN

BASDEO JAMUNAR

First Claimant

ANEEL JAMUNAR

Second Claimant

AND

DALCO CAPITAL MANAGEMENT COMPANY LIMITED

Defendant

Before the Honourable Madame Justice Quinlan-Williams

Appearances:

Respondents/Claimants: Marc Campbell

Defendant/Applicant: Farid Scoon instructed by Mr. Coppin

Date of Delivery: 15th January, 2018.

DECISION

Introduction

1. The Respondents/Claimants, the Applicant/Defendant and Lawrence Duprey entered into a Share Sale Agreement on 14th October, 2015. The Applicant/Defendant and Lawrence Duprey agreed to sell to the Respondents/Claimants three hundred (300) ordinary shares of Consolidated Properties Limited (the Company). These three hundred (300) shares constituted the issued share capital of the Company. The consideration for the agreement was Twelve Million Dollars ($12,000,000.00). At the material time the Company was seized and possessed of a property situate at Lot 9 Trincity Industrial Estate, Macoya Road, Tunapuna (the Consol Property) which was occupied by Consolidated Appliances Limited. The Consol Property at the material time also had a warehouse which contained an air conditioning system and which was supplied with water and electricity.

2. This Agreement was subsequently varied. The Variation Agreement is dated 21st December, 2015 and was executed on the 28th December, 2015. The parties to the Variation Agreement were the Respondents/Claimants, the Applicant/Defendant, Lawrence Duprey and Capildeo Lands Ltd was joined as a party. In the Variation Agreement the parties agreed, inter alia that:

    i. Basdeo Jamunar the First Respondent/Claimant shall assign legal and beneficial ownership in Bonds valued at Three Million Five Hundred and Nine Thousand Dollars ($3,509,000.00) as full and final satisfaction of the mutual obligations under the Agreement and

    ii. The First Claimant/ Respondent shall pay Four Hundred and Ninety-One Thousand Dollars ($491,000.00) to satisfy the Seller's legal fees under the Variation Agreement and as full and final satisfaction of the mutual obligations under the Agreement.

3. The Respondents/Claimants claim that the Applicant/Defendant breached the (Share Sale) Agreement as the Defendant:

i. Failed and/or neglected to deliver the Certificate of Title and/or title deed of the Consol Property to the Respondents/Claimants within ninety (90) days of the execution of the Share Sale Agreement;

ii. Failed and/or neglected to deliver vacant possession of the Consol Property to the Respondents/Claimants by the agreed date of 31st January, 2016;

iii. Delivered vacant possession of the Consol Property to the Respondents/Claimants in August 2016;

iv. Failed and/or neglected to use its best efforts to have the wall that obstructs the entrance to the Consol Property removed;

v. Delivered vacant possession of the Consol Property in circumstances where there were outstanding water and electricity bills; and

vi. Removed the air conditioning system from the Consol Property before delivering vacant possession.

4. The Respondents/Claimants are claiming damages in the sum of One Million Six Hundred and Sixty-Six Thousand, Five Hundred and Fifty Dollars and Forty-Five Cents ($1,666,550.45), interest and any other reliefs the Court deems fit.

5. On the 12th April, 2017 the Applicant/Defendant filed an Amended Defence and Amended Counterclaim. The Applicant /Defendant counterclaimed for inter alia damages against the First Claimant for the sum of Four Hundred and Ninety-One Thousand Dollars ($491,000.00) for breach of clause 2 of the Variation Agreement. Alternatively, Specific Performance for the sum of Four Hundred and Ninety-One Thousand Dollars ($491,000.00) owed to Scoons and Attorneys and Counselors at Law for legal fees arising out of the Variation Agreement dated 21st December, 2015.

6. The First Claimant in the Defence to Counterclaim filed on 24th April, 2017 at paragraph 3 averred as follows:

a) ……
b) ……
c) ……
d) in performance of the Variation Agreement and the Capildeo Land Agreement the First Claimant has assigned his legal and beneficial ownership in certain specified bonds valued at TT $3,509,000.00 and TT $2,239,000.00 respectively.
e) The consideration for the Capildeo Land Agreement has wholly failed as the Capildeo Lands have not been conveyed to the First Claimant.
f) The First Claimant stands ready to satisfy the sum of 491,000.00 owing under the Variation Agreement upon the conveyance of the Capildeo Lands to him.

