[2021] JMSC Civ.138

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017 HCV 02440

BETWEEN	**TANCOUR CONSTRUCTION JAMAICA LTD**	**1ST CLAIMANT**
AND	**TYRONE SEAN LEWIS, ANNETTE JEAN BLOUNT, COURTNEY GEORGE LEWIS AND COURTNEY TANYA RITCH t/a LEWIS AND BLOUNT CONSTRUCTION DEVELOPERS**	**2ND CLAIMANT**
AND	**CHINA HARBOUR ENGINEERING COMPANY**	**1ST DEFENDANT**
AND	**THE NATIONAL WORKS AGENCY**	**2ND DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD DEFENDANT**

IN CHAMBERS (VIA ZOOM)

Mr Courtney Lewis Claimant on behalf of himself and other 2nd Claimants and the First Claimant

Ms Colleen Franklyn Attorney-at-law for the 1st Defendant

Ms Kamau Ruddock instructed by the Director of State Proceedings for the 2nd and 3rd Defendants

JULY 8, 2021 AND JULY 20, 2021

Application for default judgment, application for summary judgment and to strike out claim CPR 15 and CPR 26

T. MOTT TULLOCH-REID, J (AG)

Background

[1] The Claimants have several applications before the Court seeking various orders. Regrettably the Claimants do not have legal representation and so their applications are not as clear as they could have been had the Claimants sought assistance from an attorney-at-law. That being said, there is no rule that would suggest that a party in litigation proceedings cannot represent himself. Where this is the case I believe that I should be even more careful when going through the pleadings and evidence to ensure that I understand what the Claimants are seeking and determine if the orders being sought can be granted.

[2] The Claimants have filed the following applications:

a. Application filed on June 8, 2018 seeking default judgment against the 2nd and 3rd Defendants on the basis that they failed to file a defence in accordance with Part 10 of the Civil Procedure Rules and summary judgment against the 1st Defendant on the basis that the 1st Defendant has no real prospect of successfully defending the claim.
b. Two applications filed on September 19, 2019 seeking that contempt orders to be made against the 1st Defendant and for default judgment to be entered in their favour against the 1st Defendant on the basis that the 1st Defendant disobeyed the order of Leighton Pusey J made on April 25, 2019 wherein he had ordered that pursuant to the overriding objectives 1st Defendant was to pay the mediation fee on behalf of the Claimant; and an application for contempt of court because the 1st Defendant failed to pay the mediation costs as ordered by the Court.
c. Application filed on October 22, 2019 seeking orders to strike out the 1st Defendant's application.

[3] In addition to the Claimants' applications, the Defendants also have applications. The 1st Defendant has an application filed on October 10, 2019 seeking an order for summary judgment to be entered in its favour or in the alternative that the claim against it be struck out. The 2nd and 3rd Defendants filed an application on July 30,

2018 seeking orders to strike out the Claimants' claim against them as it disclosed no reasonable grounds and in the alternative that they be allowed an extension of time to file their defence. It is to be noted that under separate application, the latter order was sought and was granted and so there is no need to consider the 2nd and 3rd Defendants' application to file defence out of time.

[4] I will deal with the various applications in the following manner:

a. The Claimant's application for contempt orders to be made against the 1st Defendant
b. The Claimant's application for summary judgment against the 1st Defendant and at the same time I will consider the 1st Defendant's application for summary judgment against the Claimant and the Claimant's counter-application to strike out the 1st Defendant's application for summary judgment.
c. The 2nd and 3rd Defendant's application to strike out the Claimant's claim.

