IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00440

BETWEEN	**DOKS WELL CONSTRUCTION COMPANY LIMITED**	**FIRST CLAIMANT**
	CHIN'S CONSTRUCTION LIMITED	**SECOND CLAIMANT**
AND	**THE CARIBBEAN MARITIME UNIVERSITY**	**DEFENDANT**

Application for Summary Judgement and to strike out- Building contract- "No assignment" clause- Whether 2nd Claimant lawfully assigned contract to 1st Claimant-Whether Defendant waived no assignment clause-Whether 1st Claimant entitled to claim in name of 2nd Claimant by subrogation- Whether claim has no real prospect of success.

Mr. Conrad George and Mr. Andre Sheckleford instructed by Hart Muirhead Fatta for the Claimant.

Ms. Symone Mayhew QC and Ms. Ashley Mair instructed by Mayhew Law for the Defendant.

Heard: 14th July, 2021.

In Chambers Via ZOOM

Cor: Batts J.

[1] In this matter both Claimants and the Defendant applied for summary judgment. Mr. Conrad George, for the Claimants, indicated that he was unwilling to proceed with his application at this time because he was awaiting further evidential material. In the result only the Defendant's application for summary judgment and/or to strike out the claim was heard.

[2] After hearing arguments, and considering the written submissions and evidence before me, I refused the application. My reasons for so doing may be shortly stated.

[3] Mr. George took hearsay objections with respect to the contents of the affidavit filed by the Defendant. I overruled the objection. The affiant, Mr.Evan Duggan,is the interim president of the Defendant. Although he was not present, and in consequence has no personal knowledge of the events involved, he is entitled to attest to the Defendant's records. This is also because affidavit evidence may contain "Information and belief" so long as the source is stated.

[4] The claim concerns a contract for services being certain works of construction. The Defendant retained the 2nd Claimant to do that work by a contract dated 16th November 2016. The Claimants allege that the first Claimant was an assignee of the 2nd Claimant. In consequence it was the 1st Claimant who performed the contract and who is entitled to be paid. Alternatively, and in the event the assignment is for any reason invalid, the 1st Claimant has with the permission of the 2nd Claimant brought this claim on behalf of and/or in the name of the 2nd Claimant.

[5] The Defendant contends that the or any alleged assignment of the contract is null and void as it is expressly prohibited by the terms of the contract. They contend further that, if the assignment is bad, the 2nd Claimant cannot lend its name to be used in the action. The Defendant also denies that the 1st Claimant was a subcontractor. Certain alleged variations are challenged and it is asserted that the project manager did not approve them. Interestingly the Defendant '*admits that it has had the use and benefit of the building since the issue of the certificate of*

practical completion but denies that it has been unjustly enriched." [see paragraph 14 of Defence.].

[6] Queen's counsel, in her usual thorough but concise style, submitted that the relevant contractual provision absolutely forbade any assignment:

> "*Clause 7.1. The contractor may sub contact with the approval of the Project Manager but may not assign the contract without the approval of the Procuring Entity in writing. Sub-contracting shall not alter the contractor's obligations*."

[7] The consequence, it was submitted, is that as a matter of law the 1st Claimant could not succeed. There could be no valid assignment of the contract and, as there had been no written consent, neither could there be a valid sub contract. Authorities were citied to demonstrate that the courts took a strict view of these "no `assignment" clauses see, ***Helstan Securities Ltd v Hertfordshire CC[1978] 3 ALL ER 262*** and ***Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd et al [1994] 1 AC 85*.** Furthermore, even where the benefit of a contract was conferred, the court would refuse to allow the effect of the clause to be subverted by quasi-contractual remedies, see per Justice Reyes,

> ***"12. Where parties have expressly or impliedly allocated risks among themselves through a network of back to back or interlocking agreements, the law of restitution will not without compelling reason interfere with that allocation ….. Attempting to do justice between A and B alone may lead to injustice being done as between B and C", Yew Sang Hung Ltd v Hong Kong Housing Authority [2008] HKCA 109.***

[8] I was reminded that in these applications the test is whether a party's case has no real prospect of success. Further that, although not required to make findings of fact, where a clear point of law or construction is raised the court should decide the issue, see the decision of Edwards J (as she then was) in ***Ocean Chimo Ltd v Royal Bank (Jamaica) Ltd et al [2015] JMCC Comm 22 @ paragraph 52*.** It

was submitted also that the claim should be struck out as the pleadings disclose a case that will not succeed.

