THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT CHRISTOPHER AND NEVIS
SKBHCV2020/0022

BETWEEN:

TERNION ST KITTS LTD

Applicant/Claimant

and

DDM PROPERTIES LIMITED

Respondent/Defendant

Before:
MASTER MICHELLE JOHN-THEOBALDS (AG.)

APPEARANCES (via Zoom)
Appearances:
Ms. Derriann Charles of counsel for the applicant/claimant
Ms. Midge Morton with Ms. Maurisha Robinson of counsel for the respondent/defendant

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2021: March 16th;
October 27th

JUDGMENT

[1] **JOHN-THEOBALDS M [AG.]**: This is an application by the applicant/claimant seeking an order that the respondent/defendant make an interim payment to it on account of the sums claimed in the Claim Form and Statement of Claim filed on 10th February, 2020.

Background

[2] On 28th February, 2019, the parties entered into a contract for construction works ("the contract"). The respondent sought to terminate the contract with

immediate effect by letter of the 6th December, 2019. This letter cited issues with respect to delays and the quality of work carried out by the applicant.

[3] The applicant responded by letter on 13th December 2019, stating that it never received notice from the respondent in relation to issues with the quality of work carried out under the contract prior to the termination and that no opportunity was afforded to the applicant to address or remedy the same. The letter further sought to invoke Clause O of the contract which stipulated that any claim arising out of the contract shall be subject to mediation prior to litigation and proceeded to suggest three quantity surveyors for the respondent's consideration.

[4] The respondent, in its letter of 20th December 2019, indicated that it had unilaterally retained an expert and was in the process of preparing a full report and asked to be given until 10th January 2020, to provide the same. The applicant responded, by letter dated 31st December 2019, requesting that the sums that were owed to the subcontractors in relation to the works carried out be settled while the parties continued to attempt to resolve their respective claims.

[5] The respondent neither responded to this letter, nor settled the outstanding sum requested. The applicant also received no further communication from the respondent in relation to the suggestion of mediation. As a result, the instant action was commenced to recover unpaid costs for contract works and termination costs pursuant to the contract.

[6] The respondent however filed a counterclaim for a number of failures which it alleges were committed by the applicant in the contract. Consequently, the respondent avers that it does not owe the applicant any damages because of the alleged breach and is in fact counterclaiming for damages arising to it as a consequence of the applicant's negligence and or breach of the contract.

[7] The payment being sought by the applicant, is for the sum of One Hundred and Eighty-Three Thousand, Eight Hundred and Fifty-Two United States

represents the costs of work done up to the date of termination together with its 10% profit of all costs pertaining to the project, pursuant to the agreement made between themselves and the respondent.

Applicant's submissions

[8] The applicant submits that it would be successful at trial based on the test under rule 17.6 of the Civil Procedure Rules. The basis for this contention is that the action seeks to recover unpaid costs for contract works and termination costs pursuant to the contract.

[9] The Amended Defence and Counterclaim relies on an Appraisal Report of Williams Architectural ("the report") dated 7th January, 2020 and revised on 5th March, 2020. The applicant avers not only was it not aware that this report was being carried out and so was not present when it was being done but also that it never agreed to the report.

[10] The applicant submits that it is on the basis of this report solely that the respondent has filed a counterclaim for the costs of remedial works. The applicant goes on to contend that while the report seeks to quantify the cost of remedial works needed on the property, nothing in it ties any of the works reviewed to the applicant. The only issue raised in the action relates to the quality of the work carried out by the applicant. The respondent has not adduced any evidence of payment made by it in relation to any remedial works on the property.

[11] The applicant avers that even more prejudicial in the circumstances, is the fact that further works have been carried out by the respondent on the property. The applicant submits that the actions of the respondent in this regard, has rendered any independent review and/or evaluation of the quality and/or value of the applicant's work impossible. The only evidence on which the respondent can rely, at this stage, or at trial, is the report and that report was done without the applicant's knowledge or agreement.

[12] The applicant further contends that the report on which the respondent solely relies for its counterclaim highlights a few pertinent issues including the fact that normally, the assigned contractor would be given the opportunity to correct its work. If the contractor is removed from the project, then in order to arrive at an agreed value for the corrective work, the owner would need to secure three quotations for each area of corrective sub-trade work. Alternatively, the owner may secure three quotations from three independent contractors who provide a bid for all corrective work. The owner and contractor would then agree on the preferred quotation and the value of the quote would then be deducted from monies owing to the contractor.

