

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Sub Registry San Fernando

Claim No: CV 2018-00148

BETWEEN

A AND V OIL AND GAS LIMITED

Applicant/Claimant

AND

PETROLEUM COMPANY OF TRINIDAD AND TOBAGO LIMITED

Respondent/Defendant

Before the Honourable Justice Avason Quinlan-Williams

Appearances:

Applicant/Claimant: Ramesh Lawrence Maharaj SC.
Ronnie Bissessar
Vijaya Maharaj
Varin Gopaul-Gosine.

Respondent/Defendant: Deborah Peake SC.
Heffes Doon
Marcelle Ferdinand

DECISION

1. This matter commenced by Fix Date Claim Form filed on 15th day of January 2018. A Notice of Application for interim reliefs was also filed on the 15th day of January 2018 – together with supporting evidence.

2. Both the Fix Date Claim Form and the Notice of Application were served on the Respondent/Defendant on the 15th of January 2018.
3. The Applicant/Claimant filed written submissions and a bundle of authorities in support of the Notice of Application. The application was heard on the 16th of January 2018.
4. The interim/final reliefs sought are detailed in the Notice of Application at numbers one (1) to ten (10). These reliefs mirror the reliefs claimed and detailed in the Fixed Date Claim Form at paragraph 3 - numbers one (1) to ten (10).
5. The application is premised on the basis that there are serious issues to be tried namely:
 - I. The validity of the Termination Notice and
 - II. The Respondent/Defendant's entitlement to withhold TT \$83,929,671.34.
6. The Applicant/Claimant relies in large measure on Article 36 (11) of the Incremental Production Service Contract (IPSC) as well as the Second Schedule of the **Arbitration Act Chapter 5:01** for the court to derive its jurisdiction to grant the interim/final relief applied for by the Applicant/Claimant. Article 36 (11) IPSC provides:

In the event of an ongoing breach or eminent breach and without prejudice to the power of the arbitrators to order any provisional measures or finally resolve the dispute, either the Clients (on its own behalf or on behalf of any other member of the Client's Group) or the Contractor (on its own behalf or on behalf of any other member of the Contractor's Group) may apply to the court of Trinidad and Tobago to seek an order for injunctive relief or other equitable relief of an interim nature or any provisional or conservatory nature, at any time prior to the arbitration proceeding, for the preservation of such persons rights and interests.

7. The IPSC is an agreement signed on the 18th November 2009 between the Respondent/Defendant on the first part and the Applicant/Claimant on the other part.
8. The court is satisfied the negotiated and settled contractual arrangements between the Applicant/Claimant and the Respondent/Defendant have outlined a dispute resolution process to resolve disputes between the parties that have arisen by virtue of the relationship between them. The process is detailed in Article 36 IPSC. It is multileveled and explicit as to its different tiers including what each tier means. The different tiers are negotiation, mediation and arbitration.
9. It appears that the parties are in the negotiation stage of their outlined dispute resolution process. The details for negotiation are at Article 36.2, mediation at Articles 36.3, 36.4 and 36.5. The details outlining the arbitration process commences at Article 36.5. At article 36.11 it is stated that the parties may apply to the court for injunctive or other equitable relief of an interim nature or any provisional or conservatory measure, at any time prior to the arbitration proceedings – what is prior to the arbitration proceedings according to the contract are the negotiation and mediation stages.
10. Article 36.11 does not, in the court's opinion, add much to the Applicant's/Claimant's right to apply for equitable interim relief in the usual course.
11. However, because the parties are not yet in arbitration – the Arbitration Act does not apply to this application.
12. The court considered the application, the evidence and the submissions – written and oral. In determining whether the court should grant an

injunction restraining the Respondent/Defendant, its servants and/or agents from giving effect to the Termination Notice the court was guided by ***American Cyanamid Co v Ethicon Ltd (1975) 1 All E R 504***. In this case Lord Diplock laid down the principles which govern a judge's discretion when determining whether to grant an interim injunction. The four questions that the court has to consider are:

- I. Whether the Court is satisfied that the claim is not frivolous or vexatious; in other words, whether there are serious issues to be tried;
- II. If the answer to that question is yes, then would damages be an adequate remedy for the party injured by the Court's grant of or failure to grant an injunction;
- III. If there is doubt as to whether damages would be an adequate remedy to either party or to both, the question of the balance of convenience arises;
- IV. Where other factors appear to be evenly balanced it is a counsel of providence to preserve the status quo.