7. On the 26th July, 2017 the Applicant/Defendant made an application for:

i. Summary Judgment pursuant to Part 15.2(a) Civil Proceedings Rules 1998 (CPR) on the grounds that the First Respondent/Claimant's defence to the counterclaim has no realistic prospect of success;

ii. Alternatively, that paragraphs 3(e) and 3(f) of the First Claimant/Respondent's defence to counterclaim be struck out pursuant to Part 26.2(c) CPR as it discloses no grounds for defending the counterclaim;

iii. Alternatively, judgment on admission pursuant to Rule 14.3 CPR. The Applicant/Defendant applied for the costs of this application and of the counterclaim.

Issues raised

8. On the submissions the following issues are to be determined:

i. Whether there is proper evidence before the court upon which the court can grant Summary Judgment/and or judgment on admissions.

ii. Whether the court should grant judgment by admission, summary judgment on the counterclaim.

iii. Whether the court should strike out paragraphs 3(e) and (f) of the Amended Defence to the Counterclaim.

Analysis and decision

Whether there is proper evidence before the Court.

9. The attorney-at law for the Respondent/Claimant submitted that Part A Regulation 35(1) of the Code of Ethics was breached as the Applicant/Defendant has filed an affidavit from its attorney who is on record for the matter. It was conceded that the affidavit recited some of the pleadings in the Amended Defence to Counterclaim. However, the attorney/witness on record also signed the Certificate of Truth in the Amended Defence and Counterclaim. The Respondent/Claimant's attorney-at-law submitted that the matters contained in the affidavit speak to substantial issues and matters. Therefore, this may constitute professional misconduct and the court should decline to accept this affidavit as evidence. Further the Respondent/Claimant submitted that the Applicant/Defendant's application must fail as there is not proper evidence before the court as such the Defendant has not fulfilled the requirements under the CPR, Rules 15.5(1) and 14.3 (3).

10. Regulation 35 Part A of the Code of Ethics provides as follows:

> *An attorney at law shall not appear as a witness for his own client except as to merely formal matters or where such appearance is essential to the ends of justice. If an Attorney is a necessary witness for his client with respect to matters other than such as are merely formal, he should entrust the conduct of the case to another attorney of this client's choice.*

11. In the *Hamilton K*[1] case, Sealey J (as she then was) considered whether an affidavit sworn to by an attorney-at-law offended the provisions of the Legal Profession Act, Regulation 35, Part A. The affidavit in that case dealt with facts relating to the claim and the evidence was not merely formal. Sealey J found that the contents of the affidavit were germane to

[1] A5 of 1995

the matter at hand and that it was evidence in the matter and the affidavit was inappropriate in the circumstances.

12. In Stephen Pope and *The Mayor, Alderman and Citizens of the City of San Fernando*[2], Permanand J (as she then was) also considered whether affidavit evidence filed by advocate attorney for the plaintiff contravened the abovementioned rule. The court found that the affidavit was mainly formal albeit some of the contents amounted to evidence on the matter before the Court. The contents that amounted to evidence were a repetition of what the Plaintiff swore in his affidavit and the court was not influenced by the affidavit of the advocate attorney. The Court was of the view that any cross examination could be carried out by cross examining the Plaintiff and not the attorney. It was held that the attorney's affidavit did not advance the Plaintiff's case any further and the court decided that there was no reason why the advocate attorney should not continue to appear for the Plaintiff.

13. The Applicant/Defendant relies on *Hosein's Construction v 3G Technologies* to support the argument that even if the court were to find that the affidavit of the attorney at law went beyond formal issues and therefore in breach of the code of ethics, the court has the jurisdiction to give the party the options of choosing to come off record or withdraw the witness statement. It should be noted that in the Hosein's case the attorney/witness's statement was intended to be used at the trial of the counterclaim, it was therefore proposed evidence. In the circumstance of this application the evidence of the attorney/witness is not proposed. The evidence, in the affidavit of the attorney/witness, was presented in consideration and support of this application. The CPR requires that applications for summary judgment are to be supported by evidence. The court cannot consider the application without evidence. The CPR at Rule 15.5 states

> *15.5(1) The applicant must –*
> *a) file evidence in support with his application*

and the CPR at Part 11 goes on to define what the evidence in support of the application must be, Rule 11.8 states

[2] No. 24 of 1990

Where evidence in support of an application is required it must be contained in an affidavit unless

a) a rule
b) a practice direction; or
c) a court order,

otherwise provides

14. With respect to the contents of an affidavit to be used as evidence, the CPR Rule 31.3 states

(1) the general rule is that an affidavit may contain only such facts as the deponent is able to prove from his own knowledge.