[9] These points are well made. In this case however, two factors militate against a summary judgment or a striking out. In the first place the Claimant asserts that in the course of the project the Defendant and its representatives accepted that the 1st Claimant had been sub contracted and/or assigned to the project. The written terms notwithstanding, the 1st Claimant says that, at all material times the Defendant treated directly with them. In other words, there has either, been a waiver of the strict terms of the contract or, the Defendant is by its conduct estopped and precluded from denying the 1st Claimant's entitlement to be paid for the work done. The full benefit of which has been received by the Defendant. It is this question of the alleged knowledge and conduct of the Defendant which distinguishes the case at bar from those citied to me. These factual issues can only be determined after a trial.

[10] The fact, as the Defendant puts it, that all cheques and invoices were in the 2nd Claimant's name is not dispositive of the issue. This is because it is the Defendant's case that the documentation was not indicative of the true dealings between the parties. It is a question of fact for a trial Judge whether the Defendant knowingly treated with the 1st Claimant and thereby waived the non-assignment clause and whether the Defendant's representatives had the capacity to do so. These questions of mixed law and fact are best reserved for a trial. I rely on the words of Chief Justice Gleeson, in the High Court of Australia, in ***Lumbers v W Cook Builders Pty Ltd (In Liquidation) [2008] 4 LRC 683 @ 718:***

> ***"[127] The second observation to be made is more general. It is that identification of the rights and obligations of the parties, in this case as in any matter, requires close attention to the particular facts and circumstances of the case. Necessarily that requires close attention to what contractual or other obligations each owes to the other."***

[11] The second factor which militates against a summary judgment is that the 2nd Claimant is the contractor. The issue here is whether a claim can lawfully be brought in the name of the 2nd Claimant by the 1st Claimant. The 1st Claimant is essentially relying on principles of subrogation. The argument is that, due to the dealings between the 1st and 2nd Claimants, the 2nd Claimant has allowed a claim to be brought in its name. Queen's Council submitted that, when regard is had to the terms of the contract, this is not legally possible as a matter of law. I do not agree. Let us suppose the contract was performed by the 2nd Claimant. Thereafter, because money was owed by the 2nd Claimant to the 1st, they arrived at a bargain. To that end the 2nd Claimant pledged the fruits of its contract to the 1st Claimant and, if necessary, permitted suit in its name. It seems to me that this is an example of a situation in which subrogation is possible.

[12] Does it make a material difference that the work, for the price of which the 2nd Claimant is claiming, was actually done by the 1st Claimant? Perhaps not. Such a conclusion would mean that although the contract was performed to satisfaction, since it was not performed by the 1st Claimant, the Defendant could refuse to pay anyone. I regard such a conclusion as startling and one which only a judge after trial should decide. Queen's Council, when I put this to her, denied that her client was refusing to pay. In that event her client can simply draw a cheque for the amount they contend is due, having taken into account any loss resulting from the contractual breach, and make it payable to the entity with which they have contracted. Alternatively, they may make a payment into Court. The 2nd Claimant is entitled, if paid, to pay over that money to whomever it wishes. It is no business of the Defendant.

[13] It seems to me, for all the reasons stated above, that it cannot be said that the claims brought by the 1st and/or 2nd Claimants have no real prospect of success or, that the pleadings disclose a case which must fail. I therefore, on the 14th July 2021, made the following orders:

a) Application refused

b) Costs to the Claimants to be taxed or agreed.

c) Permission to appeal is granted.

d) Parties are to proceed to Mediation which should be completed on or before November 26, 2021.

e) Case Management Conference fixed for the 1st December 2021 at 12 noon.

f) Formal Order is to be prepared, filed and served by Claimant's attorney at law

David Batts
Puisne Judge