The Claimant's application for contempt orders to be made

[5] The Claimant argues that the 1st Defendant has defied the order of Leighton Pusey J made on April 15, 2019 to pay its mediation fees. By disobeying the order of the Court, the 1st Defendant should be held in contempt. I note that mediation has not yet been embarked on. Ms Franklyn argued in response that mediation had not been held and until a date had been set, there would be no need for mediation fees to be paid. She goes further to say that the mediation fees would in any event be paid to the Dispute Resolution Foundation and not to the Claimants directly. I agree with Ms Franklyn on this point, however, I wonder why in the face of an order of Pusey J that mediation be completed by July 31, 2019 it was not done. Nevertheless, mediation was not embarked on and as such the mediation fees were not paid. The Claimants have not produced any evidence to show that he invited the 1st Defendant to agree mediation dates or mediators but that it was unresponsive. I can therefore only conclude that neither party took steps to embark on the mediation process as ordered by Pusey J. I also note that on

November 6, 2019, Anderson J dispensed with mediation. There will therefore be no need for mediation and the 1st Defendant is therefore not obligated to pay the mediation fees on behalf of the Claimants as ordered by Pusey J. The order for contempt sought filed on September 19, 2019 must therefore fail. The Claimants' application, also filed on September 19, 2019, for default judgment because orders for mediation costs to be paid by the 1st Defendant was not obeyed, must also fail.

Claimant's application for summary judgment, 1st Defendant's application for summary judgment/striking out, Claimant's application to strike out 1st Defendant's application

The Claimants' case

[6] I now turn to the Claimants' application filed on June 8, 2018 seeking "judgment issues for the claimant on the 1st Defendant" and default judgment entered in their favour against the 2nd and 3rd Defendants. The grounds on which these orders are being sought are that the 1st Defendant has no real prospect of successfully defending the claim or issue. Although the Claimants seek "judgment issues for the claimant", and the default judgment, I understand the orders being sought by the Claimants to be orders for summary judgment. I come to that conclusion based on the grounds set out for seeking the orders and the evidence set out in the affidavit of Courtney Lewis filed on June 8,2018.

[7] Mr Lewis's first submission is that the 1st Defendant failed to obey the order of Anderson J for a representative to be in Court today. He argues that the 1st Defendant has continuously disobeyed orders of the Court and should be punished for doing so. On November 6, 2020, Anderson J in setting a Case Management Conference date, ordered that the parties or representative of the parties should be present at the Case Management Conference and if the 1st Defendant failed to have a representative present at the hearing then the 1st Defendant's statement of case would be struck out. Ms Rashelle Muir, Manager of Business Development

at the 1st Defendant was present at the hearing and as such the order sought with respect to this issue must be refused.

[8] As it relates to the application for summary judgment, Mr Lewis' evidence is that he entered into an oral contract with the National Works Agency to carry out work at its corporate office located at 140 Maxfield Avenue, Kingston 10. The work was considered "urgent" and required the 2nd Claimant to do ductwork at the 2nd Defendant. He relies on a letter dated March 3, 2011 to the 2nd Claimant from the 2nd Defendant to support this allegation. He says during the course of carrying out the contract, NWA informed the 2nd Claimant that the 1st Defendant would be overseeing the project and so the 2nd Claimant would be supervised and paid by the 2nd Defendant. He argues that the work was completed but instead of paying the 2nd Claimant as agreed, the 1st Defendant has failed and/or refused to do so. He complains in his submissions that the 1st Defendant's manner of paying the Claimants affected their business negatively in that because the payment was not made in a lump sum as agreed, the 1st Defendant paid in parts and this prevented the Claimants from meeting their other business obligations and affected their finances. Mr Lewis states that although they fulfilled their contractual obligations to the NWA, the 1st Defendant did not pay the Claimants until 2012.

[9] Further, and even more importantly for the purposes of the application for summary judgment, the Claimants argue that because of the work done, the cost of doing so, exceeded the estimate first given. A bill of quantity ("BQ") was prepared and forwarded to the 1st Defendant and although the 1st Defendant has paid some of the debt due to the Claimants it has not paid all the money that is outstanding. He states that during the process of carrying out the work, 1st Defendant asked the Claimants to do additional work and so the terms of contract were varied. These additional items of work were added to the BQ but the BQ remains unpaid in full.

