In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
CONSOLIDATED ACTIONS
2017 No: 467
2018 No: 38
2018 No: 66

BETWEEN:

PAUL RODRIGUES
(TRADING AS RODRIGUES POOLS)

Plaintiff

And

CLEARWATER DEVELOPMENT LIMITED

Defendant

RULING

Distinction between an application for a split trial (to separately consider liability from quantum) and an application for the determination of a preliminary trial point- RSC Order 33- Overriding Objection RSC Order 1A and Court's Case Management Powers – RSC Order 24 Court's powers to order specific discovery- Cross applications for discovery

Date of Hearing: Wednesday 14 August 2019
Date of Decision: Friday 06 September 2019

Plaintiff: Mr. Dennis Dwyer (Chancery Legal Ltd.)
Defendant: Mr. Richard Horseman (Wakefield Quin Limited)

RULING of Shade Subair Williams J

<u>Introduction</u>:

1. The Plaintiff in these proceedings is a minority shareholder (holding 1,583 Class B shares with his wife) of the Defendant Company. The Plaintiff also carried out construction work for the Defendant under a contract in the form of an amended Letter of Agreement ("the contract" or "the Letter of Agreement"). The Defendant is a company incorporated and registered in Bermuda with the objects of acquiring and redeveloping property located at 90 South Side Road, Warwick Parish, namely Surf Side Beach Club ("the Property"). The Plaintiff's contractual relationship with the Defendant concerns the development and construction of the Property in view of establishing a new hotel, known as Azura ("the Azura Project").

2. By previous Order of the Court the following actions were consolidated on 27 April 2018:

   (i) <u>Writ Action #1</u>: (Case No. 467 of 2017) This matter was commenced by way of a Specially Indorsed Writ of Summons dated 18 December 2017 seeking damages in the sum of $412,527.62 arising out of a claim for monies due for (contractual) work undertaken and materials supplied by the Plaintiff to the Defendant in respect of Buildings 2 and 3 of the Azura Project.

   (ii) <u>Writ Action #2</u>: (Case No. 66 of 2018) This matter was commenced by way of a Generally Indorsed Writ of Summons dated 5 March 2018 seeking an unspecified sum of damages (to be assessed) and the delivery of all bid, tender and contract documents in relation to the development and construction of Buildings 7 and 8 of the Azura Project.

   (iii) <u>The Petition Action</u>: (Case No. 38 of 2018) An amended petition, dated 16 May 2019[1], was filed for the Court to proceed under section 111 of the Companies Act 1981 (alternative remedy to a winding up in cases of oppressive or prejudicial conduct). In this action the Petitioner (the same Plaintiff for Writ Actions #1 and #2) seeks an order for the Defendant Company to purchase the Petitioner's shares (in accordance with a Court-ordered valuation based on the market value of the Defendant Company's assets and in accordance with the terms of an Agreement Letter, dated 27 October 2016). The Petitioner is also in pursuit of an order for the Defendant Company to produce its management and/or audited accounts in addition to "*a copy the Company's assets including the Azura project works which have undertaken to date, and if none exist then to secure at their costs such valuations*". Alternatively, the Petitioner seeks a winding up order under Part XIII of the Companies Act 1981 or "*such other ("just and equitable") order as may be made in the premises*".

3. The Defendant filed a summons, dated 9 May 2019, for the Court, in exercise of its case management powers under the Overriding Objective at RSC Order 1A and pursuant to RSC Order 33/4A, to determine the Defendant's liability prior and separately from any assessment of damages. The Defendant argued that to do otherwise would subject the parties and the Court to an inordinate wastage of time and expense since the issue of liability entails the

[1] The original petition was first filed in the Court on Tuesday 20 February 2018

simplistic task of constructing a contentious term of the Letter of Agreement relevant to Writ Actions #1 and #2.

4. The Plaintiff, on the other hand, submitted through his Counsel that the Defendant is attempting to improperly have the Court adjudicate the main action in the form of a preliminary point. The Plaintiff argued that the factual matrix of these matters are complex and that it would be difficult, if not impossible, for the Court to grasp the issues without first hearing all of the evidence at trial. The Plaintiff further contended that the Defendant ought not to have belatedly invited the Court to determine these preliminary points because to do so would result in a deviation from the Court's case management duties as prescribed by the Overriding Objective.