(2) However, an affidavit may contain statements of information and belief-

(a) where any of these Rules so allows: and

(b) where it is for use in any procedural or interlocutory application or in an application for summary judgment, provided that the source of such information and the ground of such belief is stated in the affidavit

(3) …

(4)…

15. In the case of John *Bruce Milme v Trinidad Dock and Fishing Services LTD*[3], Gobin J considered the admissibility of an affidavit of an attorney at law on record for the Applicant/Defendant on an application for relief from sanctions where there was a failure to file witness statements by a certain date in circumstance with an unless order. The objection was two fold: firstly, that the matters in the affidavit could not be within the personal knowledge of the attorney and secondly, that the attorney had failed to depose to the source of his information. In deciding on the admissibility of the evidence Gobin J stated

Evidence in this context must obviously mean admissible evidence, so the question of admissibility of the evidence contained in Alexander's affidavit is not one, which to my mind is "over technical" or trifling, it goes to the

[3] CV 2007-03438 (decision delivered on 10th day of July 2008)

issue of compliance with the rule at all, and ultimately whether there is any evidence on which the Court can exercise its discretion. (paragraph 8)

And Gobin J further stated

…the matters relied upon could not possibly be within Mr. Alexander's personal knowledge and that his statements could only have been the product of information communicated to him. As the affidavit stands, the requirement that it must state who provided that information and whether he indeed believed it, has not been met. In the circumstances it would seem to me that the claimant's objection is one of substance and must be upheld (paragraph 10).

16. An examination of the affidavit of the attorney/witness shows that the contents of the said affidavit is not merely formal but include matters that are relevant and germane to making a decision on this application. Several of the paragraphs in the affidavit recites the pleadings and also refers to the agreements that the parties entered into. There are several paragraphs that go beyond mere formality. These include paragraphs 8, 13, 14, 15 and 16. The evidence contained in these paragraphs are included with the intention of being cogent and compelling evidence towards a finding favourable to the applicant. The analysis contained in these paragraphs is demonstrative of this assertion. The court finds that the proper course of action was that this affidavit should have been sworn too by a representative of the Defendant and not by the advocate attorney on record. The court agrees with the sentiments expressed by Kokaram J in *Hosein's Construction and 3G Technologies*[4] stated

Furthermore the Code of Ethics sets out the standard of the practice of law in this jurisdiction. A Court must be careful to demand no less of a standard of the attorney so as to preserve the honour and dignity of the profession and the proper administration of justice. As a matter of public policy the court cannot countenance a lesser

[4] CV 2008-00560

standard relating to practice than those which the attorneys have set themselves for the regulation of their profession.

17. This application and the use of the affidavit evidence of the attorney/witness does not afford the court the same options that the judge suggested in the Hosein's case. The judge in the Hosein's case suggested that because the witness statement of the attorney went beyond mere formality he had to make a decision to either withdraw the statement or come off record in the case. As noted earlier, in this case the attorney/witness evidence has already been tendered for use in the determination of this application. The only option this court has is to exclude the evidence of the attorney/witness.

18. The attorney/witness must have known that according to Regulation 35 of the Legal Profession Act, that presenting himself as a necessary witness for his client his obligation was to have entrusted the conduct of the case to another attorney of his client's choice. He must also have known that what he deposed to in his affidavit went beyond mere formalities. Again he must have known that as a deponent he is required to give the source of his information whereas here, it could not have come from his own knowledge and not leave the court to infer the source of the information. Again he must have known that as a deponent he must state the grounds of the belief of the information he deposes too.

19. For all the reasons stated, the court will exclude the evidence of the attorney/witness. As a consequence of the court's ruling there is no evidence before the court and the application for summary judgment must fail.

20. In the event that the court is wrong in its finding on the first issue, the court will also consider the other grounds of the application.