13. The court is not satisfied that the threshold requirement as outlined in ***American Cyanamid Co v Ethicon Ltd (1975) 1 All E R 504*** – have been met. Based on the evidence presented by the Applicant/Claimant the court is not satisfied that there is or are serious issues to be tried.

14. In arriving at this decision the court considered the termination clause in the IPSC. The termination clause is clause 29.1 it provides as follows:

In addition to the right to terminate this Agreement contained in Articles 27, 41 and 46, the Client may terminate this Agreement by thirty (30) days Notice to the Contractor if the Client has reasonable grounds for suspecting that any member of the Contractor's Group has misconducted itself or otherwise has been involved in wrongful or fraudulent activity and the Client shall be entitled to exercise its right to continue the Work in similar manner and on similar terms and conditions as contained in Article 27.4. Termination of this Agreement

shall become effective upon expiry of the said (30) days from date of receipt of the Notice by the Contractor.

15. The Respondent/ Defendant had reasonable grounds to terminate the agreement. The internal audit report which is a report titled "Investigation into the Volume Discrepancies Between Crude Oil Produced by E&P and the Crude Oil Pumped to R&M" provided the Respondent/Defendant information amounting to reasonable grounds that the Applicant was engaged in fraudulent activity. This fraudulent activity amounted to an overstatement of the Catshill production and consequently and overpayment to the Applicant/Claimant.

16. The test for reasonable ground, is similar to the test for reasonable suspicion. In ***S v Chong Fook Kam 2W.L.R. 441*** the court held that the test for reasonable suspicion was a lower test than prima facie proof. In ***R v Chehil [2013] 3 S.C.R. 220*** the court held that reasonable and probable grounds must be grounded in objective facts and that reasonable suspicion is a lower standard that engages a reasonable possibility. Applying an objective test of what reasonable grounds means the Respondent/Defendant had reasonable grounds for suspecting that the Applicant/Claimant had misconducted himself based on the information contained in the internal audit report.

17. The Applicant/Claimant had access to and an opportunity to respond to the information contained in the internal audit report. Following the response of the Applicant/Claimant, the Respondent/Defendant was left with the view that there were reasonable grounds and so were justified, by the terms of the agreement, to terminate the contract.

18. With regard to the withholding of the TT \$83,929,671.34, the sum of money was retained under a term of the agreement. Mr. Hanif Baksh in his affidavit at paragraph 166, filed on the 15th of January 2018, agrees that

the Respondent has the right to retain this sum of money until the dispute resolution process is completed.

19. Further the fact that the Applicant/Claimant did not receive a copy of the Kroll and Cline Reports does not raise a cause of action as the Respondent/Defendant has the right to retain these and other information which are privileged.

20. The Applicant/Claimant did not satisfy the court that they have a real prospect of success in succeeding in its claim that the Respondent/Defendant unlawfully terminated the contract or withheld the sum of TT \$83,929,671.34.

21. Additionally, the Applicant/Claimant did not satisfy the court that they have a real prospect of success in succeeding in their claim that the contract cannot be terminated before the arbitration or the dispute resolution process is completed. In ***Ericsson AB v EADS Defence and Security Systems Ltd [2009] EWHC 2598***, Akenhead J said in his judgment

I am wholly satisfied that the dispute resolution provisions...do not by implication or otherwise suspend a party's rights under the contract to take whatever steps which it is entitled to take. Put another way in the context of this case, it is not a breach of contract in my opinion for a terminating to take place even whilst a dispute as to whether it can take place has been referred to adjudication (page 10 paragraph 42)

22. The Respondent/Defendant was well within their right, according to the terms of the agreement, to take the action that they did in terminating the contract and withholding the money even while the dispute resolution process was engaged.

23. With respect to the Applicant/Claimant's application and submission and all the issues raised therein, including the issue of waiver and whether they have a right to a renewal of the contract, the court is not satisfied that there are any serious issues to be tried.

24. Even if the court is wrong in this regard – the circumstance of the Applicant/Claimant and the Respondent/Defendant and their contractual relationship are such that the Applicant/Claimant can be adequately compensated in damages for any breach of the contract due to expire in 2019 (in the first instance and 2029 – on another interpretation) but there is no remedy, in the court's opinion, which would do justice to the Respondent/Defendant if it grants the interim relief and they were to be successful in the dispute resolution process.

25. The application for interim/final relief is hereby refused.

26. The application for an injunction pending the filing of an appeal, is hereby refused.

27. Cost to the Respondent/Defendant to be assessed, certified fit for senior and junior counsel.

Avason Quinlan- Williams

JUDGE

17th January 2018

(JRC – Leselli Simon Dyette)