5. Additionally, both parties filed a summons application for the Court to make orders for specific discovery.

6. At the close of the hearing I reserved my ruling and which I now provide based on the below reasoning.

Application for Determination of Preliminary Issue under the Petition Action

7. On the Defendant's 9 May summons it is requested that the Court determine a preliminary issue pursuant to Order 33 Rule 3 of the Rules of the Supreme Court (RSC). RSC O.33/3 provides:

   33/3 Time, etc. of trial of questions and issues
   3 The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

8. Where it appears to the Court that determination of any separately tried question or preliminary issue substantially disposes of the action, the Court may dismiss matter or make such other order or judgment as may be just under RSC O.33/7.

9. The preliminary issue in question is as follows:

   > "*Whether under the terms of the Agreement Letter entered into between the Plaintiffs and the Defendant, and the Plaintiffs having notified the Defendant that they wish their shares to be purchased, the Plaintiffs are obliged to accept the formula set out in the Agreement Letter which states that the Investor shall receive 5% on their investment from the time their funds were deposited with the Defendant until the date of repayment*."

10. The relevant term of the Agreement Letter provides as follows:

    Business Structure:

    Initial Equity Investment:
    $650,000 (15.80% Shareholding) in the name of Investors;

Intended Long Term Equity Investment:

$250,000 (6.80% Shareholding) in the name of Investors, CDL shall continue to actively pursue equity investment from other sources. In the event, as is expected by CDL, that sufficient additional equity becomes available, investors shall have the option to either:

A) Elect to keep their full $650,000 equity investment, or any portion above the minimum of $250,000 or

B) Have CDL place the amount above $250,000 that they wish not to keep with the other party. In the event any of said amount is placed with another party, Investor shall receive interest on that amount at the rate of 5% from the date such amount was deposited into the CDL account to the date said amount is repaid to Investor.

11. This preliminary issue is relevant to the Petition action where the primary relief sought is for the Defendant to purchase the Plaintiff's shares at fair market value. The Court's power to make any such order is anchored in section 111(1)-(2) of the Companies Act 1981 which provides:

Alternative remedy to winding up in cases of oppressive or prejudicial conduct
111 (1) Any member of a company who complains that the affairs of the company are being conducted or have been conducted in a manner oppressive or prejudicial to the interests of some part of the members, including himself, or where a report has been made to the Minister under section 110, the Registrar on behalf of the Minister, may make an application to the Court by petition for an order under this section.

(2) If on any such petition the Court is of opinion—

(a) that the company's affairs are being conducted or have been conducted as aforesaid; and

(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up,

the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

12. The relief prayed in the Petition:

That the Company purchase the Petitioners shares on a valuation to be ordered by the Court and that in any event be conducted on the basis of the market value of the assets of

the Company and also in accordance with the terms of the Agreements Letter dated 27 October 2016

13. By an open offer letter to the Plaintiffs, dated 13 August 2019 (the eve of the hearing) the Defendant stated in its material parts:

    "*As noted in our submissions to the Court, our client has made an open offer to purchase your clients' shares for $800,000 based on the formula contained in the Letter of Agreement for 973 shares as well as an additional premium for the remaining 609 shares. On a review of the audited accounts, this is a generous offer. We note that your client's position that he is not bound to sell his shares in accordance with the calculation set out in the Letter of Agreement.*

    Leaving aside the question as to whether your clients are bound to sell the shares in accordance with the Letter of Agreement, our client reiterates that it is willing to agree to purchase your clients' total shareholding for $800,000.00. If the offer is not acceptable to your client, our client will then agree to purchase your clients' shares at a price based on an independent valuation. This would effectively resolve the Petition proceedings leaving the two Writ actions outstanding. Cost of the valuation would be shared equally between the parties with costs reserved. The parties would agree to be bound by the valuation.

    We trust that after reviewing the audited accounts, your client will accept our client's offer of $800,000.00 and bring the Petition matter to an end. Our client's offer of $800,000.00 will remain open until 31st August 2019. If it is not accepted on or before the 31st August 2019, we will apply to the Court to strike out or stay the Petition based on our client's alternative offer to purchase your client's shares based on an independent valuation."

14. Mr. Horseman relayed that the Defendant intends to consent to the primary relief sought in the Petition so that the Petitioners shares are purchased at a sum not below fair market value and consistent with the above-cited term of the Letter of Agreement. Mr. Horseman cogently submitted that the $800,000 offer surpassed the threshold set under the Letter of Agreement.

15. Additionally, the Defendant confirmed that it served the Petitioner/Plaintiff (again, on the eve or shortly prior to the hearing) with records of all of its audited accounts spanning from its inception in 2015 through to the close of 2018 in satisfaction of the second term of relief prayed in the Petition.

16. The only remaining relief contained in the prayer is for the Defendant Company to be wound up under the provisions of the Companies Act 1981 or for such other just and equitable order of the Court.

