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IN THE SUPREME COURT OF JUDICATURE OF JAMCAICA

IN THE CIVIL DIVISION

CLAIM NO. HCV 5133 OF 2009

BETWEEN	BLACK BROTHERS INCORPORATED LIMITED	CLAIMANT
AND	HOUSING AGENCY OF JAMAICA LIMITED (Formerly the National housing Development Corporation Limited)	1 ST DEFENDANT
AND	WHITEHALL ESTATE PROVIDENT SOCIETY LTD.	2 ND DEFENDANT

Mr. Abe Dabdoub and Mr. Gayle Nelson instructed by Gayle Nelson and Company for the Claimant.

Mr. Patrick Foster and Ms. Tavia Dunn, instructed by Nunes Scholefield, Deleon and Company for the 1st Defendant.

Setting Aside of Default Judgment – C.P.R. 13. (3) (1) realistic prospect of successfully defending the claim – privity of contract.

Heard: 13th January and 11th February 2011

Campbell, J.

(1) On the 3rd February 2010, the 1st Defendant applied to set aside a Judgment in Default of Defence filed on 20th day of November 2010, and that the 1st Defendant be permitted to file its Defence within 10 days of the Order.

(2) The Claimant, a registered company, carries on the business of developers and contractors. The 1st Defendant, (NHDC) was incorporated to provide project financing and project management services for, inter alia, the Government of Jamaica (GOJ) housing programme called Operation Pride. The 2nd Defendant (Society) takes its name from a small rural community in the parish of Westmoreland, whose Provident Society is one of the

organizations that the housing programme is to benefit, and is a developer of lands which GOJ has made available.

(3) On or about the 13th March 2002, NHDC and the Society entered into a Loan Agreement in which NHDC has agreed to lend the Society the sum of \$528,883,126.18, which the parties estimated as the amount needed to complete the development of some 1,178 low income lots. This Loan Agreement provides that after the fulfilment of certain conditions, the Society shall be entitled to serve notice upon NHDC to advance to the Society sums to the extent certified in accordance with the provisions of the contract.

(4) On the 30th April 2001, the Society contracted Claimant to complete the development for a consideration of \$572,259,811.00 or such other sums as may become payable under the provisions of the contract at the times and in the manner prescribed by the contract. The Agreement deemed six specific documents as being part of the Agreement, i.e., (a) Letter of Acceptance, (b) the said Tender, (c) the Conditions of Contract, (d) the Specifications, (e) the Drawings, The Bill of Quantities.

(5) On the 29th September 2009, the Claimant filed a claim for the amount \$145,934,794.41, and alleged in his particulars, inter alia, the Agency (NHDC) and Whitehall (Society) on the one part and Black Brothers on the other part, entered into an agreement for Black Brothers to carry out, inter alia, certain infrastructure work on Phase 11 of the Whitehall Project.

The law

(6) The Civil Procedure Rules (2006) 13.3 (1), provides;

“The court may set aside or vary a judgment under Part 12 if the defendant has a real prospect of successfully defending the claim.”

It is clear that the defence tendered should be more than just arguable. In **Swain v Hillman and Another** (2001) 1 ALL ER 91, the English Court was examining the term “real prospect” in relation to summary judgment proceedings. The defence must have a real and not a fanciful prospect of succeeding.

(7) In **ED & FMan Liquid Products Ltd v Patel & Anor**, Lord Justice Potter said,

“I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observations in *Saudi Eagle* that the defence sought to be argued must carry some degree of conviction. Both approaches require the Defendant to have a case which is better than merely arguable . . .”

It is also clear that it is not a part of my function in hearing this application to embark on a “mini-trial”

The Applicant’s Case

(8) The applicant pointed to paragraph 4 of the Particulars of Claim, which was at the nub of the Claimant’s case. It was urged that para 3 of the draft defence exhibited to the affidavit in support, provided an answer in its denial of any “privity of contract” between the Claimant and NHDC. Paragraph 4;

“The 1st Defendant denies the allegations contained in paragraph 4 of the Particulars of Claim. The 1st Defendant says that it did not enter into any agreement with the Claimant as alleged or at all and specifically denies that it had any agreement with the Claimant as alleged or at all in relation to Phase 1 or Phase 11 of the Whitehall Project or any other project. The agreement attached and exhibited to the said paragraph of the Particulars of Claim as “BB1” is in support of the allegations contained therein, in fact, an agreement between Whitehall Land Development Organisation/Whitehall Citizens association on one hand as employer and the Claimant on the other hand as contractor.”

(9) The issue is whether NHDC is a party to the agreement between the Society and the Claimant. Mr. Foster submitted that the documentary evidence does not support such a claim. He argued that the claimants have not pleaded the existence of any other contract it may have entered into with the 1st Defendant and has not exhibited any other contract. The Claimants are unable to allege that the language of the loan agreement between NHDC and the Society incorporates the contract between the Society and the Claimant. The infrastructure contract between the Claimant and the Society is separate and distinct from the Loan Agreement.

(10) At paragraph 11 of its Defence,

“The Applicant says that the Claimants failure to honour its commitment to the development of Whitehall Phase 11 and its decision to abandon the Whitehall Phase 11 project in June 2007 and thereafter refusing to resume infrastructure work after it had been advised to do so by the Engineers of the Development.”