[13] The essence of the applicant's grievance is that the respondent failed, refused or neglected to follow any of the procedures set by the report on which it it is now seeking to rely for the settlement of its claim for costs for remedial works. The applicant submits that this is the same procedure which it suggested in its letter of 13th December 2019. The applicant further submits that the respondent ought not to be allowed to rely on the report when it is itself in breach of the recommendations contained therein.

[14] The applicant contends that in all the circumstances, the respondent would not succeed in making the findings of the report binding on the applicant and having not pleaded or produced any evidence whatsoever of any actual expenses in relation to alleged remedial works, on a balance of probabilities, its counterclaim would be dismissed at trial.

[15] The applicant further submits that at no point in any of the documentation filed in this matter does the respondent deny receipt of the materials and invoices for works for which the applicant is seeking payment. Additionally, the applicant submits that the respondent has not adduced any reliable evidence in relation to the remedial works done as pleaded in its defence and counterclaim.

[16] The applicant submits that it in all the circumstances, on a balance of probabilities it would succeed in being awarded a substantial sum at the trial of

the action and for this reason its application for an interim payment ought to be granted.

Respondent's Submissions

[17] The respondent submits that upon consideration of an application for interim payment, the burden of proof lies with the applicant to convince the court (i) that if the matter proceeds to trial, it will obtain judgment for a substantial sum and (ii) and if so, what amount should be ordered by the court at this stage. The authorities not only place the burden of proof on the applicant, but also sets the bar a little higher with respect to the civil standard of proof.

[18] The respondent invited the court to consider the learning expressed in the decision of **Thomas Lyndon et al v. Barnes Bay Development Ltd et al**[1], where it was stated at paragraph 61 that:

> "For the sake of completeness it is worth stating that the rule requires the court to be satisfied that the Lydons will win on a balance of probabilities. Being likely to succeed at trial is not enough. See British and Commonwealth Holdings plc v Quadrex Holdings Inc [1989] 2B 842 and Herdelburg Graphic Equipment Ltd v Commissioners of HM Revenue and Custom [2009] STC 2334."

[19] It is the contention of the respondent, that the current application for an interim payment is flawed for the following reasons:

(i) none of the alleged sub-contractors are party to the suit;

(ii) the applicant has not established privity of contract between the respondent and the subcontractors which would give rise in law to an obligation on the part of the respondent to satisfy any debt allegedly owed to the third party contractors;

(iii) the gravamen of the respondent's defence and counterclaim is that the applicant is liable to it for damages as a result of its negligence in the carrying out of its duty under the contract and that the work performed was of less than merchantable quality and

[1] AXAHCV0051/2008 (decided on 12 December 2010); unreported.

as such went to the root of the contract, thereby giving rise to liability.

The respondent submits that these issues are not preliminary in nature, but are fact-heavy and would require extensive evidence at the trial of the matter not before. It therefore cannot be said, that this is a matter which would be suitable for the court to make an order for an interim payment by simply reviewing the pleadings which have already been filed.

[20] The respondent avers that the applicant has not convinced the court that it will win. If the defence is on the border of having a real prospect of success then, it is difficult for a court to find that the applicant will be successful at the trial of the matter. The respondent argues further that where there are disputes as to facts, it is not proper for the court to engage in a mini-trial since, at this stage of the pleadings, as all the litigants are expected to do in accordance with Parts 8 and 10 of the Civil Procedure Rules, is to set out their respective statements in as concise a form as possible.

[21] The respondent submits that in dealing with an application for an interim payment, the court has a duty to consider the existence of a set-off or a counterclaim which has prospects of success. Therefore the court must consider the counterclaim filed by the respondent claiming relief arising out of the alleged negligent conduct of the applicant.

[22] The respondent goes further to argues that the authorities provide that at this stage of the proceedings, the court should also consider any prejudice to the parties, which may or may not arise from the granting or not granting of the order sought. The respondent submits that if the court were to grant an interim payment order as the applicant requests, this would result in obvious prejudice to the respondent, having regard to the pleaded defence and counterclaim in which the respondent raises challenges to a number of issues including the standard of workmanship by the applicant under the contract. The respondent avers that the applicant was required to perform the work in a "workmanlike" manner but failed to do so and it has evidence in support of this contention. If

the court were to grant an interim payment order under these conditions, it would have decided summarily on a principal aspect of the respondent's case without affording the respondent the opportunity to extend and explore its defence and counterclaim by going through the exchange of witness statements and cross-examination at trial processes.