17. Mr. Horseman submitted that the Plaintiff's minority shareholding combined with the Defendant's purchase offer made it unjustifiable and thus unlikely that the Court would order that the Defendant Company be wound up (See *Re Seadrill Ltd and Ors [2018] Bda LR 39* where minority shareholders unsuccessfully opposed a summons under a voluntary petition action for a recognition order in respect of a restructuring support agreement under Chapter 11 of the United States Bankruptcy Code). However, Mr. Dwyer persisted that it is open to the trial judge to make a winding up order or other such order despite the Defendant's

expressed willingness to consent to the primary relief pleaded. Notably, Mr. Dwyer was unable to propose any examples of what other orders were open to the Court to make.

18. Before any order can be properly made under section 111, the Court must first be of the opinion that the affairs of the company are being conducted or have been conducted in a manner oppressive or prejudicial to the interests of some part of the members, including the petitioning member. Where so satisfied, the Court would then have to find that a winding up order would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up. Under these circumstances, the Court would then consider whether to make an order regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company. It is clear from the Petition that the Plaintiff's principal endeavor is for the purchase of his shares at fair market value. The execution of such a sale would of course be aided by the production of the Defendant's audited accounts and other such records for the purpose of a valuation.

19. In my judgment, it is unnecessary for the Court to determine the preliminary issue for the disposal of the Petition action since the only contested relief sought by the Plaintiff is for a winding up order, which on the face of the Court documents seems unlikely. I should parenthetically note that Mr. Horseman did not pursue this part of his summons during his oral submissions. He instead informed the Court that the Defendant would likely bring an application to strike out the Petition in the event that the Plaintiff refuses to discontinue the Petition action, undeterred by the Defendant's consent to the primary relief sought. Persevering, Mr. Dwyer defended his client's alternative pursuit for a winding up order or other such just and equitable order. Of course, these are arguments for the Court during any such strike out application in exercise of the Court's inherent jurisdiction and/or under RSC O.18/19.

20. For this reason I will not direct for the preliminary issue to be determined under RSC O. 33/3.

Analysis and Decision on Application for a Split Trial under Writ Action #1:

21. The Defendant prayed for an order in the following terms:

> "*that there be a split trial on the issue of the Defendant's liability under the said Agreement prior to any hearing on quantum of damages and in particular whether the Plaintiffs can claim damages for the alleged failure of the Defendant to allow the Plaintiffs to bid on all additional phases of the development and/or the alleged refusal of the Defendant to enter into further contracts with the Plaintiffs relating to the construction and development*."

22. Mr. Horseman relied on the generality of the Court's case management powers and duties under the Overriding Objective at RSC Order 1A which provides:

1A/1 The Overriding Objective

(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.
(2) Dealing with a case justly includes, so far as is practicable-
(a) ensuring that the parties are on equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate-

- *(i) to the amount of money involved;*
- *(ii) to the importance of the case;*
- *(iii) to the complexity of the issues; and*
- *(iv) to the financial position of each party;*

(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases

1A/2 Application by the Court of the Overriding Objective
2 The court must seek to give effect to the overriding objective when it-
(a) exercises any power given to it by the Rules; or
(b) interprets any rule.

1A/3 Duties of the Parties
3 The parties are required to help the court further the overriding objective.

1A/4 Court's Duty to Manage Cases
4 (1) the court must further the overriding objective by actively managing cases.
(2) Active case management includes-

- *a) encouraging the parties to co-operate with each other in the conduct of the proceedings;*
- *b) identifying the issues at an early stage;*
- *c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;*
- *d) deciding the order in which issues are to be resolved;*
- *e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;*
- *f) helping the parties to settle the whole or part of the case;*
- *g) fixing timetables or otherwise controlling the progress of the case;*
- *h) considering whether the likely benefits of taking a particular step justify the cost of taking it;*
- *i) dealing with as many aspects of the case as it can on the same occasion;*
- *j) dealing with the case without the parties needing to attend at court;*
- *k) making use of technology; and*

l) *giving directions to ensure that the trial of a case proceeds quickly and efficiently*

23. In order to determine the most fair and expeditious way of proceeding with this matter, it is necessary to first consider the nature and depth of the disputed issues for resolve and whether the issues on liability and quantum are separable or in fact irrevocably intertwined. In this action, the issue of liability is tied to quantum so much so that the evidence underlying the level of work done and materials purchased by the Plaintiff is dispositive of both liability and quantum. Contentious issues on *quantum meruit*[2] may require the Court to hear expert opinion evidence from quantity surveyors. The Court will likely be called upon to make findings on calculations based on the percentage of labour and materials used out of the total fixed sum agreed.