[10] The Claimants' bill is one of the documents exhibited to the Affidavit of Courtney Lewis filed on June 8, 2018. The bill is dated April 18, 2017. The amount owing was noted as being $6,589,722.78 with only $5,157,924.10 of the amount being

paid. Ms Franklyn argued that the bill was paid in full in 2012 for work done in 2011. She questions why Mr Lewis is relying on a 2017 bill for work done in 2011. Mr Lewis' response is that the 2017 bill was presented because the 1st Defendant had indicated that it could not find the old bill and as during moving office the original bill was lost, the bill had to be reconstructed. Mr Lewis concludes that the 1st D continues to be indebted to the Claimants in the sum of $1,431,798.68.

[11] Mr Lewis has asked me to consider the cases of **Biguzzi v Rank [1999] 1 WLR 1926**, **Peter Haddad v Donald Silvera SCCA #21 of 2003 and Arbuthnot Latham Bank Limited v Trafalgar Holding and ors [1997] EWCA Civ.** (I believe that the **Arbuthnot case** is also cited at **[1998] 1 WLR 1426**). He has not made any submissions on how these cases are to be used by the Court. The **Arbuthnot case** speaks to where cases can be struck out on the basis on delay which amounted to an abuse of the process of the Court. The Court held that where the party who did not push his case through the Court in a timely manner, his case could be struck out even though the limitation period had not passed and even where the defendant could not point to any prejudice being suffered as a result of the delay. If his is how the Claimants intend to rely on the case, I do not see how it assists them as it is certainly not relevant to the issue before me. Perhaps it was Mr Lewis' thinking that the 1st Defendant's delay in making the payment to the Claimants should result in their case being struck out. This is however not how the case is to be interpreted. The delay is in the following of procedure once the claim is filed in Court. **Biguzzi** deals with non-compliance of a party with court procedure and orders. I suspect this case is being put forward by the Claimants to support their submissions that the 1st Defendant has been generally non-compliant with orders made by the Court. I have already dealt with this issue in paragraph 7 above and am therefore of the opinion that the case is not helpful to the Claimants. The **Peter Haddad case** also deals with the issue of delay but as it relates to bringing an appeal. It is not relevant for the same reasons I indicated above when considering the **Arbuthnot case**.

The First Defendant's case

[12] The First Defendant filed written submissions on April 13, 2021. The relevant paragraphs of the written submissions which deal with the issue of summary judgment begin at paragraph 33. Paragraph 46 onwards are helpful in setting out the Defendant's case. Ms Franklin agrees that there was a contract. She is not aware of an oral contract but if one existed between the Claimants and the 2nd Defendant, it would have been superseded by the written contract between the 2nd Claimant and the 1st Defendant. The contract document entered into between the 1st Defendant and the 2nd Claimant noted the contract price as being $4,534,493.84. This is the same amount which the Claimant had put forward in the proposal dated March 30, 2011 issued to the 1st Defendant by the 2nd Claimant. It is also the same amount at the end of the BQ prepared by the 2nd Claimant and addressed to the 1st Defendant.

[13] Ms Franklyn also gives an explanation as to why the sums due to the 2nd Claimant were paid in instalments and not a single lump sum. She says the sums were paid as portions of the work were done and confirmed by the 1st Defendant. She refers to the certificates of payment that were issued. Ms Franklyn agrees that there were variations to the contracted work so that the cost of doing the work increased. She however does not agree the increased amount. The variation of the contract price was $5, 206,761.80. Nine certificates of payments totalling approximately $5,102M were paid to the 2nd Claimant. There was a shortfall of approximately $104,135.24 but that sum represented the contractor's levy and other duties payable to the Government of Jamaica. Ms Franklyn argues that on the Claimants' own documents, it is clear that the sums owed to the Claimants by the 1st Defendant were paid in full. If the Court makes that conclusion, there would be no mini-trial embarked on but it would just be a process of the Court examining the facts. The Court should grant summary judgment against the Claimants as they have no real prospect of successfully bringing the claim. The case of **Swain v**

Hillman [2001] 1 All ER 91 was relied on wherein Lord Woolfe MR defined "real" as realistic as opposed to fanciful.