Summary Judgment/ Judgment by Admission/ Striking Out

21. On the face of the Respondents/Claimants and Defendant pleadings it is undisputed that:

    i. On the 14th October, 2015 the Respondents/Claimants, the Defendant and Lawrence Duprey entered into a Share Transfer Agreement. In this

agreement the parties agreed to transfer the entire share capital of Consolidated Properties Limited to the Respondents/Claimants;

ii. On 21st December, 2015 the Share purchase agreement was varied and Capildeo Lands Limited was added as a party to the agreement. Furthermore, it was agreed that the First Claimant would assign his legal and beneficial ownership in specified bonds (valued at $3,509,000.00) to the Defendant in full and final satisfaction of the mutual obligations under the Share Purchase Agreement.

iii. On this date another agreement was also executed. This agreement was between the First Claimant and Capildeo Lands Limited. In this agreement the First Claimant agreed to assign specific bonds (valued at $2,239,000.00) in considerations for ten (10) acres of land situated in Diego Martin.

iv. It is undisputed that these bonds were transferred as per the agreements.

22. The Defendant's counterclaim surrounds Clause 2 of the Variation Agreement and the payment that remains outstanding thereof. This clause reads as follows:

> "*NOW THEREFORE IT IS HEREBY AGREED AS FOLLOWS:*
>
> *1. ……..*
>
> *2.* ***Upon execution of this agreement*** *Basdeo Jamunar shall pay Four Hundred Ninety-One Thousand Dollars (491,000.00) to satisfy the Seller's legal fees under this Agreement and in settlement full and final settlement of the mutual obligations under the Share Price Agreement [emphasis added]*.

23. The Variation Agreement was executed on the 28th December, 2015.

24. The Applicant/ Defendant submitted that notwithstanding the fact that both the Variation Agreement and the Capildeo Lands Agreement were executed simultaneously they are

separate contracts with separate considerations and different obligations on different parties. Therefore, if there has been a failure to convey the lands in the Capildeo Lands Agreement the First Defendant can bring an action against Capildeo Lands Limited. This company is not before the court. The Respondents/Claimants also have not pleaded that the Defendant is responsible for the failure of the lands being conveyed.

25. The First Respondent/Claimant opposed the application on the grounds firstly, that a defence of equitable set-off was raised to the counterclaim. Secondly, it is the First Claimant's case that the obligation to pay the sums claimed in the counterclaim has not yet arisen.

26. In the First Respondent/Claimant's affidavit sworn on 23rd November, 2017 in response to the application he deposed:

> Sometime in November, 2015 there was a meeting between the Respondents/Claimants, Mr. Harinarine and Mr. Reis at Motor One Insurance Company Limited. He deposed that at this meeting they were informed that Motor One needed an urgent capital infusion to comply with certain Central Bank capital obligations. As such they enquired whether the Respondents/Claimants would have been willing to pay the outstanding amount ($4,000,000.00) under the agreement although this payment was not yet due.
>
> The First Claimant/ Respondent deposed that he indicated that he was unwilling to make the payment in cash however, he had some government bonds that exceeded the outstanding amount ($4,000,000.00) that he was willing to part with. On this day the Respondents/Claimants were taken to Capildeo lands by Mr. Harrinarine and Mr. Reis and they represented to the Claimant that these lands would be conveyed to them if they assigned the bonds to them. The Respondents/Claimants decided to accept the proposal and thereafter in November, 2015 there was another meeting at Motor One Insurance Company. This time the Respondents/Claimants, Mr. Harrinarine, Mr. Reis and Mr. Scoon (the attorney who was representing the Defendants at that time) attended the meeting.

On 21st December, 2015 attended at the Defendants attorney's office to execute the proposed agreement. Along with the Respondents/Claimants present at this meeting was Mr. Harrinarine, Mr. Reis and Mr. Coppin. On this date the Respondents/Claimants were presented with the Variation Agreement and the Capildeo Land Agreement. The Respondent deposed that this was the first time he would have seen the agreement furthermore it was not explained to him why there were two agreements as opposed to one agreement. He deposed that he viewed the agreements as two parts of a single agreement.

Summary Judgment

27. The Defendant applied for Summary Judgment pursuant to Rule 15.2 (a) CPR. Rule 15 (2) (a) CPR provides as follows:

> *The court may give summary judgment on the whole or part of a claim or on a particular issue if it considers that-*
>
> > *(a) on an application by the claimant, the defendant has no realistic prospect of success on his defence to the claim, or part of claim or issue.*

28. Summary Judgment provides early judgment in cases where a defendant has no realistic prospect of success and any defence raised would delay judgment. One defence raised in this case is one of equitable set-off.

