

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-01763

BETWEEN

F.M. CONTRACTING & SERVICES LIMITED

Claimant

AND

THE WATER AND SEWERAGE AUTHORITY

Defendant

Before the Honourable Mme. Justice Jacqueline Wilson

Date of Delivery: June 26, 2019

APPEARANCES:

Mr. Yaseen Ahmed and Ms. Chantelle Le Gall Attorneys at law for the Claimant
Ms. Sashi Indarsingh Attorney at law for the Defendant

DECISION

1. This is the claimant's application to strike out the defendant's amended defence filed on 22 March 2019 for failing to disclose any grounds for defending the claimant's claim. In the alternative, the claimant seeks summary judgment against the defendant on the whole of its claim for the payment of the sum of \$4,730,538.16.

THE CLAIMANT'S CASE

2. The claimant alleges that the sum of \$4,730,538.16 is payable by the defendant pursuant to a contract under which the claimant agreed to provide main repairs, the installation of stop cocks, curb valves and metres upon request by the defendant for a period of two years commencing 1 August 2014.

3. The claimant alleges that it submitted a number of invoices to the defendant for payment which have not been honoured and that in failing to make payment on the invoices the defendant has acted in breach of contract. The claimant alleges that a majority of its invoices have been honoured by the defendant in the past and that the outstanding invoices and the documentation provided in support of them bear no difference to those in respect of which payments were made.
4. The claimant asserts that the defence does not make out a case for the non-payment of the outstanding invoices; that the defendant's personnel have certified the work performed by the claimant; that no complaint was raised by the defendant as to any defects in the work performed; and that the defendant has acknowledged that the outstanding invoices are properly due for payment.
5. The claimant asserts that it has fulfilled all of its obligations under the contract in keeping with the contractual procedures and that there is no realistic prospect of the defendant succeeding on its defence.

THE DEFENDANT'S CASE

6. The defendant denies that the sums claimed in the outstanding invoices are due and owing to the claimant.
7. The defendant alleges that in submitting the outstanding invoices the claimant failed to comply with the requirements and procedures of the contract and denies the existence of a practice of approving invoices in the absence of such compliance.
8. The defendant contends that the outstanding invoices do not accurately reflect the work performed by the claimant and that the sums claimed in many of the invoices are excessive or inflated.

9. The defendant asserts that it is undertaking an audit to verify the claimant's compliance with the contract and that, in this regard also, the outstanding invoices have not been approved for payment.

LEGAL PRINCIPLES

10. The principles to be applied in determining an application for summary judgment are not in dispute. They were summarised by Lewison J in ***Nigeria v Santolina Investment*** [2007] EWHC 437 (Ch) as follows:

1. *The court must consider whether the Defendant has a "realistic" as opposed to a "fanciful" prospect of success.*
2. *A "realistic" defence is one that carries some degree of conviction. This means a defence that is more than merely arguable.*
3. *In reaching its conclusion the court must not conduct a "mini-trial".*
4. *This does not mean that the court must take a face value and without analysis everything that a Defendant says. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.*
5. *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.*
6. *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without a fuller investigation into the*

facts at trial than is possible or permissible on an application for summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

11. In ***Khatri v Cooperative Centrale Raiffeisen-Boerenleenbank BA*** [2010] EWCA 397, at paras 4 and 5, Jacob LJ added the following observations:

“I would only add this – that one has to be careful not to take the last point too far when the case concerns the construction of a written contract. The factual matrix is key to understanding what the parties must have intended by the words they used. But it far from follows that the need to know what that matrix was requires a full trial with discovery, evidence and cross-examination of witnesses. If there is no actual conflict of evidence on a relevant point of background matrix, it is only when there really are reasonable grounds for supposing that a fuller investigation of the facts as to the background might make a difference to construction that the court should decline to construe the contract on a summary judgment (including a striking out) application.

The court should not be over-astute to decline to deal with the construction of a contract summarily merely on the basis that something relevant to the matrix might turn up if there were a full trial. Most disputes as to “pure” construction of a contract will be suitable for summary determination because the factual matrix necessary for its construction will itself be determinable on that application.”

12. It is undisputed that the objective of summary judgment is to resolve issues at an early stage and to save time and costs. In deciding whether to exercise powers of summary judgment, the court must consider whether the overriding objective of dealing with cases justly is better served by the summary disposal of a particular issue or by letting all matters go to trial so that they can be fully investigated and an informed decision made: **Three Rivers District Council v Bank of England** [2001] 2 All ER 513.
13. The discretion to strike out is subject to similar considerations and, where the allegation involves the failure to disclose grounds for bringing or defending a claim, is exercisable where the claim is bound to fail on its merits or as a matter of law. An important consideration is that the court, when faced with an application to strike out, must consider whether the justice of the case militates against this nuclear option and requires a more proportionate response: **Real Time Systems Limited v Renraw Investments Ltd.** [2014] UKPC 6.
14. Appropriate cases for striking out on the ground of failure to disclose grounds for bringing or defending a claim include cases where the statements of case raise an unwinable case, where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides or where a claim or defence is not valid as a matter of law: **Brian Ali v The Attorney General of Trinidad and Tobago** CV2014-02843.
15. In this matter, the following issues arise for determination:
 - I. Whether the outstanding invoices meet the contractual requirements for payment, and if not;
 - II. Whether a practice had developed under which the defendant did not require strict adherence by the claimant with the contractual requirements regarding the submission of invoices, and if so;

- III. Whether the defendant has thereby waived its entitlement to insist upon the strict compliance with the contractual requirements by the claimant.

These issues raise questions of fact which cannot be determined on the pleadings as they currently stand but fall for determination at trial when the pre-trial and trial procedures have been invoked and the evidence of witnesses has been tested.

16. It is well-settled that the court should exercise caution in granting summary judgment in cases where there are conflicts of fact on relevant issues which need to be resolved before judgment was given. The court should, similarly, hesitate in granting summary judgment even where there was no obvious conflict of fact where reasonable grounds exist to believe that a fuller investigation into the facts would add to or alter the evidence available and so affect the outcome of the case: ***Bolton Pharmaceutical Co 100 v Doncaster Pharmaceuticals Group Ltd*** [2006] All ER (D) 389
17. It cannot be said with certainty that the defendant's defence raises an unwinnable case or is not valid as a matter of law or that the continuance of the proceedings is without any possible benefit and would waste the resources of both the claimant and the defendant. In the circumstances, the justice of the case weighs against the grant of summary judgment or striking out the amended defence.
18. The claimant's application is therefore dismissed.
19. The claimant shall pay the defendant's costs of the application to be assessed by this court in default of agreement.

Jacqueline Wilson

Judge