24. The principal argument made by the Defendant is that considerable costs in time and money would be wasted if the Court found that the Defendant was not liable under the claim. I reject this submission insofar as it relates to Writ Action #1. A finding that the Defendant is liable in Writ Action #1 is dispositive of very little. So to proceed to a trial on liability alone under Writ Action #1 would be a needless waste of time and money for both the Courts and the parties. The central dispute would only be dissolved by the Court's factual findings on the level of work done ie quantum.

25. For this reason, I refuse the Defendant's application for a split trial on Writ Action #1.

Analysis and Decision on Defendant's Discovery Application in Writ Action #1

26. The Damages pleaded in Writ Action #1 are in the total sum of $412, 527.62. It is agreed between the parties that the Defendant made a payment of $164,304.94 to the Plaintiff approximately three months after the filing of this writ. The Plaintiff's case is that the balance of $254,228.63[3] is owed.

27. These damages represent the Plaintiff's claim for monies owing to the Plaintiff for work done and materials purchased in aid of the work done. On the Plaintiff's Reply pleadings, the damages claimed are outlined as follows:

Balance due for works and materials	*$297,557.02*
Payment	*$14,606.00*
	$282,951.02
15% Profit Margin on Fixed Price Contract	*$135,582.60*
Balance Due	*$418,533.62*
Less Paid on account	*$164,604.99*
	$254,228.63

[2] *Quantum meruit* might arise on the Plaintiff's claim for an assessment of a reasonable sum caused by the Defendant's wrongful acts which prevented the Plaintiff from completing the contractual works.

[3] The figure for the remaining alleged balance owed is calculated to be $248,217.63 in Mr. Horseman's first affidavit at para 5. In the Plaintiff's Reply pleading the Plaintiff calculated the remaining balance to be $254,228.63.

13. The Plaintiffs deny that they have been fully compensated for the work they have undertaken and will aver that they were wrongfully terminated from completing the contracted work and are entitled to their loss or profit on the fixed price contract sum.

28. The extent of the work performed and the measure of the work materials purchased by the Plaintiffs is disputed between the parties.

29. By a summons application, dated 16 April 2019, the Defendant invited the Court to make an order for the Plaintiff to produce various internal financial records as proof of the works completed and the materials purchased.

30. At paragraph 7 of Mr. Horseman's first affidavit, he stated:

"*As the amount of work completed by the Defendant (and) the materials used are in dispute, the Plaintiffs need to give disclosure of their records for the construction works completed and materials purchased. It is not sufficient to simply produce three applications for payment which are disputed. This will be a case which will require expert evidence to resolve the issue of the value of the works actually completed by the Defendant. The Defendant will need to (be) able to review the Plaintiff's records to assess what works were completed by the Plaintiffs and materials actually purchased by the Defendant. In addition, the record of the actual expenditures and resources allocated to the job will assist in determining whether the Plaintiff has been adequately compensated for the works done*."

31. Attached as exhibits to Mr. Horseman's affidavit are invoices received by the Defendant for payment to the Plaintiff in respect of Buildings 2 and 3. Cross-referencing the September 2017 invoices against the October 2017 invoices, Mr. Horseman criticized the figure increases shown for works completed and materials purchased on the basis that the Plaintiff left the property work site on 1 October 2017.

32. Counsel submitted that the route to determining the level of work performed will necessarily be aided by expert evidence from a quantity surveyor. At paragraph 4 of Mr. Horseman's first affidavit he said:

"*The Defendant says that the works completed were worth $143,723.01 as assessed by a quantity surveyor, however, the Defendant paid the Plaintiffs $164,309.99 based on a previous assessment of the value of works. The Defendant denies that anything further is owing and avers that the Plaintiffs have been over-compensated for the actual works completed*."

33. The Court was directed to evidence of party correspondence from Mr. Horseman, dated 1 April 2019, where he requested the various items to be disclosed. The specific class of materials sought under Writ Action #1 was recited at paragraph 13 of Mr. Horseman's first affidavit:

(vii) Copy of file, timesheet, expenses and accounts relating to Construction of Building 2/3

You will note that we have also included a request for a copy of your client's file in relation to the construction of Building 2/3 matter. Your client has not disclosed any underlying

documentation confirming the costs and expense incurred pertaining to the work he performed on the site. There is in dispute the value of those works prior to your client leaving the site and we need to have disclosure of your client's actual expenditure as it relates to his work on Building 2/3.

