

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION**

**2018/CLE/gen/177**

**BETWEEN**

**ESSEX GLOBAL CAPITAL, LLC**

**Plaintiff**

**AND**

**PURCHASING SOLUTIONS INTERNATIONAL, INC**

**Defendant**

**Before:** The Honourable Madam Justice Indra H. Charles

**Appearances:** Mr. Ferron Bethell with him Mrs. Viola Major of Harry B. Sands,  
Lobosky & Company for the Plaintiff  
Mr. Stephen Turnquest with him Ms. Syneisha Bootle of Callenders  
& Co. for the Defendant

**Hearing Date:** 3 October 2019

**Practice - Order 43 - Right to an accounting - Purchasing Agent Agreement - Assignment  
- Order 31A – Court’s case management powers**

Pursuant to Order 43 of the Rules of the Supreme Court, the Plaintiff seeks an accounting by the Defendant. The Defendant says that there is a preliminary issue to be tried, namely that of breach of trust, and therefore, the Plaintiff’s application is premature.

**HELD: Granting the Plaintiff’s application for an accounting and for its accountants to be allowed access to audit and copy the accounts and records with costs assessed at \$11,796.40 to the Plaintiff.**

1. Order 43 gives a plaintiff the right to an accounting at any time after the defendant has entered an appearance or after the time limited for appearing has expired.

2. Pursuant to Order 31A of the Rules of the Supreme Court, the Court of its own motion could order the Defendant to produce an accounting in order to deal with this matter more expeditiously and to save time and expense.
3. Under the terms of the Purchasing Agent Agreement between Baha Mar Ltd. and the Defendant, the Defendant was required to maintain accounts and records of all transactions performed on behalf of Baha Mar Ltd. and was required to grant Baha Mar Ltd, and their accountants, access to audit and copy the accounts and records related to such transactions.
4. The Purchasing Agent Agreement was assigned to the Plaintiff in its entirety as it relates to furniture items, save and except for rights connected to manufacturer's warranties.
5. The right to an accounting is encompassed by the assignment from Baha Mar Ltd. to the Plaintiff.
6. As there is no preliminary issue to be tried, the Plaintiff is therefore entitled to an accounting of the items listed in its Summons filed on 5 June 2019. The Plaintiff shall also be at liberty to have its accountants allowed access to audit and copy the accounts and records related to such transactions listed in the said Summons.

## **RULING**

**CHARLES J:**

### **Introduction**

[1] On 5 June 2019, the Plaintiff ("Essex") filed a Summons pursuant to Order 43 of the Rules of the Supreme Court ("RSC") seeking an accounting by the Defendant ("Purchasing Solutions") of:

1. All items ordered for the residential condominium units pursuant to the Purchasing Agent Agreement;
2. The vendors from whom such items were ordered;
3. The payment status of items ordered, including evidence of any deposits and/or payments made;
4. The production status of items ordered;
5. The physical location of items ordered; and
6. All amounts paid to the Defendant in connection with the Defendant's services under the Purchasing Agent Agreement.

[2] In a nutshell, Purchasing Solutions states that Essex is not entitled to an accounting as there is a preliminary issue to be tried. According to learned Counsel Mr. Turnquest who appears for Purchasing Solutions, Essex is attempting “*to put the cart before the horse*” by seeking relief under O. 43 in circumstances in which the question of Essex’s right to an accounting has yet to be ventilated and is vehemently contested by Purchasing Solutions.

### **Factual matrix**

[3] The facts, as I found them from the documents produced, are that on or about 23 January, 2014, Purchasing Solutions entered into an Agreement Between Owner and Purchasing Agent for Furniture, Fixtures and Equipment (“FF&E”) and for Operating Supplies and Equipment (“OS&E”) with Baha Mar Ltd. (the “Purchasing Agent Agreement”).

[4] On 20 April, 2015, pursuant to the terms of the Purchasing Agent Agreement, Baha Mar Ltd. exercised its right to assign the Purchasing Agent Agreement and did in fact assign it to Essex.

[5] Under the terms of the Purchasing Agent Agreement, Purchasing Solutions was required to maintain accounts and records of all transactions performed on behalf of Baha Mar Ltd, and subsequently, on behalf of Essex. Purchasing Solutions was further required to grant to Baha Mar Ltd. and subsequently to Essex and their accountants, access to audit and copy the accounts and records related to such transactions.

[6] Dispute arose between the parties and on 29 March 2018, Essex commenced this action against Purchasing Solutions alleging breach of contract, breach of fiduciary duty and conversion. Amongst the remedies sought by Essex is for Purchasing Solutions to provide an accounting of six varied items which are sought in the present application.

