IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2015CD00027

Between	**Construction Developers Association Limited**	**Claimant/Respondent**
AND	**Renaissance Property Homes Limited**	**1st Defendant**
AND	**Jeremy Brown**	**2nd Defendant**
AND	**Jamaica Mortgage Bank**	**3rd Defendant**

Summary Judgment- Whether Receiver and Debenture Holder liable under a Continuing Contract – Whether Receiver Negligent – Whether Debenture holder Vicariously Liable – Whether Claim has Real Prospect of Success.

Heatha Miller for Claimant

Kwame Gordon instructed by Samuda and Johnson for Second and Third Defendant s

Heard: 1st February and 12th February 2016.

Cor: David Batts J.

[1] By Notices of Application filed respectively on the 20th and 30th July 2015, the Third and Second Defendant s seek the following relief:

(a) Summary Judgment
(b) Costs

The grounds of the applications are also similar. The claim it is said has no real prospect of success because firstly the 2nd Defendant at all material times was

the agent of the 1st Defendant and secondly because the claim is now barred by statute of limitation, thirdly the receivership had ended by the time the claim arose and fourthly because the Third Defendant cannot be vicariously liable for the acts or omissions of the Second Defendant .

[2] The Claim was filed on the 2nd March 2015. It alleges against the First Defendant breach of a contract dated "September 2000 "by which the Claimant agreed to carry out certain infrastructure works. It is alleged that the contract was terminated by the Second Defendant on the 23rd January 2003. A final Payment Certificate was issued by the Contract Engineer on the 3rd March 2009 but the sum certified has not been paid .It is alleged that the Second Defendant is liable, as a Receiver appointed by the Third Defendant , because by an oral agreement (later reduced to writing on the 8th July 2002) the Second Defendant agreed to the Claimant continuing the work .It is alleged also that the Second Defendant owed a duty of care to the Claimant. He breached that duty, and is therefore liable in negligence, by allowing the Claimant to continue the work when he knew or ought to have known the First Defendant was unable to pay for it. The Third Defendant is alleged to be vicariously liable for the acts or omissions of the Second Defendant .

[3] In response to the Claim and Particulars of the Claim, the Second and Third Defendant s filed detailed Defences. They contend that the Second Defendant was appointed a Receiver on the 13th June 2002 and the appointment was revoked on the 20th April 2007.It is alleged that the Debenture pursuant to which the Receiver was appointed renders the First Defendant liable for the acts or omissions of the Second Defendant who was the Receiver and is therefore the agent of the First Defendant . It is further contended that the infrastructural work was never completed. It is also contended that no contract for completion of work was entered into with the Claimant. The Defendant s say that the Engineer was asked to provide an estimate to complete the works. Having received this it was determined that the project was not viable. It is alleged that the Final Payment

Certificate was issued on the 30th August 2006.It is alleged that the Claim is barred by statute of limitation.

[4] The Defendant s rely, in support of their applications for summary judgment ,on the affidavits of Donna Samuels Stone filed on the 20th July 2015 and of Jeremy Brown (Second Defendant) filed on the 30th July 2015.The Claimant relies on the affidavit of Roy Williams filed on the 8th October 2015. Each party also filed written submissions. The parties were allowed to make further oral submissions limited to a response to the written submission of the other. I am indebted to the attorneys for the concise but clear articulation of their respective points of view.I mean no disrespect in my failure to restate in detail the points made.

[5] Having carefully reviewed the matter and the authorities cited I am satisfied that the claim against the Second and Third Defendant s must be dismissed. There is "no real prospect" of the Claimant succeeding on the claim within the meaning of Rule 15.2 of the Civil Procedure Rules 2002.I bear in mind of course that it is no part of my remit at this stage to resolve issues of fact. I am also aware that the court is very reluctant to drive a litigant from the seat of judgment without affording him a trial. Indeed even issues of law, where sufficiently complex or difficult to resolve, are best reserved for a trial. However, in appropriate cases the power to strike out under this rule should be exercised as it saves costs and time and leads to a more efficient use of the court's resources, see generally ***Swain v Hillman [2001]1 Aller 91***.