[14] While the Claimants' pleadings are not easy to read, with a little patience, the meaning can be deciphered. I do not agree with Ms Franklyn that the Claimants do not have a real prospect of succeeding on the claim. This is a claim for a specific sum of money and for damages for breach of contract. To determine if in fact there was a breach of contract, the court will have to engage in a full trial. It is for a Court to carefully consider the evidence of the parties and their witnesses, if any, and the documentary proof put forward in support of their respective positions to make a determination as to whether any monies are due and outstanding and if there was indeed a breach of contract which resulted in the Claimants experiencing the alleged loss. I am not able to embark on a trial this stage of the proceedings and given that I am of the view that the Claimants have a real prospect of succeeding, at the very least on the claim for sums outstanding on the BQ, the orders sought in the 1st Defendant's application must be refused.

[15] As I have considered the 1st Defendant's application, it goes without saying that the Claimants' application to strike out the 1st Defendant's application is refused.

The 2nd and 3rd Defendants' application to strike out the Claimants' claim against them

[16] The 2nd and 3rd Defendants filed an application with affidavit of Carson Hamilton in support seeking an order that the claim be struck out for disclosing no reasonable grounds for instituting it. The application is grounded on CPR 26.3(1)(c) where a court may strike out a claim which discloses no reasonable grounds for bringing it and that the claim has not set out a cause of action against the 2nd and 3rd Defendants. Mr Hamilton's evidence is that the Claimants brought the claim pursuant to a contract entered into between the 2nd Claimant and the 1st Defendant. The 2nd Defendant is not a party to the contract and there is no contractual relationship between the Claimants and the 2nd Defendant.

[17] Exhibited to Mr Hamilton's affidavit is a copy of the contract on which the Claimants are basing their claim. The first page reads as follows:

> "*Contract Document*
>
> *Between*
>
> *China Harbour Engineering Company*
>
> *And*
>
> *Lewis & Blount Construction Developers*
>
> *For*
>
> *NWA Soils Laboratory Refurbishing & Relocation of Basement Pantry*"

The third page is headed "Form of Agreement" and reads in part as follows:

"*This Agreement is made this 8th day of June 2011 between China Harbour Engineering Company Ltd of 5th Floor North, Courtleigh Corporate Centre No 8, St Lucia Avenue, Kingston 5 (hereinafter called "The Contractor") of the one part and "Lewis & Blount Construction Developers: of 140 Maxfield Avenue, Kingston 10, Jamaica (hereinafter called "The Sub-Contractor") of the other part*."

Article 1 is headed "General Conditions of Contract". Article 1(1) reads as follows:

"*The Contract. The Contract Documents form the Contract for NWA Soils Laboratory Refurbishing & Relocation of Basement Pantry which is located at 140 Maxfield Avenue, Kingston 10, Jamaica. The Contract represents the entire and integrated agreement between the parties hereto* ***and supersedes prior negotiations, representations or agreements, either written or oral*** *(my emphasis). The Contract Documents shall not be construed* ***to create contractual relationship of any kind with any additional parties*** *(my emphasis). The Contract Documents shall consist of this form and the Work Schedule that has been agreed upon by both Parties."*

The contract was signed by a representative of the 1st Defendant and Mr Courtney Lewis on behalf of Lewis & Blount Construction Developers.

[18] Ms Ruddock at paragraph 7 of her written submissions filed on April 13, 2021 said that the 2nd Defendant had scoped some work to be done for its soil laboratory which needed refurbishment. It contracted the 1st Defendant to do the work, which then subcontracted the 2nd Claimant. The 2nd Defendant only generated the Taking Over Certificate as this was necessary to put the 1st Defendant on notice that the job had been completed by the 2nd Claimant so that the 1st Defendant could pay the sums due and owing to the 2nd Claimant for the work performed. The 2nd Defendant was not a party to the contract but had to verify to the 1st Defendant that the work had been completed in accordance with the terms of the contract. That was its only role.