### **Order 43**

[7] Order 43 rule 1 provides:

- (1) Where a writ is indorsed with a claim for an account or a claim which necessarily involves taking an account, the plaintiff may, at any time after the defendant has entered an appearance or after the time limited for appearing, apply for an order under this rule.
- (2) An application under this rule must be made by summons and, if the Court so directs, must be supported by affidavit or other evidence.
- (3) On the hearing of the application, the Court may, unless satisfied by the defendant by affidavit or otherwise that there is some preliminary question to be tried, order than (sic) an account be taken and may also order that any amount certified on taking the account to be due to either party be paid to him within a time specified in the order.[Emphasis added]

#### **Article 4 of the Purchasing Agent Agreement**

[8] The Purchasing Agent Agreement, which is an Exhibit to the Affidavit of J. Mike Williams filed on 31 August 2018 and labelled "Certificate" marked "JMW-1", provides for an accounting at Article 4. It states as follows:

#### **ARTICLE 4**

##### **ACCOUNTING, DISCLOSING, AND AUDITING**

**4.1 The Purchasing Agent shall maintain good accounts and records of all transactions performed on behalf of the Owner. The Owner and the Owner's accountants shall be allowed access to audit and copy the accounts and records related to such transactions. The system for management of the accounts and records shall be subject to the approval of the Owner.**

**4.2 The Purchasing Agent shall protect and preserve all documents obtained though (sic) its relationship with the Owner, including accounts, records, drawings, specifications, purchase orders, bills of lading, vouchers, memorandum, correspondence and other data (the "Materials") for a period of at least three years following complete performance of its services under the Agreement. The Purchasing Agent shall provide the Owner with copies of the Materials as well as all warranties with contact information for the applicable vendor or manufacturer and flame certificates for Owner's reference, both at completion of the Project and prior to any temporary certificate of occupancy inspections and schedules as part of the completion of Purchasing Agent's obligations under this Agreement. [Emphasis added]**

[9] It is common ground between the parties that Article 4 contains no prerequisite for an accounting to take place. It is a freestanding right which exists in O. 43 and can be exercised, even where the contract appears to be operating smoothly and without incident.

## **Discussion**

[10] In paragraph 5 of the Amended Defence filed by Purchasing Solutions on 10 May 2019, it averred that they have completely accounted to Baha Mar Ltd. for all expenditures, in that all funds paid to them by Baha Mar Ltd. were expended on goods for which Baha Mar Ltd. had authorized Purchasing Solutions to purchase.

[11] Learned Counsel for Essex, Mr. Bethell submits that, even if all of Purchasing Solutions' purchases were authorized by Baha Mar Ltd. as alleged, the fact of the authorization does not equate to an accounting pursuant to Article 4 of the Purchasing Agent Agreement. Nor is it a Defence to a claim for an accounting. The right to an accounting exists irrespective of whether or not Purchasing Solutions' expenditures were authorized by Baha Mar Ltd.

[12] Purchasing Solutions also averred, in paragraph 24 of their Amended Defence, that the assignment from Baha Mar Ltd. to Essex did not include an assignment of the right to an accounting. The assignment, contained at pages 81-84 of the Affidavit of J. Mike Williams, filed on 23 May 2018, provides as follows:

**“2. Assignment. The Assignor hereby assigns and transfers to the Assignee all of the Assignor’s right title and interest under the Agreement in and to the Furniture and all rights and remedies in respect of any breach thereof (save and except that all manufacturer’s warranties and all rights and remedies in respect of any breach thereof shall continue to be held by the Assignor) effective as of the Effective Date.”**

[13] According to Mr. Bethell, all ‘right title and interest under the Agreement’, should be interpreted as it is written, that the assignment pertains to all of the rights, title and interest covered by the Purchasing Agent Agreement (so far as it relates to Furniture items). The only exceptions to the assignment are explicitly stated in

therein as all manufacturer's warranties. There is no indication that the right to an accounting is a provision which has been excluded from the assignment.