29. In the application for Summary Judgment the Applicant/Defendant contended that although the Variation Agreement and the Capildeo Land Agreement were executed simultaneously they were separate contracts with different parties, different obligations and different consideration. In support of this the Defendant referred to the pleadings of the First Claimant specifically paragraphs 16, 17 and 18 of the Statement of Case and paragraphs 3 (c), (d), (e), and (f) of the Amended Defence to Counterclaim. The Defendant contended that any failure to convey the ten (10) acres of land pursuant to the Capildeo Land Agreement would cause the First Defendant to have a cause of action in contract to

sue Capildeo Lands Limited. In the instant claim Capildeo Lands Limited is not before the court. Furthermore, the Claimant has not pleaded how or why the Defendant is responsible for the failure of Capildeo Lands Limited.

30. 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. Where a tribunal has exercised a discretion and found an equitable set-off appropriate, 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[5].

31. In *Geldof Metaalconstructie NV v Simon Carves Ltd*[6] where Rix LJ considered the test for equitable set-off, at paragraph 43 v and vi he stated as follows:

> (v) Although the test for equitable set-off plainly therefore involves considerations of both the closeness of the connection between claim and cross-claim, and of the justice of the case, I do not think that one should speak in terms of a two-stage test. I would prefer to say that there is both a formal element in the test and a functional element. The importance of the formal element is to ensure that the doctrine of equitable set-off is based on principle and not discretion. The importance of the functional element is to remind litigants and courts that the ultimate rationality of the regime is equity. The two elements cannot ultimately be divorced from each other. It may be that at times some judges have emphasised the test of equity at the

[5] Halsbury's Laws of England, Volume 11 (2015), paragraph 410
[6] [2010] EWCA Civ 667

expense of the requirement of close connection, while other judges have put the emphasis the other way round.

(vi) For all these reasons, I would underline Lord Denning's test, freed of any reference to the concept of impeachment, as the best restatement of the test, and the one most frequently referred to and applied, namely: 'cross-claims … so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim'. That emphasises the importance of the two elements identified in *Hanak v Green*; it defines the necessity of a close connection by reference to the rationality of justice and the avoidance of injustice; and its general formulation, 'without taking into account', avoids any traps of quasi-statutory language which otherwise might seem to require that the cross-claim must arise out of the same dealings as the claim, as distinct from vice versa …

32. In the instant case there is a closeness of connection between the claim and the counterclaim as both the claim and the counter claim would have arisen from alleged breaches of the Agreement and the Variation Agreement. Furthermore, there is mutuality between the parties as each party is alleging that money is due to each other as a result of alleged breaches of the Agreement and the Variation Agreement. The doctrine of equitable set-off arises on both the claim and the defence to that claim as well as having been specifically raised as an issue on the counterclaim and the defence to that counterclaim. In my view it would be unjust to allow one claim to be enforced without regard to the other claim. Accordingly, both the claim and counterclaim would be dealt with at trial.

Judgment on Admission

33. The application for Judgment on Admission pursuant to CPR Rule 14.3 is refused on two grounds. Firstly, there is no admission within the meaning of the CPR Rule 14.1. The Respondent/Claimant has not admitted the “whole or any part of any other party’s case” by either giving notice in writing before or after the issue of proceedings. Secondly the law,

by virtue of the CPR Rule 14.3(3), is that an application to determine the terms of a judgment on admission must be supported by evidence and based on the court's ruling that the affidavit of the attorney/witness is inadmissible, there is no evidence before the court.

Striking Out Paragraphs 3(e) and (f)

34. The Applicant/Defendant applied for paragraphs paragraphs 3(e) and 3(f) of the First Claimant/Respondent's defence to counterclaim be struck out pursuant to the CPR Rule 26.2(c) as it discloses no grounds for defending the counterclaim. The Respondent/Claimant has raised by implication from the claim and what is averred therein and expressly by the defence to the counterclaim the equitable relief of set-off. Based on the issues discussed above on the doctrine of equitable set-off, the application is refused. The court is required to decide on these in the course of the full determination of the issues raised.
35. It is hereby ordered that Applications made on 26th July 2017 for
    1) Summary Judgement is refused.
    2) Strike out paragraph 3(e) and 3(f) First Claimant / Respondent defence to counterclaim is refused.
    3) Judgment on admission is refused.

36. Cost to be paid to the Respondent/Claimants by the Applicant/Defendant in the sum of $8000.00.

Avason Quinlan-Williams
Judge

Dated Monday 15th January 2018

(Leselli Simone-Dyette – JRC)