[23] The respondent contends that if the applicant is unsuccessful on the first leg of the test then there is no need for the court to consider the second leg, that is, what quantum the court give grant on an interim payment order. For the above reasons the respondent finds that the application must fail.

The Law on granting an interim payment.

[24] The Civil Procedure Rules 2000 provide as follows:

Orders for interim remedies

"17.1

1. The court may grant interim remedies including-

...

(m) an order (referred to as an "order for interim payment") under rules 17.5 and 17.6 for payment by a respondent on account of any damages, debt or other sum which the Court may find the respondent liable to pay."

[25] The Rules go on to state:

Interim payments – general procedure

"17.5

1. The applicant may not apply for an order for an interim payment before the end of the period for entering an acknowledgment of service applicable to the respondent against whom the application is made.
   - Rule 9.3 sets out the period for filing an acknowledgment of service.

2. The applicant may make more than one application for an order for an interim payment even though an earlier application has been refused.

3. Notice of an application for an order must be –
   - served at least 14 days before the hearing of the application; and
   - supported by evidence on affidavit.

4. The affidavit must –

- exhibit any documentary evidence relied on by the applicant in support of the application;
- set out the grounds of the application;
- state the applicant's assessment of the amount of damages or other monetary judgment that are likely to be awarded; and
- if the claim is made under any relevant enactment in respect of injury resulting in death – contain full particulars of the –
  (i) nature of the claim in respect of which the damages are sought to be recovered; and
  (ii) person or persons for whom and on whose behalf the claim is brought.

5. If the respondent to an application for an interim payment wishes to rely on evidence or the applicant wishes to rely on evidence in reply, that party must –
   - file the evidence on affidavit; and
   - serve copies on every other party to the application; at least 7 days before the hearing of the application.

6. The court may order an interim payment to be made in one sum or by instalments.

Interim payments – conditions to be satisfied and matters to be taken into account

17.6

1. The court may make an order for an interim payment only if –

...

d. (except where paragraph (3) applies), it is satisfied that, if the claim went to trial, the applicant would obtain judgment against the respondent from whom an order for interim payment is sought for a substantial amount of money or for costs; "

Discussion

[26] Rule 17.6(1)(d) of the Civil Procedure Rules provides the conditions under which an order for an interim payment can be made. It clearly expresses that in order for an interim payment to be payable, the court must be satisfied that, if the claim went to trial, the applicant would obtain judgment against the respondent for a substantial amount of money or for costs. There is no requirement for the court to be satisfied that the claim succeeds in its entirety. What the court must be satisfied of is that a substantial amount of money would be ordered to be paid by the respondent.

[27] The test for the grant of an interim payment is set out in the Court of Appeal case of **GKN Group v Revenue and Customs Commissioners**[2]. In this case Lord Justice Aikens was of the view that three points of constructions arise from this rule:

(i) firstly, what is meant by it is satisfied that;

(ii) secondly, what is meant by if the claim went to trial the applicant would obtain judgment for; and

(iii) finally, what is meant by a substantial amount of money.

[28] At paragraphs 33, 34 and 36 of the judgment Lord Aikens discussed the first point:

> "On the first point, it is obvious that the Applicant seeking the Interim Payment has the burden of satisfying the court that the necessary conditions have been fulfilled for it to consider exercising the power to grant an Interim Payment order. An Interim Payment order is one that is obtained in civil proceedings. Whatever conditions have to be satisfied must be the usual standard of proof in civil proceedings unless there is an express indication in a statute or rule of court to the contrary..... In the case of an application for an Interim Payment order under CPR Pt 25.7(1)(c), of course, the Applicant has to satisfy the court on a balance of probabilities about an event that has not, in fact, occurred; that is, that if the claim went to trial, he would obtain judgment (and for a substantial amount of money). That leads on to the next and more important question: of what does the Applicant have to satisfy the court? To which the answer is: that if the claim went to trial, the Applicant would obtain judgment for a substantial amount of money from this Respondent. Considering the wording without reference to any authority, it seems to me that the first thing the judge considering the Interim Payment application under para (c) has to do is to put himself in the hypothetical position of being the trial judge and then pose the question: would I be satisfied (to the civil standard) on the material before me that this Applicant would obtain judgment for a substantial amount of money from this Respondent.