- [14] Learned Counsel Mr. Turnquest submits that it is their case that the assignment from Bahamar Ltd. did not include an assignment of the right to accounting and Essex's right to an accounting does not cease to be a preliminary issue to be tried. According to Counsel, Essex's interpretation of the provisions of the Assignment does not dispose of the question nor obviate the need for it to be tried.
- [15] As I dissect the wording of the assignment, I am of the firm view that the right to an accounting is encompassed by the assignment.
- [16] In conjunction with Article 4.1 also, Purchasing Solutions is mandated to allow Essex, the assignee of Baha Mar Ltd, access to their records and to perform audits to verify how the Owner's money is spent and how they have stored or otherwise dealt with its acquired property. This was one of my findings at paragraph 59 of the Ruling I delivered on 15 February 2019 in this matter.
- [17] Purchasing Solutions submits that the right to an accounting, which the Purchasing Agent Agreement undeniably gave to Baha Mar Ltd was fully honoured prior to the assignment thereby implying that there is no identifiable breach of the Purchasing Agent Agreement. Learned Counsel Mr. Turnquest submits that if this is correct there can be no breach such as the phrase "*all rights and remedies in respect of any breach thereof.*" In my view, if Purchasing Solutions had in truth and in fact fully honoured the obligation of a right to an accounting prior to the assignment, some documentation to that effect could have easily been produced.
- [18] Essex further states that Purchasing Solutions, in paragraph 25 of the Amended Defence, avers that providing an accounting to Essex would have been a pointless exercise, as Essex already had details of the sums due to suppliers and that no accounting would reveal the amounts charged by Suddath to Baha Mar Ltd.

[19] I agree with Mr. Bethell's submission that these averments in paragraph 25 of the Amended Defence are of no moment to the application for an accounting. Order 43 gives a plaintiff the right to an accounting at any time after the defendant has entered an appearance or after the time limited for appearing has expired. In fact, upon discovery, a plaintiff is obliged to request those documents. Whether or not Purchasing Solutions have those documents, Essex is entitled to have its accountants be given access to audit and copy the accounts and records of Purchasing Solutions in connection with all transactions relating to Furniture. In fact, the Court of its own motion, under Order 31 A, could order Purchasing Solutions to produce an accounting in order to deal with the matter more expeditiously and also, to save time and expense. In addition, I agree that there is no preliminary issue to be determined. An order for accounting is normally a "run of the mill" order that courts direct defendants to disclose in order to move forward with a case. The glacial age of dealing with cases is soon coming to an end in this jurisdiction. Courts would be obliged to further the overriding objective of the Rules, to enable those who have the misfortune to litigate, to do so in a quicker, cheaper and fairer manner.

[20] I agree with Mr. Bethell that, having regard to the pleadings, there is no preliminary question to be heard before an accounting can take place. Essex's right to an accounting arises from Article 4 of the Purchasing Agent Agreement. The Purchasing Agent Agreement was assigned in its entirety as it relates to furniture items, save and except for rights connected to manufacturer's warranties.

[21] Learned Counsel Mr. Turnquest refers to the case of **Allen v Taylor** (1885) 29 Ch. D. 834 where a mortgagee of shares in an estate sued for the administration of the estate, alleging misapplication of assets. The Plaintiff applied under O.15 r. 1 (UK) (which mirrors O. 43 r.1 (BAH)) for common accounts and enquiries in an administration action and also for enquiries as to mortgages of the estate's land and advances to the trustees. It was held that only common accounts and inquiries could be directed on an application under the rule, and not accounts and inquiries the right of which depended on the Plaintiff establishing a case for them at the

hearing and that the special inquiries therefore could not be directed. In similar vein, Mr. Turnquest forcibly argues that as some of the accounts and enquiries sought by Essex would be consequential on a finding of breach of trust that issue should first be determined before an accounting is ordered. He contends that there are issues to be tried. I do not agree that the issue of breach of trust should be determined before the accounting is ordered as it is an issue fit for trial when evidence will be adduced from the parties. An accounting, on the other hand, comprises of documentary evidence which ought to be in the possession, custody or control of Purchasing Solutions. Generally, the Court will order the disclosure, exchange and inspection of these documents before witness statements are given. As I see it, pleadings appear to be closed since the Amended Defence is filed and on any view, the next step in the trial process will be disclosure of documents so there is no prematurity of the application for accounting. To my mind, Essex is therefore not putting the cart before the horse but is being proactive with this case which has already suffered some delays. I commend Essex for being proactive.

[22] In my considered opinion, Essex has satisfied the threshold requirement of O. 43 r 1 and is therefore entitled to an accounting of the items listed in its Summons filed on 5 June 2019. Purchasing Solutions is ordered to disclose them on or before 4 December 2019. Additionally, the accountants of Essex shall be allowed access by Purchasing Solutions to audit and copy the said accounts and records related to such transactions listed in the said Summons.

[23] I have also summarily assessed costs at the sum of 11,796.40 as provided for in the Plaintiff's Submissions on costs.

**Dated this 4<sup>th</sup> day of October, A.D. 2019**

**Indra H. Charles  
Justice**