[6] Mr Roy Williams in his affidavit referred to above states:

> **"6. On the appointment of the 2nd Defendant as Receiver/Manager ,the Claimant was still in the process of the construction of the infrastructure works.**
>
> **7. The Claimant being aware of the appointment of the 2nd Defendant ,met with him and discussed the continuation of the work. In the circumstances of the meeting it was evident that the 1st Defendant was not in**

a position to pay its debts , and would therefore not be able to pay for work to be done by the Claimant. In the said discussions ,it was orally agreed between the Claimant and the 2nd Defendant that the Claimant would continue the work as set out in the original contract between the Claimant and the 1st Defendant .This agreement was confirmed in letter from the Claimant to the 2nd Defendant dated 8th July 2002.I attach a copy of the said letter marked "RW1".

8. Pursuant to the agreement between the Claimant and the 2nd Defendant ,the Claimant duly continued the infrastructure works as agreed."

[7] The attached exhibit is a letter from the Claimant to the 2nd Defendant , dated July 8th 2002. That letter confirms a discussion whereby the Claimant agreed to "complete the project". The price agreed was fixed at an amount "$55.9 million in excess of the value of the construction works contained in QS certificate # 3" and was expressed to be subject to certain understandings. There is no expressed or implicit reference to the Third Defendant being personally liable for the payments or otherwise guaranteeing such payment. There is no assignment of the construction agreement to either the Second or the Third Defendant . It is in short clear even on the Claimant's evidence that the Second Defendant was doing what receivers do, continuing the business of the Company in Receivership. The other letter exhibited to Mr Williams' affidavit underscores this point. It is written by the Receiver on the letterhead of the Company (the First Defendant), and advises on 23rd January 2003 of the termination of the contract.

[8] In the context of a Receivership the Claimant, in order to have any real prospect of success, would have had to be able to demonstrate that the Receiver was either acting in his personal capacity or had the authority to and did, enter into a new contract on behalf of the Third Defendant. This has not been done, nor is it reasonable to expect that it could be. The terms of the debenture exhibited to the Third Defendant's affidavit are clear, the Receiver is the First Defendant's agent see clauses 11(g), 20 and 23. This is well recognised, see ***Lathia v Dronsfield Bros Ltd [1987] BCLC 321***. In that case, the learned judge, on appeal from a

decision of the Master, stated that short of a want of bona fides or an excess of authority the Receiver had no duty to other creditors, and was therefore immune from a claim for inducing a breach of contract. He in consequence struck out the Claim.

[9] Counsel for the Claimant submitted that the Receiver was liable on a contract he decided to continue. Reliance was placed on ***Powdrill and another v Watson and another [1995] 2 A.C. 394.*** That case however turned on a construction of the word "adopted" in the Insolvency Act 1986 of the United Kingdom. Counsel could point to no similarly applicable statutory provision in this jurisdiction, see also the decision of ***Nicoll v Cutts [1985] BCLC 322*** referred to in Powdrill's case and which it is said the statutory provision was intended to overrule. It should be noted that section 349 of the Companies Act of Jamaica makes no reference to the liability of a Receiver for "adopted" contracts. It was also submitted that the Third Defendant had intermeddled in the receivership and was in consequence liable. No evidence to support the allegation was however provided. The claim to negligently permitting the Claimant to continue the work while knowing the First Defendant could not pay is also unsustainable. In the first place Mr Williams' affidavit makes it clear he was aware that the First Defendant was in financial difficulty, hence the appointment of a receiver .In the second place the Receiver as indicated above has no general duty of care to other creditors of the Company.

[10] In these circumstances and for the reason stated above the Claim has no real prospect of success against the Second and Third Defendant s. An existing contract was continued. The Claimant at all material times knew or ought reasonably to have known that the Second Defendant was acting pursuant to power contained in a Debenture .He was the First Defendant 's agent and it is not suggested that he represented himself to be otherwise . It may have been hoped the project could be pursued to a successful conclusion but this was not to be. The fact it failed and the Claimant could not be paid cannot for that reason

alone create a liability in the Receiver or those appointing him. Liability cannot be inferred from the facts alleged by the Claimant's witness.

[11] As regards the other grounds of the application (that the claim is statute barred and that the Receivership had ended by the time the cause of action arose) these turn on disputed issues of fact. Had it been necessary I would have allowed these questions to be decided after a trial. The document from the engineer **Exhibit DS2** to the Affidavit of Donna Stone bears two dates and therefore it is for a tribunal of fact to determine when did the cause of action arise. My decision does not turn on a resolution of this factual issue.

[12] The Claim for the reasons stated in paragraphs 1 to 10 above is dismissed against the Second and Third Defendant s with costs. I award only costs of one application because the Defendants were represented by the same firm. It was unnecessary to file separate applications with overlapping grounds. The costs are to be taxed or agreed.

David Batts
Puisne Judge