[29] At paragraph 38 the Court discussed the second point.

> "In this paragraph Lord Aikens stated: The second point is what precisely is meant by the court being satisfied that, if the claim went to trial, the Applicant "would obtain judgment for a substantial amount of money"? In my view this means that the court must be satisfied that if the claim were to go to trial then, on the material before the judge at the

[2] [2012] EWCA Civ 57.

> time of the application for an Interim Payment, the Applicant would actually succeed in his claim and furthermore that, as a result, he would actually obtain a substantial amount of money. The court has to be so satisfied on a balance of probabilities. The only difference between the exercise on the application for an Interim Payment and the actual trial is that the judge considering the application is looking at what would happen if there were to be a trial on the material he has before him, whereas a trial judge will have heard all the evidence that has been led at the trial, then will have decided what facts have been proved and so whether the Applicant has, in fact, succeeded. In the latter case, as Lord Hoffmann makes plain in Re B ([2008] AC 561 at 2) if a judge has to decide whether a fact happened, either it did or it did not: the law operates a "binary system" and there is no room for a finding that it might have happened. In my view the same is true in the case of an application under CPR Pt 25.7(1)(c). The court must be satisfied (to the standard of a balance of probabilities) that the Applicant would in fact succeed on his claim and that he would in fact obtain a substantial amount of money. It is not enough if the court were to be satisfied (to the standard of a balance of probabilities) that it was "likely" that the Applicant would obtain judgment or that it was "likely" that he would obtain a substantial amount of money.

[30] The final point was discussed at paragraph 39 where Lord Aikens stated:

> "Next there is the question of what is meant by "a substantial amount of money". In my view that phrase means a substantial, as opposed to a negligible, amount of money. However, that judgment has to be made in the context of the total claim made. What is a substantial amount of money in a case where there is a comparatively small claim may not be a substantial amount when the claim is for a much larger claim? It may be that in very small claims an Applicant could never satisfy the court that, even if it obtained judgment, the amount of money it would obtain would be "substantial". But that is not this case and each must be decided on its facts."

[31] The question that must be asked therefore is whether the court is satisfied, on a balance of probabilities, that if the claim went to trial, based on the material currently before it, the applicant would obtain judgment for a substantial amount of money.

[32] Following the guidance laid out by the court in **GKN Group v Revenue and Customs Commissioners**, I must put myself in the position of the trial judge and determine, based on what is before me, whether it is likely that the applicant would succeed in its claim and would obtain judgment for a substantial amount

of money, in this case at least or over the sum of US$183,852.48 as requested by the applicant.

[33] In the statement of claim filed on 10th February, 2020, the applicant has claimed the sum of US$281,003.31 or approximately EC$750,278.84 or such other greater sum that represents actual costs due and owing for work done by the applicant at the respondent's property situated at Front Street, Palmetto Point, Trinity, St. Kitts, together with all costs of termination, demobilization costs and termination charges by subcontractors and vendors, plus 15% of all such costs for overheads and profit.

[34] In the defence filed on 12th March 2020, the respondent has challenged the amount claimed by the applicant and has counterclaimed for loss and damage suffered in the sum of EC$1,367,872.20. The basis of the respondent's counterclaim would include a challenge to the sums as invoiced by the applicant for reasons such as excess and inflated billings, unsubstantiated and unitemized billing for work done and items used to carry out the project.

[35] Rule 17.6 (4) of the Civil Procedure Rules requires that the sum awarded to the applicant for interim payment must not be more than a reasonable proportion of the likely final judgment. Also, in determining the interim payment award, the Civil Procedure Rules requires the court to take into account any set off claimed by the respondent and any counterclaim.

[36] It is clear from the pleadings that the issues in this case are fact sensitive. While the applicant's claim is for unpaid works, the value of these works is being disputed by the respondent. The applicant claims the sum of US$183,852.48 being the sum due and owing to the subcontractors and or suppliers. In contrast, not only has the respondent challenged the case put forth by the applicant but, in the First Affidavit of David Fletcher, the respondent has also challenged the invoices of the applicant on many grounds. The respondent also counterclaims for remedial works done on the property and relies on the report to prove this. The applicant argues that respondent should not be allowed to rely on the report which was done without their knowledge or participation. Further, the remedial

work undertaken by the respondent has negated the possibility of the applicant's conduct of any independent review and/or evaluation of the quality and/or value of the work, neither has it given the applicant an opportunity to correct its work.