34. Mr. Dwyer, on the other hand, made the following objections at paragraphs 4-5 of his second affidavit:

4. The Plaintiffs object to production of the two classes of documents sought on the grounds that their production is not relevant or necessary for the fair disposal of the consolidated causes of action herein and/or have been disclosed and are already in the custody or possession of the Defendant.

5. Dealing with the documents sought in relation to the actual work undertaken by the Plaintiff on Buildings 2/3, this element relates to the pending Action No. 67 of 2017 and Mr. Horseman makes reference to this part of the request in paragraphs 3 to 9 inclusive of his said Affidavit. It will be of assistance to the court if I make specific reference to certain statements made by Mr. Horseman which I comment upon and which I respectfully submit are relevant to the court making a proper determination of this part of the Defendant's Application:

a. The Plaintiff commenced work on Buildings 2/3 at the Defendants' specific request on a Fixed Contract Basis at an agreed price of $903,884.00 as evidenced by his bid documents dated 11th January 2017 following a tendering process.

b. In accordance with industry practice, once works were commenced on the above basis, interim stage payments would be sought by the Plaintiff by presentation of interim applications for payments which were duly presented for payment and consist of pages 4 to 12 of Exhibit "RH1".

c. The contract price included the 15% uplift and was not an addition to the agreed fixed price

d. The Plaintiff's claim for actual work undertaken was $291,551.02 as set forth in the Writ of Summons and had been due and payable since the interim requests submitted between June and October 2017.

e. The interim payment of $164,309.99 referred to by Mr. Horseman was only paid in March 2018 some 3 months after commencement of the proceedings and following a Summary Judgment application by the Plaintiff which relied upon the Defendants own admission of liability following a report by them from Mr. Tim Berry of ABC Ltd (see below).

f. As the work was done on a Fixed Price Contract basis, the industry practice for valuing interim requests for stage payments is to inspect the work on site and cross reference it to the percentage of work priced in the bid contract documents.
The Plaintiff was not paid in spite of 3 separate requests over some 3 months and to the best of his knowledge in breach of industry practice no site inspections were undertaken

by the architect to value the work, nor did the Construction Managers Greyman, on behalf of the Defendant, direct payment to the Plaintiff of any kind as a result of which the Plaintiff suspended site work on 21 September 2017.

g. The Plaintiff's services were terminated by a Directors' resolution of the Defendants on 3rd October 2017, notice being given on 9th October 2017.

h. The Defendants employed the said Tim Berry following the wrongful termination of the Plaintiff's services who produced a report dated 11th October 2017, a copy of which is now shown to me and marked Exhibit "DWD-1".

i. It can be seen from the report on behalf of the Defendant that Mr. Berry had access to all the necessary documents and information to enable him to carry out an inspection and undertake a valuation of works. Thereafter, he met with the Plaintiffs Quantity Surveyor to review all material and whilst agreement could not be reached, the part payment referred to earlier was eventually made and accepted on account some five months after the report.

j. The Defendants own expert does not seek or has not sought additional material or documents to those already made available to him.

k. Time Berry does not indicate in his report the basis of his valuation as the Plaintiff is not privy to the instructions he received from the Defendant, thus the presumption is that it was done on the basis of the Fixed Price Contract.

The Plaintiffs in their pleadings have made their position clear and have repeated their claim has to be assessed, not on quantum merit basis as is suggested by the Defendant but on a Fixed Contract Basis. That following the wrongful termination of the Plaintiff's services, he is entitled to the balance of monies due for work undertaken and materials supplied on a Fixed Price Basis plus the 15% profit he has lost had he been allowed to complete the contract work at the agreed price.

Thus the documents now sought will not in any way assist the parties in determining the issues and questions raised in this particular part of the proceeding.

35. The Plaintiff's resistance to the Defendant's request for the file of records on Buildings 2 and 3 is made on the basis of the Plaintiff's opinion that they do not assist or that the Defendant's work valuation expert, Mr. Tim Berry, was previously offered access to such information. Mr. Dwyer's objection is also made with reliance on his client's view of industry standard practices for how completed works are inspected on fixed price contracts.

36. RSC Order 24 governs the law on discovery in civil and commercial proceedings. O.24/1(1) provides as a starting point:

24/1 Mutual discovery of documents
1 (1) After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of this Order, be discovery by the parties to the

action of the <u>documents which are or have been in their possession, custody or power relating to matters in question in the action</u>.