The Claimants

(11) The crux of the Claimant's submission is;

- a) That the Defendants on the one part and the Claimant on the other part entered into an agreement for the Claimant to carry out, inter alia, certain infrastructure work on . . . the Whitehall Project (Particulars of Claim; para. 4).
- b) That pursuant to the said agreement, the 1st Defendant is liable to pay to the Claimant or to its order, sums claimed by the Claimant in respect of works carried out on the Whitehall Project, upon certification of such sums by the Project Engineer and after verification of the said sums by the 1st Defendant's Quantity Surveyor.
- c) That the judgment entered is for the Claimant's claim in respect of certificates #23 and # 5, the said sums therein having been duly certified by the Project Engineer and verified by the 1st Defendant Quantity Surveyor.

(12) The Claimant points to the central involvement of the NHDC in the Whitehall project, through its Engineers and Quantity Surveyors. The Claimants argued that NHDC's case is ambivalent, in that they are contending no privity between themselves and the Claimant,

however, they have counter-claimed to recover sums outstanding as overpayment on the payment certificates.

(13) The Claimant further contends that the terms of the agreement on which they rely are to be found in the oral undertakings made at a meeting of the parties at the Pegasus Hotel in 2003, (2) correspondence in which NHDC acknowledges its obligations to pay the Claimant on the basis of certificates presented for the works done at Whitehall. (3) Letter dated 5th May 2008 on the letterhead of NHDC, where he writes that;

“Through a mutual agreement, the contractor and the corporation have agreed to conclude the projects currently contracted between the Provident Society and Black Brothers Inc.Ltd.”

(4) Letter dated 15th October 2004 in which the NHDC gives their irrevocable undertaking to pay over certain sums due to Capital Solutions, (5) 29th March 2007, letter of NHDC, advising the Society of the NHDC's intention to cease funding the Project, and that they would not be entertaining any request for payment by the contractor (1st Defendant) . . . in connection with the project. The Loan Agreement, Clause 2, and a letter from NHDC to the Claimants, in which the Claimants were urged to move expeditiously to complete this contract in a satisfactory manner.

(14) The oral contract which, according to the Claimant, was formed out of discussions had at the Pegasus Hotel was not pleaded. The facts in relation to these meeting are disputed; a dispute which could not be resolved without the benefit of cross-examination. The letters at (2) - (5) concern the execution of the 1st Defendant's obligations pursuant to the Loan Agreement. Those obligations, according to NHDC are owed to the Society and not to the Claimants. The participation of the NHDC's Quantity Surveyor is to ensure that the funds of the lender, NHDC, are not disbursed unless certain requirements are satisfied. The complaint of the Counsel for the

NHDC, that the pleadings do not disclose any allegation of a co-lateral agreement is well grounded.

(15) The interesting feature of the application is that the brunt of the arguments were focused on whether the claim as pleaded could maintain the action, the hearing taking on the feel of an application to strike out the Claimant's case. The application soon became an inquiry into the sustainability of the Claimant's case. In the language of football, the scrimmage was taking place before the Claimant's unattended goal and not before NHDC's goal as one would expect in an application of this type. The Claimant it was, who was called upon, in the absence of documentary evidence, to prove that it had a contract with the NHDC. The Claimant had the further difficulty of adducing evidence to prove their assertion that the actions of the NHDC, pursuant to its obligations, also evidence a co-lateral agreement with the Claimant. There was no documentary evidence to support the Claimant's allegation that the 1st Defendant had breached an agreement with him. In demonstrating the deficiencies in the Claimant's case, the 1st Defendant demonstrated that it satisfied the requirement of a realistic prospect of successfully defending the case.

(16) The other pre conditions of 13.3 (1) (a) and (b) were not the subject of much debate before me. The 1st Defendant's uncontroverted evidence is that several attempts were made to contact the Claimant's attorney-at-law. The affidavit of Simone Jarrett, in support of the application, alleged at para 5, that the Claim Form and Particulars of Claim herein were filed on the 29th September 2009 and served on the Agency by bearer on the 30th September 2009; para 6 that an Acknowledgement of Service was filed by them on our behalf on the 14th October 2009 and para 7, that the time limited for filing the defence herein expired on the 12th November 2009. Mr. Patrick Foster, Q.C. telephoned Mr. Gayle Nelson on the 9th November 2009 to request his

consent to file Defence out of time . . . advised that he was out of office. In the absence of a return call, Mr. Foster renewed his efforts to contact Mr. Nelson, he was met with the same response; Mr. Nelson was out of office. Letter was sent to Mr. Nelson's office requesting consent to file Defence out of time.

(17) I accept that, in the circumstances, the delay was not inordinate and a good explanation for filing a Defence has been tendered. I find that the 1st Defendant has a real prospect of successfully maintaining his assertion that it was not party to any agreement with the Claimant with respect of the execution of the Whitehall development. The 1st Defendant has a case that carries a real conviction that its involvement in the Whitehall was in keeping with its obligations under the Loan Agreement with the Society. The Judgment in Default of Defence filed on the 20th November 2010 is set aside. The 1st Defendant is permitted to file its Defence within ten days of this Order.