[19] Mr Lewis on behalf of the Claimants argue that while there was no written contract between the Claimants and the 2nd Defendant, there was a verbal contract. His first contact was with the 2nd Defendant. He had begun to do work for the 2nd Defendant pursuant to the verbal contract. It was only at a point in the project, when ducts were already being built and payment was to be made that the 2nd Defendant introduced him to the 1st Defendant and because he needed to be paid, the work having already been started and some of which was completed, he signed the contract with the 1st Defendant. He signed only out of necessity and nothing more but as far as he was concerned his relationship was with the 2nd Defendant. Mr Lewis submits that prior to the 2nd Defendant introducing him to the 1st Defendant he did not even know that they existed. Although Mr Lewis makes these submissions, I note that at paragraph 8 of his affidavit filed on June 17, 2019, he says he was not authorised to sign any documents of debt or contracts alone and he needed to co-sign with the other partners of the business and his name alone on the contract does not make it valid. This statement by Mr Lewis raises more questions than answers. Why would he sign a contract if he was not authorised to do so by his partners? Why did he not wait until all the partners were available to

sign the document? Further, why is he saying the contract is not valid but relies on it in his claim against the 1st Defendant?

[20] Ms Ruddock relies on the case of **Sebol Limited and Selective Homes and Properties Limited v Ken Tomlinson and ors 2004 HCV 02526** the decision of Sykes J (as he then was) to support her position that where the Claimant has no reasonable grounds for bringing the claim, in this case, there is no claim because the documentary evidence is clear that there is no contract between the Claimants and the 2nd Defendant and further that even if there was a verbal contract as Mr Lewis says there was, the terms of the written contract state clearly that the written contract superseded any prior written or oral negotiation, representation or agreements.

[21] Mr Lewis has not convinced me that there indeed exists a contract between himself and the 2nd Defendant. The wording of the written contract in setting out the parties thereto is clear. The 2nd Defendant is not named as a party. It is also clear on the face of the contract that any oral contract is superseded by the written contract. Mr Lewis has indicated that he accepted payment for the work done by the Claimants from the 1st Defendant and not from the 2nd Defendant. The Claimants have failed to show that they have a claim that has a reasonable possibility of success as against the 2nd and 3rd Defendants. In the circumstances, and in an effort to further the overriding objective of saving costs, time and resources, the Claimant's claim against the 2nd and 3rd Defendants will be struck out with costs to the 2nd and 3rd Defendants.

[22] I have now considered the issues raised in all the applications. It is hoped that my decision will be sufficient to tidy up the file and put the matter in a state of readiness for trial. My orders are as follows:

(a) The Claimants' application for contempt orders and default judgment to be entered against the 1st Defendant both filed on September 19, 2019 are

refused. The Claimant is to pay the 1st Defendant costs of $25,000.00 in each application on or before September 16, 2021.

(b) The Claimants' application for summary judgment against the 2nd and 3rd Defendants filed on June 8, 2018 is refused. The Claimant is to pay the 2nd and 3rd Defendants costs in the application in the amount of $25,000.00 on or before September 16, 2021.

(c) The Claimants' claim against the 2nd and 3rd Defendants is struck out. The Claimants are to pay the 2nd and 3rd Defendants costs in the 2nd and 3rd Defendants' application to strike out the Claimants' claim filed on June 30, 2018, in the amount of $25,000.00 and must do so on or before September 16, 2021.

(d) The Claimants' application filed on June 17, 2019 to strike out the application of the 2nd and 3rd Defendants filed on July 30, 2018, is refused. There shall be no order as to costs on this application.

(e) The Claimant's claim is stayed until all orders for costs to be paid by them have been complied with.

(f) The 1st Defendant's application for summary judgment to be granted against the Claimants filed on October 10, 2019 is refused. The parties are to bear their own costs of the application.

(g) The Claimants' application filed on October 22, 2019 to strike out the 1st Defendant's application for summary filed on October 10, 2019, is refused. The parties are to bear their own costs of the application.

(h) The Claimants' application for the leave to appeal is granted.

(i) The 1st Defendant's application for leave to appeal is granted.

(j) The Case Management Conference is adjourned to October 4, 2021 at 2:30pm for ½ hour.

(k) The 2nd and 3rd Defendant's attorneys-at-law are to file and serve the Formal Order.

(l) The 1st Defendant's attorneys-at-law are to file and serve the Formal Order.