37. There is no suggestion in Mr. Dwyer's reply affidavit evidence that the requested documents do not exist. Of course, the Plaintiff was required under RSC O.24/2 to serve on the Defendant a list of documents which were or had been '*in his possession, custody or power relating to any matter in question between them in the action'*. It should not be overlooked that the Plaintiff made the following statement in its List of Documents at item 5:

    Neither the Plaintiffs nor their attorney nor any person on their behalf have now or ever have had in their possession custody or power (of/over) any document of any description whatever (sic) relating to any matter in question in this action other than the documents enumerated in Schedules 1 and 2 hereto.

38. The Plaintiff's List of Documents is verified by the affidavit evidence of Mr. Rodrigues sworn on 21 December 2018. The verifying affidavit was made in compliance with RSC O.24/2(7) which provides:

    (7) Any party to whom discovery of documents is required to be made under this rule may, at any time before the summons for directions in the action is taken out, serve on the party required to make such discovery a notice requiring him to make an affidavit verifying the list he is required to make under paragraph (1), and the party on whom such a notice is served must, within fourteen days after service of the notice, make and file an affidavit in compliance with the notice and serve a copy of the affidavit on the party by whom the notice was served.

39. The majority of the document descriptions under Schedule 1 of the Plaintiff's List of Documents for 'Building Contract Documents' refer to email exchanges. The remainder documents do not appear to fit the description or class of documents sought by the Defendant.

40. Unsurprisingly, the Defendant does not accept that the documents he seeks in discovery are not in existence. On my assessment, the Plaintiff would surely possess or have the power bring under its custody its internal records for the completed construction works and the materials it purchased to the value of $297,557.02. Such records would, of course, show actual expenditures and would likely consist of, *inter alia*, bank records showing expenditures made during the relevant period and/or purchase receipts in respect of the construction work done on Buildings 2 and 3 of the Azura Project. Other relevant documents related to this matter in question would also include proof of salary payment to employees (eg. workmen time sheets and correlating payroll tax receipts).

41. It may very well be industry standard for nothing more than invoices to be produced for payment on fixed price contracts, where of course the parties are in harmony with one another. However, when kinship and amity are stranded somewhere out in an ocean of contentious litigation, the standard for production of documents is governed by RSC O. 24 and not the construction industry practices. I accept the Defendant's contention that the mere production of invoices for payment does not suffice under the discovery test outlined in RSC O. 24.

42. On this basis, in exercise of the Court's powers under RSC O.24/3(1) I order that the Plaintiff make and serve a list of all the documents which are or have been in its possession, custody or power relating to the construction work actually done on Buildings 2 and 3 of the Azura Project.

<u>Analysis and Decision on Application for a Split Trial Writ Action #2:</u>

43. Some of the core issues for resolve under Writ Action #2 involve the application of principles of construction on the terms of the contract.

44. The Plaintiff's case is that it was contractually entitled to "*be the preferred Pool Construction Contractor, Insulated Concrete Forms Supplier and Contractor and Supplier of other construction services and finish materials as appropriate, provided that such contractor services, products, quality and pricing were competitive with those the Defendant could obtain through any and all other options available to it…*"

45. On the Defendant's case, the Court should interpret the following contract clause to mean that the contract is void for lack of certainty or that it simply did not provide a guaranteed right to the Plaintiff to be selected for each bid:

    "*…Developer <u>will use reasonable efforts</u> to coordinate with RP prior to concluding construction services with another provider or ordering materials from another supplier to allow RP to match quality, style, and pricing of any such terms*."

46. The Defendant is also expected to state in evidence that the insertion of the words "*and supplier of other construction services*" into the amended Agreement Letter was unfairly made without his specific knowledge prior to signature. This is a fact finding mission for the trial judge.

47. The trial judge cannot be expected to hear and sift through copious documents in evidence in order to calculate the costs of the Defendant's numerous works in addition to the consequential losses claimed by the Plaintiff. (Mr. Horseman presented a visual aid on the volume of contractual documents relevant to the Plaintiff's claim for an assessment of damages when he showed the Court a 3-4 inch binder filled with the Defendant Company's portfolio of contracts.) The issue of quantum would further involve evidence of the Plaintiff's business activities, expenditures and income (or lack thereof) relevant in proving its losses and its duty to mitigate those losses.

48. In my judgment the issues relating to liability should be determined before the Court fixates on quantum. Of course, if a trial judge concludes that the Defendant is not liable, the cumbersome issue of quantum need not be tried, thereby rescuing the parties from a hefty disposal of time and money.

49. The Court is always beholden to its duty to manage cases expeditiously and fairly under the Overriding Objective at RSC O.1A. A salient component of active case management means identifying the disputed issues at an early stage and deciding the order in which those issues are to be resolved.