[37] The sums claimed by both parties are at considerable variance, as is the evidence adduced thus far. The proceedings had only reached the stage of a reply being filed when the application for an interim payment was made. Witness statements have not yet been filed and so the only information on which the court can determine this application is on what is before it. It is trite that witness statements usually amplify pleadings and so it may very well be the case that all the facts on which the respondent, and dare I say possibly even the applicant as well, are not before the court.

[38] The dicta of Lord Hope in **Three Rivers District Council and others v Bank of England (No. 3)**[3] was applied by our Court of Appeal in **Eastern Caribbean Flour Mills Ltd. v Ormiston K. Boyea.** Barrow JA, as he then was, in referring to the use of witness statements had the following to say:

> "43. Lord Hope's reproduction and approval of the exposition by Lord Woolf MR in **McPhilemy v Times Newspapers Ltd** on the reduced need for extensive pleadings now that witness statements are required to be exchanged, should be seen as a clear statement that there is no difference in their Lordships' views on the role and requirements of pleadings. The position, as gathered from the observations of both their Lordships, is that the pleader makes allegations of facts in his pleadings. Those alleged facts are the case of the party. The "pleadings should make clear the general nature of the case," in Lord Woolf's words, which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand to mean pleadings with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader's case.
>
> [44] It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings. The

[3] [2001] 2 All ER 513.

issue in the **Three Rivers** case was the need to give adequate particulars, not the form or document in which they must be given. In deciding that it was only the pleadings that she should look at to decide what were the issues between the parties the judge erred, in my respectful view. If particulars were given, for instance, in other witness statements the judge was obliged to look at these witness statements to see what the issues between the parties were. It follows, in my view, that once the material in Mr. McAuley's witness statement and Report could properly be regarded as particulars of allegations already made in the pleadings such material was relevant and, therefore, admissible. This proposition applies equally to the contents of the documents identified as Tabs 31 and 33."

[39] The respondent submits that it would be difficult for the court, at this stage, with a duty to go through all of the evidence (but not to conduct a mini-trial), to decipher without witness statements and cross-examination, which witness is more convincing and who is entitled to what. I agree with the respondent in this regard.

[40] The case law is clear that the interim payment procedure is not suited to cases of serious dispute on issues of fact or law. In this case the issues in relation to the sums owed are heavily disputed and has given rise to a situation where the same cannot be resolved without witness evidence and cross examination which takes place at a trial. In the absence of such, it is unlikely that the court will be able to accurately predict the outcome of the trial.

[41] In **Joseph Pinder v Trishel Wettherill**[4], Pereira JA (as she then was) elucidating on the suitability of interim payments in such cases held:

> "5. Taking into account the tenor of CPR 17.6 and the case of **Schott Kem Ltd. v Bentley and Others**, the principles guiding the exercise of the court's discretion in such circumstances are clear. The court must be satisfied that the applicant would obtain judgment based on more than the making out of a prima facie case. Although evidence meeting the criminal standard of proof (beyond reasonable doubt) is not required, the burden, (on a balance of probabilities) is high.
>
> 6. Further, the Schott Kem case is also authority for the principle that the interim payment procedure is not suited to cases of

[4] ANUHCVAP2011/041, delivered on 5th June 2012, unreported.

> serious disputes on issues of fact or of law. The version of events here are very much in conflict and gives rise to a situation which cannot be resolved in the absence of cross examination at a trial as to liability and then further, as to the degree of liability."

[42] The question which must be asked is whether, using the evidence before me, I am able to satisfy myself on a balance of probabilities that the applicant will be awarded a substantial amount of money at trial. In my view, I cannot. The court only has the benefit of the pleadings, up to a stage of a reply, to go on and the full spectrum of the evidence to be relied on at trial by either party has not been adduced. Given the heavily contested nature of this matter, I am not satisfied on a balance of probabilities that the applicant has successfully proved their case and should be granted an order for interim payment. I dare say that it would be an injustice to the case to do so and would not advance the overriding objective of the Civil Procedure Rules to deal with cases justly.

Conclusion

[43] For the reasons set out above, I hereby order:

(1) The application for an interim payment is refused.

(2) Costs to the respondent in the sum of $750.00.

(3) The matter is to proceed in accordance with the Rules.

[44] I am truly grateful to counsel for their helpful submissions.

Michelle John-Theobalds
Master [Ag.]

By the Court

Registrar