50. In the Defendant's summons, the particulars of liability for predetermination are stated as follows:

> "*... and in particular whether the Plaintiffs can claim damages for the alleged failure of the Defendant to allow the Plaintiffs to bid on all additional phases of the development and/or the alleged refusal of the Defendant to enter into further contracts with the Plaintiffs relating to the construction and development*."

51. Choosing a wide paint brush over a fine point pen, I reject the Defendant's proposed wording on liability and simply direct that the issue of liability in its general sense should be tried prior to and separately from quantum under Writ Action #2.

<u>Analysis and Decision on the Defendant's Discovery Application in Writ Action #2</u>

52. The Court was directed to party correspondence from Mr. Horseman, dated 1 April 2019 where he requested the following specific items to be disclosed:

(i) *The business's bank statements for all business accounts for the period of 1 October 2017 to 1 April 2019;*
(ii) *Copies of any significant contracts entered into by your clients during the period of 1 October 2017 to 1 April 2019 ($5,000.00 and over);*
(iii) *Quarterly payroll tax returns for the period;*
(iv) *Documentation confirming the numbers of staff employed by your clients;*
(v) *Documentation showing the source of construction income of $267,943.10;* (and)
(vi) *Documentation detailing professional fees of $222,321.01*

53. These documents constitute the proof required by the Defence for the Plaintiff to prove its claims on loss and damages. I accept that this class of documents is also relevant to the defence case that the Plaintiff had a duty to mitigate its losses. The Court's power to predetermine liability prior to enforcing any discovery orders is expressly stated at RSC O. 24/4(1):

> ***24/4 Order for determination of issue, etc. before discovery***
> *4 (1) Where on an application for an order under rule 2 or 3 it appears to the Court that any issue or question in the cause or matter should be determined before any discovery of documents is made by the parties, the Court may order that that issue or question be determined first.*

54. Mr. Horseman agreed that any order granting the Defendant its specific discovery could be properly held in abeyance pending the Court's determination on liability. For the same reasons I relied on in finding that liability should be tried separately from quantum, I agree that my order granting the Defendant its application for discovery should be stayed until further order at such time that the Court may address its mind to a trial on quantum.

Analysis and Decision on the Plaintiff's Discovery Application in the Petition Action and under Writ Action #2

55. The documents sought in the Plaintiff's summons application for discovery are described in Mr. Dwyer's third affidavit, sworn on 13 May 2019. The Plaintiff's request for specific discovery was initially made in party correspondence. The outstanding requested items was addressed as follows:

"*Does there exist and if there does provide a copy of any contracts, subcontracts or pricing of the following works already undertaken: a, Reception Building 1,b. Foreshore, c. Landscaping and vegetation, d. Hardscaping of pathways, e. Retaining walls and carts paths*."

56. In Mr. Dwyer's third affidavit he states that he followed up with a subsequent request:

"*(...) We note that the contract which is disclosed in your client's said List, AIA Document A134-2009 (which is the standard form of agreement between owner and construction manager as constructor) provides at paragraph 6.11 that the owner, i.e. your clients, and their auditors shall "during the regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to order and copy,* ***the construction manager's records and accounts (Greymane Contracting Limited) including complete documentation supporting accounting entries…****". Could you please therefore advise whether such materials were sought by your clients from the construction manager and if so, could you please identify and provide us as part of your disclosure. In the event that no such request for protection has been made, could you please confirm as part of your client's ongoing audit, the auditors in question (KPMG) are taking steps to secure that information*."

57. At paragraph 5 of Mr. Dwyer states:

"*The documents that are sought are material to some of the issues in the consolidated actions as they establish what project work was undertaken on behalf of the Defendant by their appointed construction manager and/or others,* ***the cost to the Defendants of such works and the profit made by Greymane in relation to such phase works which is material in calculating the damages being claimed by the Plaintiffs as "preferred contractor".*** *It will also establish whether the costs and expenses incurred were reasonable in all the circumstances bearing in mind the process of securing independent bids for Fixed Price Contracts based upon a tendering process appear to have been abandoned. The question arises was the work undertaken at a fair and reasonable cost to the company and without duplication of fees and charges imposed by Greymane and others. The Defendant's List of Documents does not identify any construction managers' records or accounts or supporting documents in relation to the ongoing project work which are documents that are clearly in the power and control of the Defendant and to which they have access and which are relevant as to the charges paid by the Defendants to Greymane for the project work carried out*."

Decision on Plaintiff's Discovery Application under the Petition Action:

58. The principal and primary relief sought under the Petition Action is made under section 111 of the Companies Act 1981 for the purchase of the Plaintiff's minority shares at fair market value.

59. I have considered the Defendant's 13 August offer letter together with Mr. Horseman's added assurances to the Court that the Defendant intends to consent to the section 111 relief. It would be a mismanagement of the Court's duties and powers under the Overriding Objective to order the Defendant to produce any further documents relevant only to the question of whether the Defendant Company has conducted its affairs in an oppressive or prejudicial manner. At this stage of these proceedings, I consider that the balance of the Petition Action would likely be disposed of once the fair market value the Plaintiff's shares is determined.

60. Any pursuit by the Plaintiff, (a minority shareholder (15%) who is not a director of the Defendant Company), for a winding up order is bound for a very steep uphill journey. In those circumstances, the Court would be misguided to compel the Defendant to produce extensive contractual documents for the purpose of the Plaintiff's quixotic pursuit for a winding up order.

61. For this reason I refuse the Plaintiff's request for the construction manager's accounts and records in the Petition Action.

Decision on Plaintiff's Discovery Application under Writ Action #2:

62. Mr. Horseman specifically objected to Mr. Dwyer's request for discovery of the subcontracts entered by Greymane Contracting Limited "Greymane". He argued that because Greymane is not a party to these proceedings it cannot be properly compelled to produce its contracts with other persons or entities who are also not party to any part of this consolidated action.

63. The Plaintiff says that reference to the Greymane sub-contracts would be necessary in assessing the loss suffered by the Plaintiff for having been wrongfully bypassed on the contract work to which it was contractually entitled. I do not accept this submission. In my judgment, the value of the Plaintiff's alleged losses under Writ Action #2 may be fairly assessed by the total costs owed by the Defendant Company under its contract with its construction manager, Greymane, and the other contracts to which the Defendant was directly party. I am also mindful that the Plaintiff also has recent possession of the Defendant's audited accounts from inception through to close of 2018. Further, this Court will not direct non-parties to this action to produce copies of its private contracts.

64. For these reasons I refuse the Plaintiff's summons application for specific discovery.

Conclusion:

65. I have found in favour of the Plaintiff under the Petition Action in refusing the Defendant's application for the Court to determine the preliminary issue under the Petition Action regarding the enforceability of the formula set out in the Agreement Letter which states that the Investor shall receive 5% on their investment from the time their funds were deposited with the Defendant until the date of repayment.

66. I have found in favour of the Plaintiff under Writ Action #1 in refusing the Defendant's application for a split trial on liability and quantum.

67. I have found in favour of the Defendant under Writ Action #1 in granting its application for specific discovery of all documents which are or have been in its possession, custody or power relating to the construction work actually done on Buildings 2 and 3 of the Azura Project. Unless the Plaintiff produces a list of all such documents within 21 days of the date of this ruling, the Specially Indorsed Writ (Case No. 467 of 2017) shall be struck out and dismissed in exercise of this Court's inherent powers.

68. I have found in favour of the Defendant under Writ Action #2 in granting its application for a split trial on liability and quantum. However, I have rejected the Defendant's proposed draft wording of the issues as to how liability should be determined.

69. I have found in favour of the Defendant under Writ Action #2 in granting its application for specific discovery. Accordingly, I order that the Plaintiff make and serve a supplemental list of all the documents which are or have been in its possession, custody or power relating to the construction work actually done on Buildings 2 and 3 of the Azura Project. The supplemental list of documents shall include any existing materials falling under the following class of documents relevant to the period between 1 October 2017 and 1 April 2019, inclusive:

    (i) The Plaintiff's bank statements for all business accounts Copies of any business contracts (valued at $5000.00 or more) to which the Plaintiff was party;
    (ii) Quarterly payroll tax returns;
    (iii) Documentation confirming the numbers of persons employed by the Plaintiff;
    (iv) Documentation showing the source of construction income; and
    (v) Documentation detailing professional fees of $222,321.01

70. My order for specific discovery in favour of the Defendant's application for disclosure of the above-listed class of documents shall be stayed pending further Order of the Court or the disposal of the trial on liability in respect of Writ Action #2.

71. I have found in favour of the Defendant under Writ Action #2 in refusing the Plaintiff's application for specific discovery of all documents which are or have been in its possession, custody or power relating to the Greymane's subcontracts with parties other than the Defendant Company. However, any outstanding contract documents to which the Defendant is directly party are to be disclosed to the Plaintiff it this has not yet already been done.

72. Unless either party files a Form 31D to be heard on costs within 14 days of the date of this Ruling, I award 70% of the Defendant's costs on a standard basis, to be taxed if not agreed.

Friday 6 September 2019

____

HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT